

# Recovery of Trade Debts in Brazil

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This note provides Brazil – specific information on the legal options available to a business creditor looking to recover a trade debt (in a business-to-business context) including ordinary legal proceedings, special fast-track procedures (if any), insolvency proceedings and amicable settlement opportunities.

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Most businesses are likely to need to pursue an unpaid invoice at some time, regardless of the sector in which they operate.

The process of recovering trade debts can often be tricky when it involves ongoing commercial relationships. Customers are also sometimes reluctant to deal with businesses that are known for approaching debt recovery aggressively, so pursuing a debt may result in the creditor losing goodwill in the market. However, businesses cannot afford to let their long overdue debts accumulate and eventually turn into bad debts, so quick and assertive action is often required. Understanding the pros and cons of the options available to parties is a crucial part of effectively managing and maintaining a healthy business.

This Note is a quick guide discussing the recovery of a trade debt in a business-to-business context in Brazil. It considers the options available to a business creditor seeking payment for goods or services that it has supplied from its customer who refuses to pay despite being legally bound to do so.

It also examines the main options available to a business creditor trying to recover a trade debt in Brazil from a business debtor, including ordinary legal proceedings, special fast-track procedures (if any), insolvency proceedings, and amicable settlement opportunities. For a high-level overview of how to recover an outstanding trade debt and the key considerations that may arise across several jurisdictions, see [Recovery of trade debts: a cross-border overview](#).

## Recovery of Trade Debts

### Main Options

The options for recovering debts can be divided into extrajudicial measures and judicial measures. The extrajudicial measures are:

- Pre-action letters.
- Notices of dishonor.
- Settlements.

The judicial measures (listed in descending order of efficiency and agility) are:

- Collection claims.

- Monetary claims.
- Enforcement proceedings.
- Claims under judicial reorganization.
- Claims under bankruptcy proceedings.

## Alternative to Legal Options

The creditor can take administrative measures, for example, send an extrajudicial notice requesting the payment, protest the debt before the protest notary, or try to have the case settled.

## Whether the Type of Remedy Varies Depending on the Value of the Debt

According to Brazilian legislation, the proceeding to be followed is not determined by the amount due. It is instead decided by the type of document that proves the creditor's claims. Sections 783, 784, and 785 of the Civil Procedure Code (*Código de Processo Civil*) (Law No. 13.105/2015) establish which titles are enforceable. The creditor cannot choose whether to pursue insolvency proceedings or not, as this will be dictated by Law No. 11.101/05 (known as the Insolvency Law).

## Pre-Action Conduct

### Letter Before Claim

It is standard practice in Brazil to send a pre-action letter specifying the details of the claim. However, there is no general rule (for example, a rule set out in the Civil Procedure Code) requiring that a letter must be sent before starting litigation.

Issuing a notice of dishonor (a proceeding adopted before protest notaries to grant publicity to the debt), is a condition for filing enforcement proceedings for some debts, for example invoiced payments due. This is also required where a creditor wishes to request a debtor's bankruptcy.

It is not mandatory for parties to consider alternative dispute resolution (ADR).

### Penalties for Non-Compliance

Since there are no general rules specifying a pre-action letter must be sent, there are no penalties for failing to do so. Issuing a notice of dishonor (*see above, Letter Before Claim*) is a condition for filing enforcement proceedings for some titles and requests for a debtor's bankruptcy.

### Evaluation of Debtor's Financial Position

Creditors can obtain certificates issued on behalf of the debtors through court websites or court distributors' departments. The certificates demonstrate whether there are, among other things, any claims, enforcement proceedings, labor debts, or tax debts against the debtor.

The creditor can also retain companies to verify the debtor's financial strength based on public information.

## Limitation Period

The limitation period depends on the nature of the trade debt. The Civil Code (*Código Civil*) (Law No. 10406/2002) provides the following limitation periods:

- One year for debts owed to partners and shareholders, starting from the date of the company's liquidation.
- Three years for rent debts, interest, debt securities, and insurance debts.
- Five years for contractual debts.

## Extension of Limitation Period

The limitation period can be extended once, through a specific proceeding to interrupt the limitation period. The creditor must explain the reasons why it could not file the claim to recover the debt before the expiration of the limitation period. The courts generally grant the interruption, regardless of the grounds argued by the creditor.

## Competent Court

As a rule, the court with jurisdiction to determine trade debt recovery disputes in the first instance is the court of the debtor's headquarters (which is determined by its registered address). However, a court selection clause included in a trade debt contract will be respected.

## Specialist Courts

See above, *Competent Court*.

## Court Proceedings

### Starting Court Proceedings

A claim for the recovery of a trade debt must be filed through a complaint (initial petition) before the court.

### Court Fees

The creditor must pay court fees that are generally about 1% of the debt (subject to a cap of around BRL80,000). The courts will define the fees to be paid by the claimant in the application. In the São Paulo State Court, for example, the claimant must pay 1% of the amount claimed, capped at BRL85,000.

### Service

The debtor can be served through a formal letter issued by the court or through a judicial officer. There is no time limit for delivering service of process to the defendant or debtor. If the court fails to serve the defendant, the creditor must provide the court with another address for the defendant or debtor.

## Defense

The defendant must file its statement of defense within 15 business days from when evidence of the delivery of service of process is attached to the case files. The debtor can dispute the debt by arguing that it has already been paid, that the creditor did not fulfil its obligations, or for other reasons.

If the debtor admits the debt, the best strategy is to try to settle the case. Another possible strategy is to try and find problems with the monetary adjustment or the calculation of the debt.

If the defendant fails to file a defense, the court will presume that the debtor admits the debt and issue an award to order the debtor to pay. If the debtor fails to pay, the court can freeze bank accounts and attach other assets.

## Later Stages

After the presentation of the statement of defense, the court can immediately make an award. If necessary, the court will initiate the evidentiary phase to obtain the evidence requested by the parties to prove the existence or non-existence of the debt (among other matters).

Enforcement proceedings will follow, in which the debtor can ask to pay the debt in six instalments.

## Summary Proceedings and Lower Value Claims

There are no fast-track proceedings in trade debt recovery cases. The enforcement proceeding is the fastest proceeding to recover a debt.

### Duration of Proceedings

The duration of the process will depend on the assets of the debtor and on the court. For example, an enforcement proceeding in the São Paulo State Court will generally take around three to four years to be concluded.

## Interim Measures

The creditor can request an injunction to freeze the debtor's assets.

### Grounds

The creditor must prove that the debtor would otherwise be able to hide or sell its assets, with the result that by the end of the enforcement proceedings it would not have the assets needed to comply with the award.

## Final Remedies

The courts can enforce the award by freezing the debtor's bank accounts or revenues or by obtaining its properties or other assets.

## Late Payment Interest

The interest on late payments that can be applied by parties other than banks is equal to 1% per month, known as judicial interest (*Section 406, Civil Code*).

Bank contracts can apply interest rates higher than 1% per month.

## Legal Fees and Costs

The successful party can recover all legal costs from the unsuccessful party in litigation, except those related to its lawyer's contractual fees. Brazilian courts do not grant the successful party the refund of the extrajudicial costs incurred to collect debts.

### Unsuccessful Party Liability for Costs

See above, *Legal Fees and Costs*.

### Court's Discretion on Costs

Courts do not have any discretion to rule over costs if the parties have already made an agreement on costs.

### Recovery of Legal Costs in Cases Settled Without Court Action

If a dispute has been settled before legal proceedings are initiated the calculation of costs will depend on the contract. Attorney fees incurred in a pre-judicial phase can only be recovered if parties have agreed they are recoverable. As a rule, only court fees are recoverable.

### Costs-Only Proceedings

If the parties have agreed on who will pay the costs but are unable to agree on the amount of costs they can initiate a proceeding to produce technical evidence on the costs incurred and the court will arbitrate how these costs can be recovered.

### Recovery of Legal Costs After Court Proceedings Have Commenced

If the dispute is settled after legal proceedings have been commenced and the parties cannot agree on costs, the court can refuse to ratify the settlement. The court can also determine that the parties should divide the costs equally.

### Recovery of Legal Costs Where Court Proceedings Are Settled During Trial

The court will always decide on costs where a dispute is settled at trial. See above, *Legal Fees and Costs*. The court will ratify the decision the parties have made about splitting costs in the settlement.

## Enforcement of Judgments

Judgments are considered due and enforceable after the closing of all appeals. If a debtor fails to satisfy the judgment, the court can issue an order to freeze the debtor's accounts or to attach its assets.

### Payment in Instalments

The courts cannot specify that payment be made in instalments on its own initiative, but the debtor can request this in the enforcement proceeding. On requesting payment in installments (a maximum of six), the debtor must file the receipt of the first installment payment. If the creditor accepts the payment in installments, the debtor pays the other installments every 30 days.

## **Procedure for Enforcement**

Judgments are considered due after the closing of all appeals. If the debtor fails to satisfy the judgment, the creditor can file an application to start the enforcement phase. The court can issue an order to freeze the defendant's accounts or to attach its assets.

## **Time Limit**

There is no time limit within which a judgment must be enforced.

## **Time Taken to Determine and Enforce a Debt Recovery Claim**

The time local courts normally take to determine and enforce debt recovery claims depends on several factors including:

- The court.
- The nature of the debt.
- The existence of the debtor's assets.

It generally takes around five years to enforce debt recovery claims.

## **Appeals**

Appeals against awards issued by the lower courts must be filed with the Court of Appeals (Second Instance). Appeals against a decision of the Court of Appeals must be filed with the Superior Court of Justice or the Supreme Federal Court.

## **Grounds for Appeal**

Within the appeal, the creditor must argue that the lower court did not apply the correct facts or legislation to the case.

## **Time Limit for Filing Appeal**

As a rule, the time limit to file appeals is 15 business days.

## **Insolvency Proceedings**

### **Effectiveness of Insolvency Proceedings**

Creditors can file a bankruptcy request in respect of a debtor if both:

- The debtor has failed to pay a debt which is equal to or higher than 40 times the minimum wage (currently BRL1,000).

- There is evidence of the debtor's insolvency.

Insolvency proceedings can be an effective tool for debt recovery since they are aggressive and the debtor can be declared bankrupt if it fails to pay its debt.

### **Disadvantages of Issuing Insolvency Proceedings Against Debtors**

Some courts require the creditor to pay the bankruptcy judicial trustee fees.

The creditor must prove that the debtor does not have enough assets to pay its debts, which is not a simple matter.

Brazilian courts do not allow creditors to use bankruptcy requests as a mechanism for collecting trade debts.

### **Insolvency Proceedings and Disputed Debts**

A creditor can commence bankruptcy proceedings against the debtor if the debt is genuinely disputed or if the debtor has a genuine cross-claim right or right of set-off. They cannot do so if the debtor is subject to a judicial reorganization.

### **Insolvent Debtors**

For bankruptcy purposes, a debtor is deemed insolvent when its assets are lower than its debts and it cannot overcome its financial crisis.

For judicial reorganization purposes, a debtor is deemed insolvent when it cannot satisfy the debts to its creditors, but it does have assets and capacity to overcome its financial crisis.

### **Insolvency Law**

The primary legislation on insolvency (including cross-border insolvency) is Law No. 11.101/05.

### **Insolvency Proceedings Involving Foreign Companies**

Brazil is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency. However, the Brazilian Superior Court of Justice has recently authorized the inclusion of foreign subsidiaries in the judicial reorganization of a Brazilian company. The Superior Court of Justice considered that the CIMO (Center of Main Interest) of the foreign company was in Brazil and therefore, to protect the creditors' interests, the foreign company should be allowed to request judicial reorganization.

### **Debt Collection Agencies**

Recovery of debts can be outsourced to third parties.

### **Steps to Reduce Legal Costs When Recovering Debts**

The best way that a creditor can ensure that any legal costs incurred in trying to recover a debt will not outweigh the amount of the debt is to have the contract notarized at the time of its execution. This allows the creditor to enforce the debt without having to go through litigation and therefore reduces its legal costs (*see [Recovery of Trade Debts](#)*).

## Alternative Dispute Resolution to Recover Trade Debts

The ADR methods that can be adopted are conciliation and mediation. Conciliation and mediation can be required by contract or used at the discretion of the parties.

ADR is considered as a serious and viable alternative to formal legal proceedings in Brazil. There are renowned conciliation and mediation chambers which specialize in these types of proceedings.

Parties are not required to consider ADR before and/or during court or insolvency proceedings.

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