



Euler Hermes

# Collection Profile Brazil

## Collecting in Brazil

- The payment behavior of domestic companies is acceptable, though standard payment terms are very varied and DSO remains high.
- Given the length and cost of legal action in Brazil, chances of obtaining enforceable judgments in a timely manner are low and it is preferable to consider amicable arrangements and specialist debt collection methods as a means to avoid domestic courts.
- When it comes to insolvent debtors, use of the company rescue mechanisms is increasing; in practice, however, the chances of recovering debt remain extremely low.

## Collection complexity



## Complexity relating to

Notable      Severe  
→

Payments	\$ \$ \$ \$
Court proceedings	⚖️ ⚖️ ⚖️ ⚖️
Insolvency proceedings	↘️ ↘️ ↘️ ↘️



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## General information

### Availability of financial information

Relevant financial information on domestic traders is not reliable. Indeed, although stock exchange listed groups tend to communicate reliable information, non-listed companies (which are the most common type of business in Brazil) fail to do so or tend to release information on an informal basis. As a result, efforts to avoid doubtful practices are increasingly put into place, especially in relation to anti-corruption efforts. Relying on local and settled banks is therefore advisable, and financial information should be obtained through specialized providers.

Euler Hermes in Brazil has access to the most up-to-date financial information and obtains the most relevant contacts for future assessment. Euler Hermes allocates each company a grade reflecting its financial health and how it conducts business. Grades represent a core of our knowledge and analyses, and help clients identify and avoid risk. Data is continuously monitored to offer the most up-to-date information to support management decisions.

### Main corporate structures

Liability for business debts is determined by legal structures, which are described as follows:

Corporations (Sociedade Anônima, SA) and Limited Companies (Limitadas, LTDA) are frequently used in the establishment of subsidiaries and joint ventures. Both may be fully owned by local/foreign individuals and undertakings alike, and while there are no minimum capital requirements, certain limitations may apply in protected sectors. Limitadas require at least two shareholders (otherwise, Individual LLCs may be set up). In addition, Mixed-Capital Companies allow private investors to conduct business in collaboration with public entities (which take control).

### Regulatory environment

Brazil is divided into 26 states and has a peculiar legal environment operating at both federal and state levels. At the federal level, the courts (Tribunais Regionais Federais) usually deal with international claims involving the public authorities and have a geographic jurisdiction (Brasília, Rio de Janeiro, São Paulo, Porto Alegre and Recife). At the state level (each state has its own laws and judicial system), the courts rather deal with all the matters excluded from federal jurisdiction. Cases in first instance are dealt with by the Justices of the Peace, but commercial disputes are rather solved through the Magistrates' Courts by specialized judges. Federal Courts (Tribunais de Justiça) deal with appeals.

In addition to difficulties in solving jurisdictional issues, the courts must also work with Civil and Common Law, which are both used in Brazil: in Civil legal systems judges must follow codified rules (but codification is not systematic in practice) but, by contrast with Common law systems, they are not bound by precedents. As a result, the legal environment is rather complex and litigation may prove extremely lengthy and difficult, which does not help to answer the various criticisms regarding the lack of independence and trustworthiness of the judiciary.



**Days Sales Outstanding (DSO):** The average DSO is around 70 days, while the average payment terms turnaround is 50 to 60 days.



## Getting Paid

### Days Sales Outstanding (DSO)

The payment behavior of domestic companies remains acceptable but is under pressure due to the macroeconomic difficulties since 2014. Although the regulator in Brazil has tried to regulate payment delays, late payments are still likely to occur unless transactions are secured: the average DSO is around 70 days, while the average payment terms turnaround is 50 to 60 days (30 days in the retail and distribution sectors, 210 days in the agriculture sector). It may be noted that the SERASA database is available to all companies and provides records of late payers and payment failures, thus making it difficult for bad payers to access new lines of credit.

### Late payment interest

Late payment interest may be claimed from the day following the due date but the law is fairly helpless on this issue. The Civil Code provides that a monthly rate of 1% of the debt may be charged by default, but the rule in practice is that interest rates must always be agreed upon as a contractual matter. Local traders are used to paying interest, however this is often considered as a negotiation tool to obtain payment more rapidly.

### Debt collection costs

Collection costs may also be fully charged to the debtor, although the law does not provide a uniform rule as to whether a default sum may be charged to the debtor, therefore negotiating this as a contractual issue is important. Courts usually consider that costs ought to represent up to 20% of the outstanding debt (especially in the legal action phase), but amounts may be used as a negotiation tool.

### Ownership protection

Retention of Title (RoT, or Reserva de Domínio under Articles 521 to 528 of the Civil Code) provisions are commonly used in Brazil to retain ownership over traded goods as long as the debt is not fully paid. However, only 'simple' RoT is deemed valid, which implies that protection is restricted to goods that are available (i.e. still in the debtor's premises) and identifiable. As long as this requirement is met, it is common to use RoT agreements as a bargaining tool during the pre-legal action phase so as to take the goods back when payment does not occur.

Once the insolvency process begins, creditors are able to lodge a claim against the debtor's assets and reclaim any goods that were delivered to the debtor but were not paid for under RoT.

RoT provision is very formal: the contract must carefully describe the goods at stake and, in order to be valid and opposable to third parties, it must be translated into Portuguese and registered with the Registro Público de Títulos e Documentos. Seeking legal advice is necessary.

### Payments

The most common payment methods are as follows:

Bank transfers are among the most popular payment methods as



#### Late payment interest:

In practice, the rule is that interest rates must always be agreed upon as a contractual matter.



they are fast, secured, and supported by an increasingly developed banking network internationally and domestically. Export transactions may be guaranteed through an Export Credit Insurance policy, which helps minimize the risk of sudden or unexpected customer insolvency. Euler Hermes' worldwide network of risk offices monitors the financial well-being of customers and grants them a specific credit limit up to which clients may trade and claim should something go wrong. Alternatively, Standby Letters of Credit (a bank guarantees the debtor's credit quality and repayment abilities) constitute reliable guarantees which can be interpreted as a sign of good faith since they can be triggered as a 'payment of last resort' if the client fails to fulfil a contractual commitment. Also, irrevocable and confirmed Documentary Letters of Credit (a debtor guarantees that a certain amount of money is made available to a beneficiary through a bank once certain terms specifically agreed by the parties have been met) may be considered as they can be obtained easily from local banks. Bills of Exchange (letra de cambio) and Promissory Notes (nota promissoria) are essentially used for domestic transactions and constitute means of pressure insofar as they constitute easily executable enforcement orders exempting creditors from having to go to court if the debt remains unpaid. In fact, due to the advanced technology used in the banking system, a form of bill also known as 'duplicata' which used to be relied upon in business-to-business transactions has progressively been replaced by bank bills (boleto bancario). Generally speaking, bank guarantees can be obtained but may remain expensive depending on the issuing institution. Advance payments of up to 100% of the invoice are authorized by law.

## Collecting overdues

### Amicable action

#### Negotiating

Given the length and cost of legal action in Brazil, chances of obtaining enforceable judgments in a timely manner are low and it is preferable to consider amicable arrangements (such as payment instalments) as a solution. As a matter of law, negotiation through conciliation or mediation is not mandatory but the Civil Procedure Code strongly encourages courts to give the parties additional opportunities to reach a settlement through Alternative Dispute Resolution methods before the evidence phase and before the judgment (see below). As a result, commencing collection with strong negotiation efforts is never a loss of time.

Before starting legal proceedings against a debtor, assessment of assets is furthermore extremely important as it allows verification as to whether the company is still active and whether recovery chances are at best. In addition, it is essential to be aware of the debtor's solvency status: if insolvency proceedings have been initiated, it indeed becomes impossible to enforce a debt.

### Legal action

#### Ordinary proceedings

It should first be noted that distances may be troublesome. On one hand, jurisdiction depends on the debtor's geographic location and the size of the country can make proceedings complicated (however if the contract provides for another jurisdiction clause then the problem may be avoided). On the other hand and for the same reason, finding the debtor may prove difficult and would slow the proceedings down insofar as trial may only start after the debtor's notification by a service process.

Legal dunning (protesto) must otherwise start with a registered Demand Letter recalling the debtor's obligation to pay the principal together with late payment interest (as contractually agreed or taking a legal rate as a reference).

Fast track proceedings (ação monitoria) may be initiated when the creditor has written proof, signed by two witnesses and registered by a public notary (documents must be translated into Portuguese by a sworn translator and legalized before the Brazilian Consulate), that the claim is legitimate: if the debtor's obligation is deemed certain, liquid and exigible (certo, liquido e exigível), the Municipal Courts (Justices of the Peace or Magistrates) usually render Payment Orders within 15 days. If the debtor fails to comply within three days, the Order then becomes enforceable. If an appeal is lodged, however, the creditor has no choice but to commence formal ordinary legal action.

Ordinary legal action would otherwise usually commence when amicable collection has failed. The claimant must serve the respondent with a registered Writ of Summons, to which the debtor must answer within 15 days of receipt. This step is essential as

Brazilian courts are very strict as to the way defendants should be summoned in court proceedings.

The proceedings are inquisitive in nature and encompass an investigation phase conducted by the court, an examination phase and a hearing phase. However, the tribunal may render a default judgment (revelia) if a duly served writ is left unanswered for. In this case, the alleged claim would be considered legitimate and the decision would reflect accordingly.

#### Necessary documents

- Commercial invoices
- Documentary bills
- Proof of transport and delivery of products
- Promissory notes
- Power of attorney
- Articles of association or constitution acts of the legal entity
- Document evidencing the legitimacy of who executes the power of attorney on behalf of the legal entity

#### Time limitations

Limitation periods (prescrição) vary from one to ten years according to the subject matter of the claim, starting from the day the cause of action arose. Commercial disputes must be filed within three years, but check-related matters fall under a six-month limitation. Beyond these time limitations, legal action will not be granted.

#### Provisional measures

Provisional measures may help preserve the creditor's interests pending a final and enforceable judgment. Indeed, the courts may order protective injunctions ex parte (without the presence of both parties), before or during the proceedings, to avoid irreparable damage (preservation of the status quo, protection of rights). Cause for emergency must be demonstrated (significant burden of proof) and the claimant would often be required to provide security on the costs (up to 20% of the claim) to preserve the debtor from irresponsible lawsuits. Where evidence is likely to disappear, the courts would also order precautionary measures aiming at preserving or obtaining such evidence.

#### Collection @ Euler Hermes

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgment and enforcement.

### Lodging an appeal

As a general rule, decisions rendered in first instance by state courts can be appealed (apelação) to the federal courts (Tribunais de Justiça). Decisions rendered in appeal may also be disputed before the Supreme Court of Justice (Superior Tribunal de Justiça) in Brasília.

### Enforcing court decisions

A judgment becomes enforceable as soon as it has become final (i.e. when all appeal venues have been exhausted) and final judgments ought to be automatically enforced by Brazilian courts.

Since reforms in 2005 and 2006 aiming at reducing enforcement periods, attachment of the debtor's assets is now possible if the latter fails to obey a final Order within three days. The 'Penhora on-line' instrument, also, allows any amount available on the debtor's account to be blocked in order to enforce a judgment.

In practice, execution can prove to be difficult since there are only limited means with which to trace assets in Brazil.

### How long could legal action take?

Obtaining a default judgment can take between eight and 18 months while a full judicial procedure can last for two to four years, depending on the complexity of the case and the availability of the courts. As previously mentioned, enforcement may also be a lengthy procedure. Cases involving foreign parties would normally not take longer than cases involving domestic parties only, however some delays may be expected if document translations are necessary.

### How much could this cost?

As a general rule, procedural costs (which may represent up to 5% of the claim) and legal costs are charged to the defeated party, which may therefore be required to pay up to 20% of the claim in compensation to the successful party. However, since Brazilian Law prevents courts from rendering decisions on subject matters not included in the parties' claims, it is essential to include cost-related demands in the Writ when serving the debtor. Court fees reaching 1% of the claim (depending on the state) must be paid prior to commencing legal proceedings. If the lawsuit is decided on behalf of the creditor, this amount should be reimbursed by the debtor. Contingency fees, whereby the legal professionals are entitled to receiving a percentage on the final award, are lawful though uncommon.

### Alternatives to legal action

#### Alternative Dispute Resolution methods (ADR)

Alternative Dispute Resolution methods are increasingly common in Brazil for business-related disputes. In particular, arbitration (regulated under the Arbitration Act, Law No. 9307/96) is often viewed as being more efficient than ordinary lawsuits since it offers expeditious and confidential proceedings together with a binding award on the merits. Arbitral awards may then be enforced directly. There is however no regulation for mediation in Brazil.



#### Litigation @ Euler Hermes

Should legal action be necessary, Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.

### Foreign forums

Foreign traders may alternatively agree to solve their business disputes in a foreign forum (i.e. under a foreign law or before a foreign court) provided that the agreement is characterized by an international connection (for example, one party has elected domicile in another country, or the place of execution is located abroad), and that a jurisdiction clause is specifically drafted for this purpose. In practice, Brazilian courts tend to retain exclusive jurisdiction to decide on various subject matters (such as real estate issues and international contracts entered into by Brazilian federal, state and municipal government entities). In addition, it is worth adding that some Brazilian courts have insisted on a right of nationals to benefit from due process of law (i.e. a right to appear before Brazilian courts) notwithstanding the existence of a foreign jurisdiction clause which might thus be simply ignored.

### Enforcing foreign awards

As previously explained, Brazilian courts normally retain exclusive jurisdiction over various subject matters and would thus tend to deny recognition of certain foreign judgments aiming at escaping domestic courts.

Nonetheless, foreign judgments may be enforced in Brazil within three months on average, provided that certain conditions are observed. Essentially, foreign decisions must be confirmed by the Superior Court of Justice to become enforceable in Brazil. This implies that the decision must be final and enforceable in the issuing jurisdiction. The decision must also be translated in Portuguese and certified by the Brazilian consulate residing in the said country. It must have been duly served, and must be compatible with Brazilian public policy, sovereignty and good moral principles.

Once confirmed, the foreign judgment becomes final and a certified copy (Carta de Sentença) of the Brazilian decision is provided in order to commence enforcement before the federal courts.

Brazil is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore, domestic courts also ought to recognize and enforce decisions rendered through international arbitration proceedings. Having said this, it may be emphasized that reference to the New York Convention is rare, as the courts rather tends to support enforcement decisions towards foreign arbitral awards under the Arbitration Act of 1996, which stipulates that such decisions must be recognized and enforced by the Superior Court of Justice. This procedure, indeed, seems more constraining than the New York Convention proceedings insofar as it aims at verifying the existence of a valid (and translated) arbitration agreement as well as various formalities (examination never implies verifications on the merits) as previously listed. Enforcements are then dealt with through a standardized one-stop-shop procedure handled by specialized judges.



## Handling insolvent debtors

Since 2005, the insolvency legislation inspired by the U.S. Chapter 11 (Law no. 111.101/05) has facilitated rescue proceedings. Greater priority has been given to creditors, thus increasingly the availability of fresh restructuring cash for companies facing temporary financial difficulties. In practice, however, the chances of recovering debt when the debtor has become insolvent are extremely low.

### Insolvency proceedings

#### Out-of-Court proceedings

The law alternatively allows out-of-court restructuring proceedings (Extra-Judicial Recuperation/Recuperação Extrajudicial). The debtor is thus given a chance to negotiate a restructuring plan informally and confidentially with its creditors, without having courts. The plan must be agreed upon by creditors representing a minimum of 60% of the business' debts and it must be approved by the court.

#### Restructuring the debt

Judicial Recuperation (Recuperação Judicial) aims first at preserving the debtor's business. Following the court's acceptance of the reorganization petition filed by the debtor, an automatic 180 days stay shielding the debtor from external claims commences. The company's directors usually remain in possession of their managing powers and have the sole responsibility to submit, within 60 days, a reorganization plan to the Creditors' Committee, under the supervision of a court-appointed trustee (administrador judicial). Each class of creditor (labor-related, secured and unsecured) must then accept the plan for it to be validated by the court. Failing to do so, the parties may shift to a bankruptcy procedure.

In practice, bankruptcy procedures have decreased since the law of 2005 has come into force.

#### Winding up proceedings

Bankruptcy (Falência) is the judicial liquidation procedure for an insolvent merchant. Unless the debtor files voluntarily for liquidation, creditors owning (single or joint) claims equal to at least 40 minimum wages may file their claims with the court. If petition for liquidation is granted, other creditors must then file their respective claims within 15 days following the public notification of the proceedings. An administrator then formulates a list of admissible claims and commences the debtor's assets liquidation prior to distributing the proceeds among the creditors.

#### Priority rules

Priority rules normally apply while distributing the proceeds to the creditors. In liquidation proceedings, judicial administration costs are normally given absolute priority over secured creditors (such as financial institutions and fresh money providers), which would however typically receive the proceeds of the debtor's auctioned assets before the employees (labor claims up to 150 times the prevailing minimum wage for each creditor, and claims deriving from



accidents at work), secured creditors up to the value of the relevant collateral, federal tax debt, creditors holding special and general privileges, unsecured creditors, etc.

In reorganization proceedings, employment claims must be paid within one year of the plan's approval.

#### Cancellation of suspect transactions (clawback)

In addition, the liquidator may cancel various types of transactions concluded within 90 days prior to the insolvency proceedings (Section 129 of the Law). Typically, fraudulent deals, improper payments, disproportionate sales, transactions aiming at favoring one creditor over the others, unfair loans etc. would be declared void.

#### How long could insolvency proceedings take?

Insolvency proceedings take around five years on average but may extend to ten years depending on the complexity of the case.

#### Necessary documents

All original sales support documents, the amount of the credit, the derivation as well.

#### Insolvency @ Euler Hermes

Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.



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