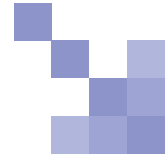


Brazil



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THE CORPORATE REAL ESTATE MARKET

1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

Brazil has seen growing trends in the real estate market in the past year. The government's offer to provide financing for investment projects in the country has led to rapid development in the real estate sector.

The demand for low and medium cost housing has increased strongly throughout Brazil and has encouraged many companies to focus their interests and efforts on this sector.

The world demand for food and energy commodities has affected Brazilian real estate markets, raising the prices of property in rural areas.

Brazil is undergoing a consolidation process in the property market, through mergers and acquisitions of small and medium-sized real estate developers, real estate brokers and construction companies with more capitalised companies.

REAL ESTATE INVESTMENT

2. Please briefly outline the opportunities for investing in real estate in your jurisdiction. In particular, consider:

- The structures commonly used (for example, property companies and partnerships).
- Are real estate investment trusts (REITs) available? If so, are they commonly used?
- The role of institutional investors.
- The role of private investors.

Structures commonly used

There are various structures commonly used for property investment, including property companies, partnerships, funding mechanisms and security structures.

REITS

The Brazilian real estate investment fund (*Fundo de Investimento Imobiliário*) is similar to the US REIT, and is commonly used for each kind of real estate investment.

Role of institutional investors

Institutional investors play a significant role in the market, investing in major sectors including retail and commercial property. They are also beginning to invest in low and medium cost housing sectors.

Role of private investors

Private investors are usually the developers of new areas and sectors, and invest in all sectors of the real estate market.

REAL ESTATE LEGISLATION

3. Please briefly set out the main real estate legislation that applies in your jurisdiction.

The main legislation regulating real estate transactions includes the:

- Brazilian Civil Code (*Federal Law 10.406/2002*), which contains provisions on the ownership and transfer of real estate, and rights and security interests in real estate.
- Public Registers Law (*Federal Law 6.015/1973*).
- Lease Law (*Federal Law 8.245/991*).

TITLE

4. Please briefly state what constitutes real estate in your jurisdiction. Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

In Brazil, land and everything that is incorporated into land (whether naturally or artificially) is classed as real estate. Land and any buildings on it owned by the same entity are registered together in the same title.

5. How is title to real estate evidenced, for example by registration in a public register of title? Which authorities manage the public title register?

Title to real estate is evidenced by registration in the appropriate real estate register. Good title to real estate can be proved by a recent certificate of title, issued by the real estate registrar. A certificate of title details all registered transactions relating to the

property over the last 20 years, and usually provides evidence of ownership and indicates any lien against the property.

With non-registered land, claims, rights or liens are only enforceable between the parties to the transaction. Therefore, although property rights are derived from a deed, the buyer's ownership of property only becomes valid against third parties once the deed is registered in the real estate register under the title number for the property.

6. Please briefly set out the information and documents registered in the public register of title, for example a description of the real estate, the owner, matters affecting the title and any relevant documents.

Since the Public Registers Law (*Law 6015/73*) came into force, Brazil has operated a public registration system for real estate, based on a system of registers. The first transaction involving a property that occurs after 1973 triggers registration in the appropriate real estate register and the property is given a title number (*matrícula*). Under this title number, the real estate registrar records:

- Details of the owner.
- A description of the property.
- The existence of any buildings.
- All third party rights and interests in the property that are subject to registration. Registrable third party rights and interests include mortgages (*hipoteca*), legal charges such as attachments, and any other real right or interest in the property.

7. Can confidential information or documents be protected from disclosure in the public register of title?

In Brazil, once documents are registered in the real estate register they become public. Anyone can apply for and obtain certificates of title and copies of titles.

8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?

In Brazil, there is no state guarantee of title. Title insurance is not available in Brazil, although some foreign insurance companies insure title to Brazilian properties.

9. How can real estate be held (that is, what types of tenure exist)?

Ownership is absolute and perpetual until disposal of the property by the owner, who is free to enjoy it and dispose of it, subject only to third party rights and applicable legal restrictions. On the owner's death, ownership transfers to the owner's heirs.

Among others, the following types of tenure exist:

- Usufruct, that is, full right of use and enjoyment, including the right to any income or produce generated by the property.
- Fiduciary ownership.
- Conditional or defeasible ownership.
- Fiduciary alienation, which is a type of security.
- The rights of the buyer under a promise to sell and purchase.
- Real right of use, which is a type of limited usufruct, giving the right to use property for a specific purpose.
- Right to build or to cultivate (*superfície*), which is a specific right to build or to cultivate that can be granted by the owner of the land in favour of a third party
- Fideicommissary substitution, in which ownership of property passes to one heir or beneficiary, who holds it in trust until his death, when the property passes to the second heir or beneficiary.
- Emphyteusis, which is the right to possess, use and enjoy the property in perpetuity. Emphyteusis was abolished when the Civil Code of 2002 came into force, although existing emphyteutic liens were not affected.
- Properties subject to a special coastal land system.

SALE AND PURCHASE OF REAL ESTATE

10. What are the main stages and documents in the sale and purchase of real estate? In particular:

- How is real estate marketed, when does commercial negotiation occur and what pre-contractual arrangements are used?
- When is the sale contract negotiated and executed?
- When are the parties legally bound?
- When is the change of title registered?
- When does title transfer and what are the formal legal requirements to transfer real estate (for example, in writing and signed by the parties)? Is notarisation required?

Marketing

Properties are usually marketed through newspaper adverts, internet databases and real estate brokers.

Commercial negotiation

Early negotiations are commonly conducted by the buyer or real estate brokers. In complex cases, legal counsel is usually involved

in negotiations, particularly if parties enter into binding obligations. Legal counsel can also be involved depending on:

- Whether title to the property needs to be investigated and cleared.
- The activities that will be carried out at the property by the new owner.
- The complexity of the due diligence.

Pre-contractual arrangements

Pre-contractual arrangements, such as offers made by potential buyers, do not bind the parties. Most case law holds that the parties should act in good faith, even before an agreement is reached. However a binding agreement only usually exists once the seller accepts the buyer's offer.

Sale contract

A buyer begins by making an offer. If the seller accepts the offer, there is an agreement. Both parties are then obliged to comply with the terms of the agreement.

After investigation of title and providing there are no obstacles to the sale, the parties enter into a public deed of sale and purchase or public deed of promise to sell and purchase, before a notary officer. This deed is binding on the parties.

When legally binding

The sale and purchase deed becomes legally binding once signed by the parties.

Registration and when title transfers

Title and ownership transfers when the public deed is registered in the real estate register maintained by the appropriate real estate registry office. The sale and purchase deed does not transfer ownership and title. It only creates an obligation for the seller to transfer title (*Civil Code*).

11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate, for example to disclose real estate information, or in relation to title?

The seller must disclose any lien or claim over the property. The buyer must obtain all relevant information about the property and the seller through certificates of title issued by the relevant real estate registrars (*see Question 5*). The law imposes liability on the seller (unless the parties agree otherwise) for:

- Eviction, which means the buyer has recourse in damages against the seller if the property is lost to a third party by judicial decision.
- Debts related to the property arising before the transfer of title by registration.

12. Please briefly outline the real estate due diligence that is typically carried out before an acquisition (including title investigation and searches of public authorities).

Due diligence is required to obtain relevant information about the property and the property owner. A buyer should:

- Examine certificates issued by the relevant registrars and notaries (*see Question 5*). It takes about five business days to obtain the certificates. The costs of obtaining certificates about the seller and the property vary from state to state.
- Check for outstanding maintenance expenses if the property is held within a condominium or forms a unit of a building.
- Be aware that preferential rights to third parties can be created where properties are subject to lease agreements or are held in common by two or more owners.
- Obtain information about the property owner, checking for debts including tax debts.
- Check issues such as the extent of environmental responsibility and obligations where rural land is involved.

13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?

In Brazil it is not common for the seller to give formal warranties to the buyer, due to the legal liabilities imposed on the seller (*see Question 11*).

14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it? For example, environmental liability, or liability under a lease.

In some cases, liability passes with the property and therefore the buyer will inherit it on transfer of title. Such liability includes:

- Most environmental liabilities, even if they arose before the transfer.
- Real estate taxes, unless the certificates provided by the tax authorities indicate there are no debts at the time of the acquisition. In this case, the buyer is not responsible for debts indicated as paid in the certificates. In general, all outstanding debts shown in the certificates are paid before the property transfer or the debt is discounted from the sale price.
- Maintenance expenses for condominiums, where the debt is transferred with the property to the new owner. The new owner will have recourse against the former owner for these costs.

A buyer of a leased property is not liable for the obligations of the former tenant, since only the original parties to the lease are bound by it.

15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it? For example, environmental liability, defects in the real estate, and contractual liability to the buyer.

See Questions 11 and 14.

16. What costs are usually paid by the buyer? What costs are usually paid by the seller?

Buyer's costs

The buyer usually pays most of the transfer-related costs, such as transfer tax (see Question 18) and the costs of executing and registering the deed, which vary from state to state. The parties can agree alternative terms for who pays the costs.

Seller's costs

The only cost that always remains with the seller is the cost associated with the disposal of the rights for government-owned properties and properties subject to emphyteusis (*laudêmio*) (see Question 18).

Real estate brokerage fees are dictated by the agreement between the parties. The rate is generally 5% of the market value of the property and is usually paid by the seller.

REAL ESTATE TAX

17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?

VAT is not payable on the sale and purchase of real estate in Brazil.

18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase? Who pays? What are the rates? Are there any exemptions?

All real estate transfers are subject to at least one tax. Transfers made in exchange for payment (onerous transfers) and gratuitous transfers such as gifts are subject to transmission tax. Tax is calculated at the market value of the property or its appraised value, whichever is higher.

Onerous transfers are subject to ITBI (*Imposto de Transmissão de Bens Imóveis*). ITBI, also known as SISA, is a municipal tax payable by the buyer when acquiring property. The rate varies from city to city, but is generally around 2%.

Gratuitous transfers are subject to ITD (*Imposto sobre Transmissão Causa Mortis e Doação*). ITD is a state tax payable by the person who receives assets or rights (including property) by gift, inheritance or bequest. The rate varies from state to state, but is generally around 4%.

Laudêmio can range from 2.5% to 5% of the value of the property (see Question 16).

19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?

The most effective way of mitigating tax liability on acquisitions of real estate is by conducting full and thorough due diligence (see Question 12).

HOLDING BUSINESS PREMISES

20. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties, for example through outsourcing transactions?

In Brazil it is not common for companies to use third parties to manage real estate portfolios and accommodation through outsourcing transactions. However, this practice is not prohibited.

21. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?

Generally, there are very few restrictions on foreign ownership or occupation of real estate. Brazilian law does not require foreign owners to grant security for ownership or occupation.

In rural areas, ownership is restricted to persons residing in Brazil or to foreign entities authorised to function in Brazil. In these situations, specific legislation imposes restrictions, especially on the size of the property and the ownership by foreign entities.

These restrictions do not apply to the acquisition of land in rural areas by companies incorporated in Brazil, even if the companies are substantially controlled by foreign investors.

The rules on foreign investment in rural areas may be changed (see Question 39).

Foreign citizens cannot acquire land on the seashore or within 150 kilometres of country borders without special governmental authorisation. Again, this restriction does not apply to entities incorporated in Brazil that are largely foreign-controlled.

Properties owned by foreign governments or international organisations can only be used to perform their functions.

22. Does change of control of a company affect its holdings of real estate?

A change of control of a company does not affect its ownership of real estate. However, lease agreements may contain provisions stating that when there is a change of control of the tenant, the lease agreement must be ratified by the landlord.

23. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

Expropriation of property from an owner can take place where there is a public need or public interest for doing so, or if there is imminent danger.

Expropriation is governed by the constitution, which guarantees the owner fair compensation, paid in cash or public bonds before expropriation takes place. Specific legislation deals with this issue in detail (*Decree-Law 3365 of 1941* and *Law 4.132 of 1962*). Expropriation must be justified and the purchase price is generally market value. All expropriation conditions, including price, are established in judicial proceedings. Provisional possession of the property can be granted to the government by a court in expropriation cases, if the purchase price is deposited into court.

24. Are municipal taxes paid on the occupation of business premises, for example business rates? Are there any exemptions?

Property owners in urban areas are subject to a municipal tax levied annually on the appraised value of property called urban property tax (IPTU). Rates vary from city to city. Some municipalities impose additional levies on property to cover the cost of economic activities and waste disposal.

There are very few exemptions to paying municipal tax. Each request for an exemption must be adjudicated on a case-by-case basis.

REAL ESTATE FINANCE

25. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?

The most common methods are using a collateral lien created through a security sale agreement and by using legal charges such as mortgages. Real estate is a well-established source of security for financial transactions.

26. How is real estate commonly used to raise finance? In particular through:

- Secured lending.
 - Sale and leasebacks.
 - Other financing such as real estate securitisation.
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Real estate is often used in secured lending transactions (see *Question 25*).

Law 9,514, as amended, created the real estate finance system (SFI) to establish the granting, acquisition and securitisation of real estate loans in Brazil. The system aims to develop primary markets (consisting of loans) and secondary markets (trading of securities backed by loan receivables) for real estate finance by creating advan-

tageous compensation conditions and special instruments to protect creditors' rights. The SFI system includes real estate financing transactions carried out by savings banks, commercial banks, investment banks, real estate credit portfolio banks, mortgage companies and other entities approved by the National Monetary Council (CMN).

REAL ESTATE LEASES

27. Are contractual lease terms regulated or freely negotiable?

Lease terms are governed by the Lease Law (*Law 8245/91*), which applies to residential leases, temporary leases and business leases. Special statutes can apply to hospitals, schools, buildings used for social activities and leases to governmental entities.

28. How are rent levels usually reviewed and are there any restrictions on this? Is VAT (or equivalent) payable on rent?

Under the Lease Law there are three different types of rent review:

- By mutual agreement.
- Periodic adjustment according to inflation indexes. Rent is automatically adjusted according to inflation.
- Judicial review. A court conducts a rent review to re-establish the market value of the rent.

No VAT is levied on the rent of properties. Rent is subject to income tax. Where the owner is a corporate entity, rent is also subject to social contribution tax.

29. What is the usual length of lease term and are there any restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term? If yes, please give details.

There is no minimum or maximum lease term; the term can also be indefinite. The length of a lease term differs in each case; there is no usual length.

Leases of business premises with a term of five years or more allow a tenant to request a lease renewal before the courts to protect their business, provided that a written lease agreement was executed and the tenant has been continuously performing the same business for at least three years.

30. What provisions or restrictions typically apply to the disposal of the lease by the tenant (for example, can the tenant assign or sublet the lease with the landlord's consent)?

The disposal of the lease by the tenant (unless expressly agreed otherwise) is subject to the landlord's formal approval. The tenant's disposal is usually a breach of contract, since the tenant is terminating the lease before expiry of the term and incurs fixed penalties as set out in the lease agreement.

In commercial leases, it is common to state that if there is a change of control of the tenant (including a corporate restructuring or a change in the activities conducted in the premises), this is considered a transfer of the lease, which is subject to termination of the lease.

31. Who is usually responsible for keeping the leased premises in good repair?

The tenant is generally required to pay real estate taxes imposed on the owner and ordinary maintenance/condominium expenses. The landlord is responsible for extraordinary maintenance/condominium expenses for structural repairs, external painting of the building, fire and security equipment and gardening.

32. Who is responsible for insuring the leased premises?

The landlord is responsible for the cost of a suitable fire insurance policy. The parties can agree additional terms relating to other types of insurance, such as equipment insurance.

33. Can tenants usually share their business premises with companies in the same corporate group? If yes, on what terms?

Brazilian law treats the sharing of premises as an assignment of the lease, which requires landlord consent, unless agreed otherwise.

34. On what grounds can the landlord usually terminate the lease? Please briefly outline any restrictions or procedure that applies. Can the tenant terminate the lease in certain circumstances?

During the term of the lease, the landlord has the right to terminate the lease for:

- Breach of contractual duties by the tenant.
- Non-payment of rent or any other contractual costs.
- The need for urgent repairs, if:
 - such repairs cannot be executed while the tenant occupies the property; or
 - such repairs can be executed with the tenant in occupation, but the tenant does not agree to them.

Agreements can contain termination clauses, which authorise termination on insolvency, bankruptcy, compromise with creditors and similar events.

In the sale and purchase of leased property, the buyer can terminate the lease agreement within 90 days of registration of the deed of sale in the real estate register, unless the lease provides that the lease will remain in full force if the property is sold and the agreement is registered in the real estate register. In this case, the new owner must comply with the lease.

REAL ESTATE ORGANISATIONS

Brazilian Institute of Real Estate Officers (*Instituto dos Registradores Imobiliários do Brasil*)

Main activities. This institute consolidates several real estate registrar services in Brazil.

W www.irib.org.br

Brazilian Association of Notaries and Public Registrars (*Associação dos Notários e Registradores do Brasil*)

Main activities. This is an umbrella organisation representing notaries and registrars throughout Brazil

W www.anoreg.org.br

Union of Real Estate Agencies of São Paulo (*Sindicato das Empresas de Compra, Venda, Locação e Administração de Imóveis de São Paulo*)

Main activities. This organisation represents businesses engaged in the sale and purchase, lease and management of real estate in the state of São Paulo.

W www.secovi.com.br

Association of Real Estate Businesses of Rio de Janeiro (*Associação dos Dirigentes de Empresas do Mercado Imobiliário - ADEMI*)

Main activities. ADEMI is an association of companies and individuals engaged in the construction and sale of real estate properties.

W <http://ademi.webtexto.com.br>

Regional Real Estate Brokers Councils (*Conselhos Regionais de Corretores de Imóveis*)

Main activities. The Regional Real Estate Brokers Councils are responsible for licensing real estate brokers and, together with the Federal Council of Real Estate Brokers (*Conselho Federal de Corretores de Imóveis*) establish rules and standards governing the profession.

W www.creci.org.br

The tenant can terminate the lease for cause, if the landlord does not comply with its contractual duties.

The tenant can also terminate the lease before its expiry by paying a penalty, which can be:

- Fixed in the lease agreement.
- Established by legislation.
- Determined by the courts.

In residential leases, the tenant is not required to pay a penalty if the lease is terminated because their employer is transferring them to another city. In this situation, the tenant must give the landlord at least 30 days written notice.

35. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?

According to Brazilian law, the tenant's insolvency does not automatically trigger termination of the lease, unless agreed otherwise. A court-appointed trustee has a legal right to terminate the lease if it is no longer beneficial to the bankrupt estate.

PLANNING LAW/ZONING

36. What authorities regulate planning control and which legislation applies?

Planning control is regulated and implemented by the municipal authorities. Authorisation must therefore be requested from the municipal government for any construction, and for most refurbishment and expansion work. Other governmental approvals can be needed for property development, such as environmental licences.

Generally municipal planning and zoning legislation establishes restrictions and limits on each neighbourhood or area within a city.

37. What planning consents (for example, planning permission or building permits) are required and for which types of development?

A building permit granted by the municipality is required for all construction projects. Depending on the activities involved and the impacts of these activities, the project can be subject to environmental licensing.

Additional authorisation can be necessary, for example for buildings designated as historical sites or areas located in environmental conservation units.

Once construction is complete, a certificate of conclusion of works (*habite-se*) is required before the building can be occupied. Each municipality has its own issuing agency for the certificate.

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38. In relation to planning consents:

- Which body grants initial planning consents?
 - Do third parties have the right to object?
 - In what circumstances is there a public inquiry?
 - How long does an initial decision take after receipt of the application?
 - Is there a right of appeal against a planning decision?
-

Planning consents

Planning applications should be made to the municipal authorities.

Third party rights

Third parties have the right to object to planning applications.

Public inquiries

Public inquiries are held for large-scale urban projects, particularly when there is local opposition to the proposals.

Initial decision

The timeframe for the initial decision depends on the size and nature of the project; there is no fixed time period for the decision.

Appeals

A decision can be challenged by bringing an administrative appeal. If the outcome of the appeal is unsuccessful, the decision can be challenged in the courts.

REFORM

39. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

On 24 October 2007 Legislative Bill 2,289/2007 was put before the National Congress to amend Article 190 of the Federal Constitution, which states that the acquisition or leasing of rural property by foreign natural persons or foreign legal entities is regulated by federal law.

Currently, Article 190 of the Federal Constitution is regulated by Federal Law 5,709/71. However, Article 190 currently only imposes restrictions on foreign natural persons or legal entities, without reference to Brazilian legal entities controlled by foreign natural persons or legal entities. Because of this, there is debate about the differences between Federal Law 5,709/71 and the Federal Constitution, and between the courts and the government on this issue.

The objective of the new legislative bill is to adjust the position of the courts in line with the government's aim to control the occupation of rural properties by foreign entities, particularly to protect the Amazon rainforest.

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