
THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

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Fiduciary Liens Over Immovable Property in Brazil: Advancements and Setbacks

Paulo Fernando Campana Filho*

In this article, the author discusses recent changes to the law of fiduciary liens in Brazil.

Brazil has recently seen significant changes in the legal framework of security interests, including fiduciary liens over immovable property. Such changes may have a considerable impact on financing and investment in the country in the coming years. They are even more noteworthy considering that most businesses in Brazil finance their operations by means of obtaining loans with banks, usually secured by either a personal guarantee of shareholders or officers or fiduciary liens.

Security Interests in Brazil

Brazilian law allows creditors to secure their claims through rights in rem over certain property of the debtor, which are enforceable against third parties. Although such security interests are created by contract, registration is typically required to make it opposable to third parties.

Brazil adheres to the *numerus clausus* principle regarding rights in rem, meaning that law establishes an exhaustive list of allowable security interests available to creditors. The more traditional security mechanisms, such as the pledge (*penhor*) for movable assets and the mortgage (*hipoteca*) for immovable property, have been long overshadowed, in real-world practice, by the relatively new fiduciary lien (*alienação fiduciária em garantia*), which, since the late 1960s, proved to be far more effective in protecting creditors rights.

Fiduciary Liens Over Movable and Immovable Property

Fiduciary liens were first introduced in Brazil by Law 4,728 in 1965, further refined by Decree-Law 911 in 1969 (and by other laws since then), as security interests that allowed creditors to retain title to movable assets that were in direct possession of debtors, and could be promptly seized if the debt was defaulted.

Should there be a default, the creditor could initiate a seek and seizure proceeding to repossess the collateral. Historically, if the asset was not found, the creditor could file a depositary lawsuit, which could ultimately lead to imprisonment of the debtor as a bad-faith depositary of the underlying asset. While this extreme procedural measure was considered unconstitutional and in violation of the American Convention of Human Rights by the Supreme Court, in a precedent that became binding in 2009, enforcement of fiduciary assignment remains very effective in Brazil. This effectiveness helped financing of goods, including automobiles and appliances, to become increasingly popular in the country.

As the measures contained in Decree-Law 911 proved successful, Law 9,514 of 1997 introduced fiduciary liens over immovable property, with the purpose of providing a more efficient and reliable security interest than old-fashioned mortgages. Fiduciary liens over immovable property soon eclipsed mortgages as they were far speedier and less frustrating to enforce—creditors could seize the collateral extrajudicially, without the need of a court proceeding.

Claims secured by fiduciary liens, in addition to being more easily enforced, has the additional advantage of not being impaired by bankruptcy and reorganization proceedings. Since the fiduciary lien transfers legal ownership of the underlying asset to the creditor, the collateral can be enforced regardless of the debtor being subject to an insolvency proceeding. The creditor cannot remove assets that are essential to the business activities of the debtor while a reorganization is ongoing; but the claim, not being affected by the plan, can be fully paid or freely negotiated between the parties. Claims secured by conventional pledges and mortgages had no such benefit—not only are they affected by insolvency proceedings, but they were also junior to several other claims, including labor claims and post-commencement claims.

A Step Forward: Enactment of Law 14,711 of 2023

In October 2023, the Brazilian Congress enacted Law 14,711, aimed at modernizing and streamlining the legal framework for security interests in Brazil. The law intends to enhance the efficiency and security of loan transactions in Brazil and to reduce risks associated with the recovery of claims—objectives that are largely considered key in improving the business environment and fostering economic growth.

As fiduciary liens became so widespread in Brazil, they were the primary focus of the new law. As such, Law 14,711 provided, among several other measures, for the possibility of extrajudicial enforcement of fiduciary liens over movable assets, as a method to streamline and to speed up the recovery of claims. Law 14,711 also allowed for traditional mortgages to be enforced extrajudicially, somewhat mimicking the provisions of Law 9,514 applicable to fiduciary liens over immovable property.

Fiduciary Liens

Fiduciary liens over immovable property were also benefitted by the new law. Prior to the enactment of Law 14,711, the creation of a second fiduciary lien over immovables was not possible. This was one of the few disadvantages of fiduciary liens over mortgages under the previous legislation. The reasoning behind this was that, because a fiduciary lien transferred title to the creditor, it was not possible for a property to have a second-degree owner. In contrast, multiple mortgages over the same property were permitted, as, in this case, ownership remained with the debtor.

The 2023 law specifically allows for the creation of multiple fiduciary liens over the same property, addressing this limitation. In the same fashion as the rule regarding mortgages, the first fiduciary liens have priority over subsequent fiduciary liens. This new provision enables debtors to leverage their property more effectively by securing multiple loans, thereby increasing access to credit.

The second fiduciary assignment is registered in the competent Real Estate Registry (which can be done immediately after it is agreed), but only becomes effective following the cancellation of the previous fiduciary assignment. If the previous fiduciary

assignment is enforced and sold to third-party acquirers, the holder of the second fiduciary assignment subrogates in the price paid.

Collateral Agent

Another significant improvement brought by the new law was the introduction of provisions regarding the collateral agent. Following the enactment of Law 14,711, any security interest may be created, registered, administered, and enforced (either judicially or extrajudicially whenever allowed by the law) by a collateral agent, appointed by the creditors of the secured obligation.

The collateral agent acts on his behalf, pursuing the interests of the creditors, including in lawsuits that discuss the existence, validity, or effectiveness of the secured claim. The collateral agent has a fiduciary duty toward the creditors and can be replaced at any time by a decision of the creditor or of creditors holding a simple majority of the amounts of the claims.

After receiving the amounts resulting from the enforcement of the collateral, the collateral agent shall make the relevant payments to the creditors within 10 business days. For this purpose, such proceeds are held separately from the assets of the collateral agent and do not respond for his debt for a period of 180 days.

A Step Backward: CNJ's Requirement for Public Deed

Since the enactment of Law 9,514, fiduciary assignments over immovable property can be created by means of private agreements duly registered in the Real Estate Register. However, in June 2024, Brazilian's National Council of Justice (Conselho Nacional de Justiça; CNJ) gave a new understanding to the law, practically requiring a public deed for the creation of such security interests. The CNJ is a government body with the purpose of improving and supervising the court system in Brazil.

According to the recently enacted Provision 172 of the CNJ, the creation of fiduciary assignments over immovables by means of private agreements is restricted to entities authorized to operate within the Real Estate Financing System (Sistema de Financiamento Imobiliário). According to the CNJ, the provisions of

Law 9,514, allowing the formalization of fiduciary assignments over movables by private instruments, are only applicable to such entities. For any other entities, the general provisions of the Civil Code—which require a public deed for any transaction involving immovable property worth over 30 minimum wages (i.e., above roughly USD 7,000)—shall apply.

Provisions 175 and 177 further modified these rules, establishing, among other measures, that private agreements (creating fiduciary assignment over immovables) executed before the enactment of Provision 172 would remain effective. This provided some clarity but did little to address the broader concerns raised by the changes.

In a significant turn of events, however, the CNJ's Inspector-General (Corregedor Nacional de Justiça), acting on a request from the Federal Union in Motion for Measures No. 00007122-54.2024.2.00.00000, issued an injunction on November 27, 2024, temporarily suspending the effects of Provision 172. As a result, the application of these rules has been paused until a final decision is rendered. For now, fiduciary assignments can continue to be created through private agreements, maintaining the streamlined process originally envisioned by Law 9,514.

The requirement for a public deed introduces an additional step in the creation of fiduciary liens, adding bureaucracy, costs, and complication to the process—a burden that can be especially sensitive to smaller businesses and individuals. Estimates suggest that this requirement could impose up to nearly USD 1 billion in additional costs on borrowers. Although this does not come in the form of a new law, it is an interpretation of an existing provision that certainly poses a step backward to counteract the improvements brought by Law 14,711. It is hoped that these issues will be thoroughly and definitively addressed and rectified in the final decision of the ongoing case.

Conclusion

Law 14,711 marks a significant advancement in Brazil's legal framework regarding security interests. By introducing features such as extrajudicial enforcement of collateral, second-degree fiduciary liens, and regulation of collateral agents, among others, it helps fostering a more dynamic business environment. However, the CNJ's requirement for public deeds for fiduciary liens—if

maintained—will add a layer of bureaucracy and cost, representing a setback in terms of efficiency.

Note

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