

# BRAZIL

Octávio José Aronis\* & Durval de Noronha Goyos Jr.†

## 1. SECURED TRANSACTIONS: A BASIC DESCRIPTION

Secured transactions are those in which the debtor, or an appointed third party, selects part or all of their assets to ensure the fulfillment of a contracted obligation. All guarantees must be given in a separate agreement that, usually, is registered with a Notary.

There are no specific forms available for the creation and perfection of liens, which are created through registered agreements.

Due to the fact that liens are secondary obligations, once the main obligation is fulfilled, the lien is automatically terminated. Therefore, renewing liens is not possible, but creating new ones through the creation of a new obligation is.

## 2. INTERNATIONAL LETTERS OF CREDIT

Brazil operates with international letters of credit provided that they are issued under the cover of the UCP 600 (ICC Uniform Customs and Practice for Documentary Credits).

The following are mandatory elements of the letter of credit:

- (i) full name and location (city/country) of the issuing bank;
- (ii) full name and location (city/country) of the advising bank;
- (iii) the irrevocable character of the letter of credit;
- (iv) the specific number of the letter of credit;
- (v) terms for the boarding of the goods and for the negotiation of the letter of credit;
- (vi) name and address of the importer;
- (vii) complete name and address of the beneficiary (exporter);

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\*Aronis Advogados, Rua Afonso Bráz, 579-12-andar-conj. 125, 04511-001-Vila Nova Conceição, São Paulo; SP; Brasil. Tel.: 55 11 3053 3036, Fax.: 55 11 3053 3034, Email: aronis@aronisadvogados.com.br, Web: www.aronisadvogados.com.br.

†Noronha - Advogados, Rua Alexandre Dumas, 1630, São Paulo; SP; CEP 04717-004. Tel.: 55 11 5184-0094, Fax: 55 11 5188-8090, Email: dng@noronhaadvogados.com.br, Web: www.noronhaadvogados.com.br.

## International Commercial Secured Transactions

- (viii) amount of the credit in American dollars;
- (ix) brief specification of the Brazilian goods to be imported;
- (x) necessary documentation to receive the credit;
- (xi) payment form;
- (xii) state that the credit also guarantees the interest, if this is the case;
- (xiii) conditions of refundable credit through the Covenant of Credits and Reciprocal Payments and the respective number for refund;
- (xiv) reference to the credit being subject to the rules of the relevant publication of the International Chamber of Commerce; and
- (xv) specific clauses related to the documentation required, the negotiation conditions, and insurance.

### 3. STATUTORY LAWS

Secure transactions in Brazil are covered by the following laws: *Civil Code*; *Public Registry Law*; *Bankruptcy Law*; *Lease Law*; and *Code of Civil Procedures*.

Brazil is a federal republic created by the union of the states, municipalities and the Federal District according to Article 1 of the Brazilian Constitution.

### 4. TYPES OF PERSONAL PROPERTY

Brazilian Law foresees both personal and real guarantees, thus all goods may be subject to liens. Nevertheless, there are specific requirements for each type of guarantee, which need to be observed in order to be effective against third parties.

Pursuant to both Decree Law n. 413/69 and the Brazilian *Civil Code*, whenever there are liens on motor vehicles, boats or airplanes, this needs to be registered with the relevant authorities.

It is possible to provide materials, inventory or other industrial assets as collateral to secure an obligation. Such a lien is usually contracted for separately and registered with a Notary.

Floating liens are most common in the capital market, specifically with debentures as they grant the creditor general privileges over the company's assets and do not prevent the company from trading such assets. The floating charge is not binding against the assets subject to it, thus the company is free to dispose of them without the prior consent of the creditors.

Proceeds and products derived from collateral may be kept by the creditor as interest.

All assignable rights may be subject to a lien; therefore, any advances, provided that they are assignable, can be given as collateral and be subject to liens.

Real estate can be used as collateral and the possible liens over it are mortgages.

A rural pledge can be made up by a public or private instrument that needs to be registered at the Real Estate Notary of the place where the objects will be traded.

Rural pledges are divided in two categories: (i) agricultural pledge; and (ii) livestock pledge. These pledges can be for the maximum term of three and four years, respectively, and may have such term extended once.

Brazilian legislation does not provide for the possibility of creating liens on any property by any means other than through public or private instrument, and respecting the requirements of each type of guarantee granted.

## **5. LEASING OF GOODS**

The commercial leasing is an operation in which the owner of a movable or immovable asset grants to a third party the use of that asset for an indeterminate term, receiving a consideration in exchange. Contracts of commercial leasing should contain the following terms: term of the contract; value of each consideration, that the duration should not exceed a semester; option of purchase or renewal of contract; price for option of purchase or criteria for its stipulation.

## **6. PRIORITIES OF LIENS**

Regarding competition between lien holders, those with real estate guarantees have priority over those with personal guarantees.

In the event of having two or more real estate guarantees over the same property, the order of preference is chronological, from the oldest to the newest. Personal guaranties shall follow the order of the filing of the lawsuits for executing the debts.

Tax foreclosure (lawsuits brought against the debtor by the Government) shall only have priority when acknowledged prior to those brought by individuals.

### **(a) Bankruptcy**

In the case of bankruptcy, creditors shall be paid pursuant to the order set in Article 83 of the *Bankruptcy Law*, that is: (i) labour credits (limited to 150 minimum wages/creditor); (ii) real estate credits (limited to the value of the property); (iii) tax credits (meaning Fiscal Authority — the Government); (iv) privileged credits; (v) credits without privileges; and (vi) secondary credits.

It is important to emphasize in terms of the bankruptcy decision, that according to Article 99 of the *Bankruptcy Law* the effects of the bankruptcy may go back 90 days, which puts all secured transactions made during this period under analysis.

### **(b) Purchase Money Lien / Blanket Lien**

There is no such thing as a blanket lien in Brazilian Law as all guarantees are, usually, specific properties in the assets of the debtor.

Only in exceptional cases will all assets be used to indistinctly secure obligations; e.g., bankruptcy and piercing the corporate veil — provided that the limits of the partner's liability are respected.

## **7. RECOVERY / REPOSSESSION OF COLLATERAL**

In the event of defaulting in the payment, the creditor cannot by him/her enforce liens or foreclosure the debts. It is necessary to initiate a lawsuit to do so. All court orders are served and executed by Court Officers.

The debtor shall be notified prior to the recovery of the property given as collateral as repossession requires the creditor to initiate a lawsuit and all lawsuits initiated in Brazil require service on the debtor in order to be valid.

If the debtor, once duly served, does not pay the debt, it shall lose the property given as collateral. The collateral will be valued to see if it is sufficient to pay the credit due and therefore terminate the foreclosure.

The guarantees can either be adjudicated by the debtor, or sold privately or publicly.

Whatever valuation is reached, as previously mentioned, the foreclosure will only happen when the creditor is fully paid, which means that the value of the property must equal or surpasses that of the debt.

In the event the value of the property surpasses the debt, the debtor shall be reimbursed the difference. If the property is insufficient to pay the debt, foreclosure shall continue until the creditor is fully paid. Thus, other properties of the debtor will be seized to secure the payment.

The creditor cannot seek money damages in foreclosure action where it is anticipated that the collateral will be insufficient to pay the outstanding debt.

