



ISSUES RELATING TO FINANCE

BRAZIL Demarest e Almeida

CONTACT INFORMATION:

Adriana Khalil Daiuto

Demarest e Almeida

Av. Pedroso de Moraes, 1201, CEP 05419-010, São Paulo, SP

55-11-3356.1523

adaiuto@demarest.com.br

www.demarest.com.br

1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

Brazilian law No. 9514/97 lists certain modalities of “right in rem” guarantees in order to secure real estate financing transactions, as follows: (i) mortgage; (ii) fiduciary assignment of credit rights deriving from real estate sale agreements (or commitments); (iii) pledge of either credit or purchase rights under real estate sale agreement; and (iv) fiduciary transfer of title to a real property (“Alienação Fiduciária de Coisa Imóvel”).

With regard to mortgages, the basic substantive provisions regarding their perfection and the rights and duties of both mortgagors and mortgagees are contained in the Brazilian Civil Code.

Under Brazilian law, a mortgage secures repayment of a debt by creating an interest in the property in favor of the mortgagee, although the property remains in the possession of the mortgagor.

Mortgages can only be created by a public deed prepared by a public notary. The perfection of a mortgage involves the recordation of the deed with the Real Estate Registry Office of the jurisdiction where the property is situated. Once recorded, the mortgage is effective against third parties, although until such time it is legally binding between the contracting parties only. Thus, the proper recordation of a mortgage would give the mortgagee preference over any prior but unregistered mortgage created on that same property.

The fiduciary guarantees resemble the American trust receipt since the trust element is the main feature of the guarantees mentioned in (ii) and (iv) of the above paragraph.

Under the fiduciary assignment of credit rights deriving from real estate sale agreements, the title to the credits is transferred to the fiduciary assignee, as security until the full payment of the debt.

The fiduciary assignee will be entitled: (i) to hold the documents evidencing the credits; (ii) to notify the debtors of the credits, in order for them to make the payment of such credits to the fiduciary assignee, rather than to the assignor; (iii) to exercise any rights and remedies to collect the credits, as well as any others granted to the assignor under the real estate sale agreement; and (iv) to receive the amounts corresponding to the assigned credits directly from the debtors of such credits.

Administrative and collection costs are deducted from the amounts received by the fiduciary assignee, and the balance should be applied to the assignor's debt, until the amount due to the assignee is fully settled. Any amount received by the assignee exceeding the total amount of the assignor's debt should be paid over to assignor. However, if such amounts are insufficient to cover said administrative and collection costs and the assignor's debt obligation, the assignor will remain liable for any deficiency.

Under the fiduciary transfer of title to a real property, the borrower transfers the title of its real property to the lender in order to secure the payment of a loan or other financing agreements. The relevant fiduciary agreement must be recorded in the Real Estate Registry and the transfer of title to the real property thereunder will be subject to a "resolution clause", which means that, upon full payment by the borrower of the loan, the borrower shall be entitled to receive the real property title in return.

So long as the guarantee is in effect, the borrower will remain in the actual possession of the real property while the lender will obtain the constructive possession of it. If the borrower fails to settle its debt, subject to certain procedures to be taken by the lender (including notification), the Real Estate Registry will record the property exclusively in the lender's name and the lender, within 30 (thirty) days thereafter, must proceed with a public auction to sell the real property, and the proceeds thereof are applied for payment of the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

Taxes payable on perfecting a lien on real property are owed to the state in which the property is located and usually are based on the amount of the transaction. Such amounts vary on a case by case basis so a survey with the competent authorities is always recommendable before accepting or creating any such liens.



3. Describe manner in which a lien secured by real property is foreclosed.

With regard to mortgages if the borrower fails to settle its debt, the lender shall file a lawsuit to collect its debt. Once granted with a favorable decision, the lender shall file an execution lawsuit through which the real estate given as collateral will be seized ("penhorado"). After the seizure, the lender will be able to choose between (i) be awarded with the seized asset (sections 685-A and 685-B of the Brazilian Civil Procedure Code); (ii) proceed with the private sale of the asset (section 685-C of the Brazilian Civil Procedure Code); or (iii) sell the asset in public auction (sections 686 to 689 of the Brazilian Civil Procedure Code). The proceeds thereof will be used to pay the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

With regard to the fiduciary transfer of title to a real property if the borrower fails to settle its debt, subject to certain procedures to be taken by the lender (including notification), the Real Estate Registry will record the property exclusively in the lender's name and the lender, within 30 (thirty) days thereafter, must proceed with a public auction to sell the real property, and the proceeds thereof are applied for payment of the amounts due under the agreement, increased by any expenses, costs, charges and fees, including attorney's fees and legal expenses, insurance premiums and taxes incurred by the lender in connection with the exercise of its remedies.

With regard to the other guarantees, please refer to the answer to Question #1 above.

4. Describe any significant costs of or impediments to foreclosing a lien on real property.

There are no significant costs of or impediments to foreclosing a lien on real property, except for the fact that the lender will have to face a judicial dispute that is likely to be time-consuming.

5. What is the customary time period for foreclosing a lien on real property?

It is very hard for us to estimate. Court proceedings may take from months to years, depending on many factors.

6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.

No, there are no restrictions on foreign banks or foreign lenders to make real estate loans secured by real property in Brazil.

7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?



In Brazil there is no differentiation among loans secured by real property and other types of secured financing as regards interest rate legal limits.

Former Article 192, §3, of the Brazilian Federal Constitution, enacted in 1988, established a 12.0% per year ceiling/cap on bank loan interest rates. However, since the enactment of the Federal Constitution, such rate was not enforced, as the regulation of such provision was pending. Several attempts were made to regulate the limitation on bank loan interest, but none of them were implemented.

In May 2003, an Amendment to the Brazilian Constitution, EC 40/03, was enacted which revoked all subsections and paragraphs of Article 192 of the Federal Constitution. EC 40/03 replaced these restrictive constitutional provisions with a general permission to regulate the Brazilian financial system through specific laws.

With the enactment of the current Civil Code (Law No. 10,406 of January 10, 2002), in principle the ceiling/cap of the applicable interest rate has been pegged to the rate charged by the National Treasury Office (Fazenda Nacional) or the SELIC (base rate paid by Federal Government Bonds). Despite the fact that there is presently some uncertainty as to whether the SELIC or the 12.0% per annum interest rate established in the Brazilian tax code should apply, the latter understanding (12.0% p.a.) has prevailed.

Nevertheless, Brazilian Courts have interpreted that financial institutions are not subject to the above Civil Code limitations, provided that the interest amount charged follows current market rates.

8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.

There are no laws restricting the ability to make a borrower personally liable for indebtedness secured by real property. With regard to the borrower, in the event the mortgaged property is not sufficient to pay the debt, the balance may be collected from the borrower and, as a rule, all of its assets will be subject to such collection. The only applicable exception is with regard to the homestead right ("bem de família").

Specifically regarding the fiduciary transfer of title to a real property, please note that once the property is sold and the proceeds are delivered to the lender, the balance, if any, is automatically waived and the debt is considered as totally paid.

On the other hand, a third party guarantor will never be personally liable for the debt except in the event that, together with the real property guaranty, it has granted to the lender a personal guarantee/surety ("fiança"), waiving its privilege of order.