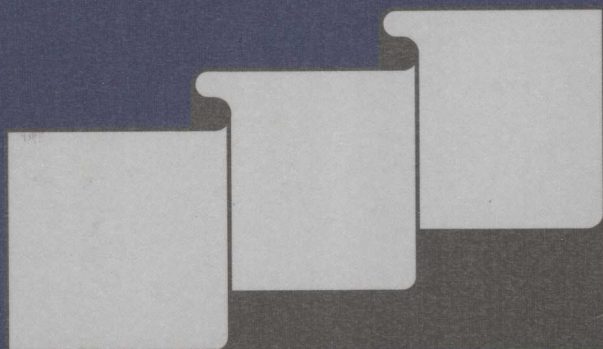


CENTER FOR INTERNATIONAL  
LEGAL STUDIES

COMPARATIVE LAW  
YEARBOOK OF  
INTERNATIONAL  
BUSINESS



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Law & Business

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# Regulation of Financial Services

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**The Comparative Law Yearbook of International Business**

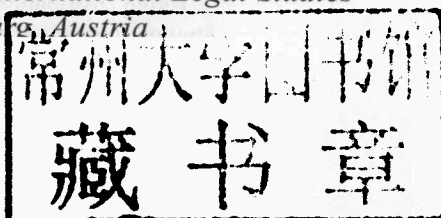
**Special Issue, 2013**

PUBLISHED UNDER THE AUSPICES  
OF THE CENTER FOR INTERNATIONAL LEGAL STUDIES

**General Editor**

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Salzburg, Austria*



**Wolters Kluwer**

Law & Business

A C.I.P. Catalogue record for this book is available from the Library of Congress

ISBN 978 90 411 47813

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Published by Kluwer Law International  
P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands  
sales@kluwerlaw.com  
www.kluwerlaw.com

Sold and distributed in North, Central and South America  
by Aspen Publishers, Inc.  
7201 McKinney Circle, Frederick, MD 21704, USA  
customer.service@aspenpublishers.com

Sold and distributed in all other countries by  
Turpin Distribution Services Ltd.  
Stratton Business Park, Pegasus Drive  
Biggleswade, Bedfordshire SG18 8TQ  
United Kingdom  
kluwerlaw@turpin-distribution.com

*Printed on acid-free paper*

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Website: www.kluwerlaw.com

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

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# **Regulation of Financial Services**

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Manuscripts proposed for publication may be sent by email to:

The Editor  
Comparative Law Yearbook of International Business  
office@cils.org

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## **Editor's Note**

Given the turmoil of recent years in the financial services sector, the editors of the Comparative Law Yearbook of International Business believe it is appropriate to review developments in the regulation of financial services in selected jurisdictions.

Accordingly, practitioners from Brazil, Bulgaria, China, Germany, Indonesia, Italy, Mexico, Portugal, Romania, Spain, Switzerland, Turkey, and the United Kingdom have provided chapters examining the current state of play in the financial services sector in their respective jurisdictions.

**Dennis Campbell, General Editor**  
**Center for International Legal Studies**  
**Salzburg, Austria, Europe**

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# Brazil

**Paulo Brancher and Fernanda Oliveira dos Santos  
Barretto Ferreira, Kujawski e Brancher  
São Paulo, Brazil**

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## Introduction

As in the United States and the United Kingdom, the legal regime for financial institutions in Brazil has been structured so as to be implemented in accordance with the definition of an institution's inherent activity.

The adoption of such a regulatory system makes a great deal of sense, considering the pivotal role of the financial system in preserving the real value of private savings by being able to provide firms and households with safe liquid financial instruments. Therefore, the Brazilian legal system separates intermediation activities from financial activities that are considered sensitive and defines them with the required accuracy. As a result, the legal regime subjects financial service providers to safeguards, limits, and special controls.

In the past few decades, a significant number of public banks have been privatized. This has made it necessary for the Central Bank of Brazil (*Banco Central do Brasil* — BACEN) to fulfill its institutional role, effectively putting into practice its supervisory intervention powers, thereby ensuring a safe financial environment for domestic and international transaction.

The Constitution of the Federative Republic of Brazil (the Federal Constitution) determines that supplementary laws must regulate the National Financial System (*Sistema Financeiro Nacional* — SFN). The purpose of the SFN is to control the provision of financial services by public and private entities, thereby regulating their activities through specific legal provisions.

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## Structure of the Financial System

### Applicable Legislation

In Brazil, the interventionist system regarding financial services dates back to 1921 and was implemented by Decree Number 14728/1921.<sup>1</sup> This Decree was succeeded by Decree Number 7923 of 2 February 1945, which created the Currency and Credit Superintendence (*Superintendência da Moeda e do Crédito* — SUMOC). Decree Number 7923 was amended by Decree-Law Number 9140 of 5 April 1946, which remained in force until the enactment of the current Law Number 4595 of 31 December 1964 (Law Number 4595/1964).

Law Number 4595/1964 provides for credit, banking, and monetary policies and institutions, and created the National Monetary Council (*Conselho Monetário Nacional* — CMN). This Law transformed the former SUMOC into a federal agency, called the Central Bank of Brazil or BACEN. The Law regulates the SFN, which basically comprises the CMN, BACEN, the Bank of Brazil (*Banco do Brasil SA*), the National Social and Economic Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* — BNDES), and other public and private financial institutions.

Law Number 4595/1964 revitalized the financial industry and the market itself; however, after nearly five decades in force, it now reveals a mismatch with the development of the economy, international relations, and the essential role dictated by the monetary policy.

Currently, while Law Number 4595/1964 is the principal law on the structuring and organization of the SFN, there are several other regulations that specifically regulate financial services, sparsely found in the Brazilian legal system. One such regulation is the International Capital and Foreign Exchange Market Regulation (*Regulamento do Mercado de Câmbio e Capitais Internacionais* — RMCCI), instituted by Circular Number 3280 of 9 March 2005, issued by BACEN (BACEN Circular Number 3280/2005). It unifies the regulation, organization, and limitation of the capital and foreign exchange markets, specifically in regards to Brazilian capital held abroad in any capacity and foreign capital invested in Brazil.

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<sup>1</sup> Sparse legal provisions existed before then, such as Decree Number 12079 of 9 November 1917 and Decree Number 13110 of 19 July 1918. The latter required financial loan institutions, banks, and all other institutions engaged in operations involving foreign exchange and notes in foreign markets to obtain prior authorization from the Minister of Finance or his designated agents for all foreign remittances and export values.

## Regulatory Bodies

The CMN is the largest regulatory body of the Ministry of Finance. It is responsible for formulating the country's financial policy and for establishing the guidelines of the Brazilian monetary, foreign exchange, and credit policies. The CMN also regulates the creation, composition, structuring, operation, and periodic supervision of financial institutions in Brazil. The resolutions, rules, and interpretations published by the CMN have a binding effect on all other members of the SFN.

BACEN is a federal autonomous government agency with its own legal personality and equity. It is managed by an executive committee of five members and a president, who are all chosen by the CMN. Generally, BACEN is responsible for enforcing the legal rules and regulations issued by the CMN regarding financial policy.

BACEN exercises control over banking activities and operations as a whole. It provides information, regulates the inflow and outflow of capital and the presence of foreign financial institutions, activates a preventive methodology in crisis situations, and imposes disciplinary measures and sanctions against market participants and asset management entities that do not maintain adequate levels of operating efficiency.

BACEN occupies a crucial role as administrator and principal manager of the implemented policy, with independence and an integrated vision of the market. Today, equipped with information technology and the online monitoring of operations, BACEN's key objectives are curbing the inflationary process and ensuring the soundness of the financial system.<sup>2</sup>

The Securities Commission (*Comissão de Valores Mobiliários* — CVM) acts as a supporting authority to the SFN. The CVM was created by Law Number 6385 of 7 December 1976, as amended, known as the Securities Act. Prior to 1976, there was no authority that was empowered with the governance and supervision of the capital market, especially with regard to publicly traded corporations.

The CVM was thus established as an independent agency linked to the Ministry of Finance. It regulates the Brazilian capital market and its participants (including stock exchanges, public companies, financial intermediaries, and investors). Its key objectives are to protect investors, maintain the efficiency and order of the markets, and promote

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2 Further discussed in the subsection "Functions and Powers of the Central Bank", below.

investment in financial markets by increasing the capitalization of Brazilian publicly held companies.<sup>3</sup>

## Definitions

### Financial Services

Brazil joined the World Trade Organization (WTO) on 1 January 1995, and the monetary policy imposed by the CMN in Brazil follows the general guidelines established by the WTO. These guidelines aim to maintain the stability of the SFN in the buying and selling of goods and services (trade) and/or capital flows into and out of Brazil.

In this context, in the understanding of the WTO (though not expressly disciplined) and following the interpretation of the SFN, banking and non-banking financial services are, by definition, services of a financial nature that are provided by individuals and/or legal entities, but excluding public entities.<sup>4</sup> By definition, banking and non-banking services include, but are not limited to, the provision of the following services:

- (1) Asset management;
- (2) Money brokerage;
- (3) Trading;
- (4) Money transaction services;
- (5) Financial services;
- (6) Lending;
- (7) Acceptance of deposits/repayable funds; and
- (8) Insurance (non-banking).

Although the General Agreement on Trade in Services (GATS) limits financial services to those in the list and others related to and/or arising from them, there is no express definition of the concept of financial services.

Consequently, financial services are those that can be included within the limits established in GATS. The four methods of providing financial services can be illustrated by four cases:

- (1) Crossborder provision, where a national from one Member State takes out a loan from a bank located in another Member State;

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3 Further discussed in the subsection "Functions and Powers of the Securities Commission", below.

4 General Agreement on Trade in Services (GATS), Annex on Financial Services, at pp. 308–311. GATS is available on the WTO website at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf).

- (2) Consumption abroad, where a national from one Member State buys financial services when traveling out of his country;
- (3) Commercial presence, where a foreign bank originating from a Member State sets up a branch or subsidiary in the territory of another Member State to provide financial services; and
- (4) Temporary movement of individuals, where a national from one Member State provides financial consulting services in the territory of another Member State.

### Banking Operations

In order to achieve their objectives, banks perform a series of transactional activities in relation to their customers, which are known by the umbrella term "banking operations". Various commentators have defined this term:

"The business conducted by banks, in the performance of their commercial activities, are called banking operations, if the function is of a credit nature."<sup>5</sup>

"In order to fulfill their economic purposes, banks perform various operations that diversify with the particularities of each company."<sup>6</sup>

"In the banking sphere, operations are construed as the series of banking acts performed by the bank to achieve its economic purpose."<sup>7</sup>

The term "banking operations" has long been established in Brazilian statute law (*lei positiva*). The repealed Commercial Code referred to these activities as "banking operations",<sup>8</sup> while Decree Number 723 of 25 November 1850 lists them among acts that are commercial in nature. Banking operations are thus established as a business activity, economically organized for the provision of services, in the light of Article 966 of the Brazilian Civil Code.<sup>9</sup>

Therefore, there are two aspects of a banking operation: the economic and the legal. As far as the economic aspect is concerned, the

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5 Gomes, *Contratos* (1981), at p. 382.

6 Martins, *Contratos e Obrigações Comerciais* (2010), at p. 526.

7 Covelho, *Contratos Bancários* (1981), at p. 25.

8 Commercial Code, Article 119.

9 Law Number 10406 of 10 January 2002.

provision of services in the credit sector is to the advantage of both the bank and the customer. This is evidenced by the fact that these services generate the circulation of wealth, as they include the elements of organization and habitualness or reiteration. From a legal standpoint, the completion of a banking operation depends on mutual assent between the customer and the bank, as provided by law. As one commentator states:

"However, one must acknowledge that in the professional exercise of banking, these operations assume specific importance, standing out from those also performed by merchants in general. This is why bankers' operations are called banking operations."<sup>10</sup>

One observation is that that banking operations are substantiated by contracts with the unique characteristics:

". . . of being of duration, in the sense that they create a relationship that is intended to last in time, whether of continuous or periodic performance, or for a definite or indefinite period of time, though there are plenty of contracts of an instantaneous nature; of being consensual contracts, though there are plenty of a real nature, which are perfected with the delivery of the thing; of being contracts of mutuality of obligations (*prestação corresponsiva*); of being free form contracts, though there are plenty of contracts of mandatory documentation; and, lastly, of being onerous contracts, though there are plenty of legal acts that a bank performs free of charge, with a view to preserving the clientele."<sup>11</sup>

Targeting the public in general, banking operations are repetitive high-volume activities conducted with an indeterminate number of people, according to standardized types of transactions that comply with uniform banking rules and international regulations applicable to the relevant financial institution.

However, because of their specific nature, the primary characteristic of banking operations is their interdependence. This is because they have a reciprocal and interdependent relationship with liability operations and asset operations.

10 Carvalho de Mendonça, *Tratado de Direito Comercial Brasileiro* 2006, at p. 142.

11 Abrão, *Direito Bancário* (2005).



Liability operations are those by which the bank collects or receives money from the public. Asset operations are those carried out by a bank when public funds are invested and which entail a certain level of risk. In the reciprocal and interdependent relationship, the bank assumes the role of debtor (which is not limited to typical operations, such as collecting deposits), which corresponds to asset operations in which the bank instead assumes the role of creditor (which is likewise not limited to typical operations, such as extending credit). Legal and economic effects are possible only because of this unique interdependency of asset and liability operations.

In this era of information technology and electronic communication enabling quick and easy access to the banking system, particularly in major urban centers, the notion of the customer-institution relationship has been lost. Today, this impersonality governs banking operations and transactions.

Notably, a large portion of the Brazilian population has no contractual relationship whatsoever with banks, instead using banking correspondents (*correspondentes bancários*) or lottery retailers (*casas lotéricas*) that offer affordable prices. In addition, the customer-institution relationship is made redundant by electronic communication services requiring less direct contact with the bank branch and by credit card management institutions and finance companies operating together in more remote consumer promotion sectors.

### **Regulated Financial Services**

In general, financial services are provided by banking and non-banking financial institutions, as well as by other institutions authorized by BACEN and/or the CVM to operate nationwide. In this respect, BACEN's role as a regulatory and supervisory body that is linked to the CMN is that of monitoring the operators and providers of three classes of financial services:

- (1) Financial institutions that receive cash deposits, such as full service banks (*Bancos Múltiplos*) with commercial portfolios, commercial banks, savings banks (*Caixas Econômicas*), and credit cooperatives;
- (2) Financial institutions authorized to operate in the market, such as full service banks without commercial portfolios, investment banks (also supervised by the CVM), development banks, credit companies, financing companies, investment companies, housing loan associations, mortgage banks, and savings and loan associations; and

- (3) Financial brokers, managers of third-party funds, or financial ancillaries, such as the Commodities and Futures Exchange, stock exchanges, securities brokerage firms and dealers, autonomous investment agents (all of which are supervised by the CVM), leasing companies, and foreign exchange brokerage companies.

The relevance of the Brazilian banking law, which essentially regulates the activities performed by banks, results naturally from the impact of these activities on the socioeconomic community. This explains why the importance of banking activities is such that the state had to ensure their control and direction and become a banker itself. Banks also perform a crucial role as payment intermediaries: scriptural or bank money (*moeda escritural*) is considered more important than currency in the form of coins and banknotes (*moeda manual*).

However, the function of banks does not consist in mere intermediation. They have become true credit mobilizers, acting always as parties of the operations and of the contracts that they execute, seeking to obtain available capital and investing it in their own names — an intermediation that always has a profit-making purpose.

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## Banking Law and Consumer Protection

Shortly after the enactment of the Consumer Protection Code,<sup>12</sup> its applicability to banking activities was questioned. At first, it was argued that the Consumer Protection Code would not be applicable to financial activity. This interpretation reflected the opinion of a number of learned scholars,<sup>13</sup> who were of the opinion that the Consumer Protection Code would not apply to financial institutions, with the exception of direct consumer credit.

The non-application of the Consumer Protection Code was based on the understanding that, under Article 2 of the Consumer Protection Code, the nature of the commodity offered by financial institutions (money) would prevent a borrower of a bank loan from being considered a consumer. As opposed to the purchaser of other products, such

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<sup>12</sup> Law Number 8078 of 11 September 1990.

<sup>13</sup> Wald, "O Direito do Consumidor e suas Repercussões em Relação às Instituições Financeiras", 666 *Revista dos Tribunais* (April 1991), at pp. 7–17; Gastão de Paes de Barros Leães, "As Relações de Consumo e o Crédito ao Consumidor", 82 *Revista de Direito Mercantil, Industrial, Econômico e Financeiro* (April–June 1991), at pp. 13–23.



as clothing or food, the borrower of a loan would never be the end user of the money, which is always transferred to a third party.

However, the superior courts did not accept this argument, as can be verified from Precedent 297 of the Federal Court of Appeals (*Superior Tribunal de Justiça* — STJ), which states: "The Consumer Protection Code is applicable to financial institutions".<sup>14</sup>

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## Financial Services for Foreign Investors

### In General

The expression "financial system" can be understood to mean a financial-monetary system that involves the state activity of the issuance of currency, the execution of economic policy (usually through BACEN), and the activity of financial institutions (public and private) in a competitive market.

In a broad sense, the financial system comprises both financial markets and financial activities and instruments. Financial markets are forums where providers of financial services perform their activities through instruments (involving the negotiation of currency, securities, contracts, interest rates, risk levels, and terms). Financial activities are secondary activities, in that they create the means and circumstances for the processing of all economic activity flows.

The providers of banking and non-banking financial services play a key role in the performance of financial activities. The former operate with monetary assets (paper money and cash deposits), while the latter operate with non-monetary financial assets (securities that back operations in the capital and credit markets).

Therefore, it is evident that financial activity is a genus of which banking activity is a species and that this activity can be performed through full service, commercial, or specialized banks. In the conduct of international business in an in-person manner, banks can operate by means of different organizational forms, including an agency, division, branch, subsidiary, representative office, joint venture, or banking consortium, among other forms.

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14 This decision is based on the precedents of Special Appeal (REsp) 106.888/PR, Second Section, DJ (Court Gazette) of 8 August 2002; Special Appeal 298.369/RS, Third Panel, DJ of 25 August 2003; and Special Appeal 57.974, Fourth Panel, DJ of 29 May 1995.