

The International Comparative Legal Guide to: **Real Estate 2008**

A practical insight to cross-border Real Estate work



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1 Real Estate Law

- 1.1 Please briefly describe the main laws that govern real estate in Brazil. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1

Real Estate in Brazil is mainly governed by the provisions set forth in the Brazilian Civil Code (Federal Law 10.406/2002), which contains rules relating to ownership and use of real estate, forms of transfer, encumber and neighbouring.

- 1.2 What is the impact (if any) on real estate of local common law in Brazil?

The Brazilian legal system is based on Civil Law and common law has no impact.

- 1.3 Are international laws relevant to real estate in Brazil? Please ignore EU legislation enacted locally in EU countries.

International laws are only relevant in Brazil whenever an international treaty duly signed by Brazil exists.

2 Ownership

- 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

As a general rule, there are no legal restrictions on the ownership of real estate by particular classes of persons. However, there are some restrictions on foreign persons owning or occupying real estate in Brazil.

For instance, only foreign entities authorised to function in Brazil or persons residing in Brazil may own rural land and even then there are some restrictions on the property's size and foreign entities' ownership. Furthermore, foreign citizens are not able to acquire land on the borders of the country, without special governmental authorisation.

Properties owned by foreign governments or international organisations may only be used for the performance of their activities.

3 Real Estate Rights

- 3.1 What are the types of rights over land recognised in Brazil. Are any of them purely contractual between the parties?

Ownership of real estate in Brazil is absolute and in perpetuity until its disposal by the owner, who is free to enjoy it subject only to third party rights and applicable legal restrictions.

There are several other types of rights on real estate, all of them purely contractual between the parties, such as (i) usufruct; (ii) fiduciary property; (iii) resolvable property; (iv) security sale agreement (*alienação fiduciária*); (v) purchase and sale commitment; (vi) real right of use; (vii) rights over superficial property; and (viii) trust (*fideicomisso*). Some properties are also subject to emphyteusis and some are subject to a special coastal land system.

4 System of Registration

- 4.1 Is all land in Brazil required to be registered? What land (or rights) are unregistered?

The Brazilian legal system is based on Real Estate Registrars and all land in Brazil is, in principle, registered.

- 4.2 Is there a state guarantee of title? What does it guarantee?

In Brazil, there is no state guarantee of title, but there is public access to the Real Estate Registrar register.

- 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

All rights and transfers regarding real estate shall be registered in order to be opposable to third parties. Non-registered titles, claims, rights or liens are only opposed to those who took part in the transaction. In addition, a variety of other acts may require registration or annotation such as, for example, changes in name or marital status of the owner.

Please note that, in our days, the title is recorded with details of all the previous owners as of 1973, a description of the property and its boundaries and all third party rights (requiring registration) to which it is subject.

4.4 What rights in land are not required to be registered?

Rights deriving from leases and gratuitous leases do not require registration, except for special cases.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

As per question 4.1 above, land in Brazil is always subject to registration.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

The property is only transferred by means of registration of the respective public deed before the competent Real Estate Registrar.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Assuming that all rights are registered, the rank of priority is made accordingly to their date of registration at the Registrar.

5 The Registry / Registries

5.1 How many real estate registries operate in Brazil? If more than one please specify their differing rules and requirements.

There are several Real Estate Registrars in Brazil, since each one is responsible for a specific area in each city of Brazil, but all of them are subject to the same rules and requirements which are imposed by Law.

5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?

As of the date hereof, it is not possible to access information on real estate registries on line.

5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

In principle yes, but only if bad faith may be proved or if there is an effective damage to the interested party in the registry. In this case, civil and criminal responsibility may be claimed.

5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

There is public access to the Real Estate Registrar; it is possible to apply for and obtain a copy of the register as well as certificates of the corresponding title number (*matrícula*).

It is important to note that under such number, the Real Estate Registrar records the details of the owner, the description of the

property and all third party rights to which it is subject, which require registration. These may include any legal mortgage or charge or any other real estate lien in connection with such property.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in Brazil? Please briefly describe their roles and/or duties.

a) Selling and purchasing agents (or realtors)

Brokers are involved in the majority of real estate transactions.

b) Lawyers

Lawyers are also involved to provide legal advice to either of the parties.

c) Notaries

Notaries should always be involved since a public deed is usually mandatory in order to have the deed registered. They check all necessary certificates as well as the representation and signature of the parties.

d) Others

In larger real estate transactions technical and environmental advisers, tax consultants and financial advisers are also involved.

6.2 How and on what basis are these persons remunerated?

- Brokers usually receive commissions at the range of 3 to 5% of the property value.
- Lawyers in Brazil usually charge hourly fees for their work or a percentage of the property value.
- Notaries use an estate array, which varies from estate to estate.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

The minimum formalities are:

- (a) execution of a public deed of purchase and sale;
- (b) payment of transfer taxes; and
- (c) registration of the deed before the competent Real Estate Registrar.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

The seller is obliged to disclose any kind of lien or claim over the property. Also, the buyer must obtain all relevant information about the property and the seller, through certificates issued by the relevant notaries.

7.3 Can the seller be liable to the buyer for misrepresentation?

In accordance with the Civil Law, the seller is responsible for (i) eviction, which means that the buyer will have recourse against the seller, in case of loss of the real estate property acquired due to any judicial order regarding third parties' rights, and (ii) debts related to

the property until its transfer before the Real Estate Registrar, except if the parties agree otherwise.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

Brazilian law does not provide for the obligation of the seller to grant formal warranty to the buyer. Contractually, however, the seller may provide warranties to the buyer.

7.5 Does the seller warrant its ownership in any way? Please give details.

The seller does not warrant its ownership, which shall be checked through the analysis of the title certificate.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

The liabilities of the buyer are basically related to the payment of the agreed price.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

Real Estate financing is subject to several different rules in Brazil, the main ones being:

SFH: created by Law 4.380/64 for the purpose of developing the real estate industry, and facilitating the construction and acquisition of residential properties, primarily for the low income population. It is only applicable for persons; corporate entities cannot apply for it.

SFI: created by Law 9.514/97 to establish the granting, acquisition and securitisation of real estate loans in Brazil. The system seeks to develop primary (loans) and secondary (trading of securities backed by loan's receivables) markets for the financing of real estate through the creation of advantageous compensation conditions and special instruments for the protection of creditors' rights. This includes financing transactions carried out by different types of financial institutions, such as savings banks, commercial banks, investment banks, mortgage companies, etc.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The main methods used are security sale agreements and mortgages. Real estate properties are considered especially strong guarantees for loans and other sorts of financing, through mortgages, the rules of which in Brazil differ from those found in countries of Anglo-Saxon origin.

Financing under the SFH must have one or more of the following guarantees, as the case may be: (i) a first lien mortgage over the property being financed; (ii) a conditional sale of the property being financed; (iii) a first lien mortgage or a conditional sale of another property of the borrower or third party; or (iv) other guarantees at the discretion of the financing agent.

Under the SFI, one of the following guarantees is required: (i) mortgages; (ii) fiduciary assignment of credit rights arising from property sale and/or lease contracts; (iii) conditional sales; (iv) pledge of receivables resulting from sales contracts or promises to sell real estate; or (v) assignments of rents and other rights (anticrese).

8.3 What minimum formalities are required for real estate lending?

Formalities will depend very much on the kind of financial system being used. Regarding the SFH, for instance, since its funding derives mainly from the proceeds of the Unemployment Guarantee Fund (FGTS), several rules related to the FGTS shall be observed, such as: applicants are required to comply with the following conditions: (i) reside or work in the city where the property is located; and (ii) do not own other property in the city where they intend to obtain the financing.

8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The lender mortgage benefits from a right *in rem* over the property. The mortgage has a preferential right to the sale proceeds over other creditors or any other mortgage which was registered after. However, privileges in favour of employees and tax credits will rank before *in rem* guarantee.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

All real estate transfers are subject to at least one tax. In case of an onerous transfer "ITBI" (*Imposto de Transmissão de Bens Imóveis*) will be paid, and in the case of a gratuitous transfer "ITD" (*Imposto sobre Transmissão Causa Mortis e Doação*) will be paid, both calculated on the market value of the property or its appraised value, whichever is higher.

ITBI, also known as SISA, is a municipal tax due by the buyer on the acquisition of real estate, which rate varies from city to city, but is usually fixed at a rate of 2%. ITD is a state tax due by the person who receives assets or rights (and real estate is included) in donation or in estate proceeding, which rate varies from state to state, but is usually fixed at a rate of 4%.

Besides, in the case of a government owned property or emphyteutics properties, there is also a cost associated with the disposal of the rights related to such properties, called "*Laudêmio*", which may range from 2.5% to 5% of the property value.

9.2 When is the transfer tax paid?

The transfer tax is usually paid beforehand, since the Notary will require proof of payment in order to grant the public deed.

9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

There is no VAT in Brazil.

9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

The seller is subject to income tax over the gain established at the sale of the property. In case of a Brazilian citizen the applicable rate would be 15% of the gain. However, Brazilian Income Tax Law provides for different tax rates and exemptions, depending on the seller.

9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes, companies are subject to an entirely different taxation system.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The lease of business premises is mainly regulated by the Lease Law (Law no. 8.245/91) applicable to urban properties. The lease of rural properties is regulated by Law no. 4.504/64 (*Estatuto da Terra*).

10.2 What types of business lease exist?

The real estate lease may be divided into two main types: (i) commercial urban property; and (ii) rural property.

10.3 What are the typical provisions for leases of business premises in Brazil regarding: (a) length of term; (b) rent increases; c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

a) Length of Term

There is no minimum or maximum term for lease agreements of urban business premises, which may also be entered into for an undetermined term.

b) Rent increases

Rent should be paid in local currency, in arrears. Indexation to foreign currency is not permitted and advanced payment is only allowed in very extraordinary circumstances.

Under the Lease Law there might be 3 different types of rent review: (i) by mutual agreement; (ii) periodic escalation according to inflation indexes (automatic adjustment of the rent in view of the inflation); and (iii) judicial review (review is made through a judge decision in order to re-establish the market value of the rent).

Expenses: In addition to the rent, the lessee is subject to real estate taxes and contribution for ordinary maintenance/condominium expenses.

c) Right to sell or sub-lease

In the case of a sale, promise to sell, assignment or promise of assignment of rights, the lessee is entitled to a right of first refusal to acquire the property under the same terms and conditions. If the agreement (i) establishes that it shall remain in full force and effect in the event of a sale of the leased premises and (ii) is duly registered before the Real Estate Registrar, then the purchaser may not terminate the lease and shall comply with the agreement until the expiration of its term. Otherwise, the purchaser may terminate the lease agreement, subject to appropriate advance notice and other formalities.

d) Insurance

The landlord is responsible for the costs of a complementary fire

insurance policy.

e) (i) Change of Control of the Tenant

Brazilian law has no specific provision on this regard but the parties may validly limit the lessee's change of control.

e) (ii) Transfer of Lease as a Result of a Corporate Restructuring

The assignment of the lease agreement, by any means, is usually subject to the landlord's previous approval.

f) Repairs

Ordinary repairs, being the ones due to the normal use of the property, shall be paid by the lessee and the extraordinary ones - connected to the viability of using the property - shall be paid by the landlord.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Rent is subject to Income Tax, payable by the owner. If the owner is a corporation, rent is also subject to Social Contribution.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Generally, business leases terminate (i) at the expiration of their term, (ii) by mutual agreement, (iii) upon default of either parties, (iv) in case of loss or destruction of the leased property, or (v) due to the need of urgent repairs in the property if (a) such repairs may not be executed with the tenant occupying the property, or (b) such repairs may be executed with the tenant occupying the property, but he/she does not agree with them. Agreements may contain termination clauses, which may authorise, for instance, termination upon insolvency, bankruptcy, composition with creditors and like events.

If the lease agreement has a duration of 5 years or more, the lessee is entitled to request its renewal in court, provided that a written agreement was executed and the lessee has been continuously performing the same business for at least 3 years.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

As a general rule, both landlords and/or tenants are not liable once they have sold their interest in a lease.

In fact, the purchaser is usually responsible for taxes related to the real estate, as well as maintenance expenses in the case of condominiums, and for environmental violations even though they occurred prior to the acquisition.

11 Zoning and Environmental Issues

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws. Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

Land use and occupation are carried out by municipal governments, in accordance with Federal Law no. 10.257/01, which establishes the general directives for urban policy, among other matters. There

are also construction rules established by each city and laws related to Environmental, Fire Department, Historical Patrimony, etc., that should be observed.

The Brazilian legislative framework of environmental protection is formed by several different laws, which basically provide that all those who carry out works or activities, which affect the environment, are obligated to prevent, minimise and repair the caused damage and assume the cost thereof.

According to the Brazilian Law, the owner can be deprived of real estate property in the events of expropriation, for public (social) need or interest, or if so demanded, in case of imminent danger.

Expropriation is regulated by the Constitution, which guarantees the owner previous and just compensation, in cash or public bonds, and may be related to urban properties or land reform. Specific legislation deals with the subject in detail. Expropriation must be justified and price will generally respect the market value. The price and all the conditions of the expropriation will be discussed judicially. Provisory tenure to the property may be granted to the government by a court, in the event of expropriation, if the price is properly deposited to the owner.

11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Several governmental approvals are required for real estate occupation and they vary according to the type of development and also from State to State.

In respect to environmental regulation, the Organic Structure of the Brazilian System for the environment is divided into federal, state and municipal environment agencies and entities, which have the power to establish, control and enforce the environment policy in their territories.

11.3 What main permits or licences are required for building works and/or the use of real estate?

Initially, a building permit granted by the municipality is necessary. Depending on the activity and its impact, the entrepreneurship shall also be licensed by the competent environmental agency.

Additional authorisations may be necessary, among others, in cases such as buildings designated as historical sites or areas located within environmental conservation units.

Once the building construction is done, in order to establish the use of the property, the acquisition of the Certificate of Conclusion of Works (*Habite-se*) is necessary. Although that certificate is required over the entire country, each municipality has its own competent agency.

11.4 Are building/use permits and licences commonly obtained in Brazil? Can implied permission be obtained in any way (e.g. by long use)?

Building/use permits are commonly obtained following a specific procedure. As a general rule, there are no implied permissions.

Environmental licences shall be renewed periodically and if the request of renewal is made according to legal requirements, the validity of the licence is automatically extended until the decision of the environmental competent agency.

11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

Time and costs of building permits varies greatly, depending on (i) the nature and size of the project; (ii) the municipality in which they run, since municipalities are authorised to set their own taxes; (iii) the works to be carried out; and (iv) the body control that grants such permit.

The competent environmental agency may establish differentiated periods of analysis for each type of environmental licence, although the environmental licensing process may not exceed the maximum period of 6 (six) months from the date of the request until its approval or rejection, with the exception of cases requiring Environmental Impact Assessment and/or public hearing, in which case the period shall be up to 12 (twelve) months.

11.6 In what circumstances (if any) is environmental clean up ever mandatory?

The Brazilian Constitution of 1988 inaugurated the principle of the socio-environmental purpose of the property. According to Brazilian environmental legislation, the polluter is strictly liable for environmental damages, such as soil contamination. In this sense, anyone who contributes, directly or indirectly, to an environmental damage can be jointly liable for its reparation.

11.7 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in Brazil.

Although this is a global tendency, Brazil still does not have any plan of assessment and management of the energy performance of buildings in Brazil.

12 General

12.1 Are there any current proposals for significant reform of real estate law in Brazil please give details.

There are no current proposals for reform of the real estate law.

12.2 Date at which law is stated

This chapter is up to date as of March 2008.



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