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KLA – KOURY LOPES ADVOGADOS
Buying and Selling Real Estate in Brazil



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRAZILIAN LAW



“Buying and Selling Real Estate in Brazil”

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1. OVERVIEW OF BRAZILIAN HISTORY

Brazil is a federative republic and the largest country in both South and Latin America. It is also the world's fifth-largest country by area and sixth by population. In the Americas, it is the only country where Portuguese is the official language.

Bordered by the Atlantic Ocean on the east, Brazil has a coastline of 7,491 kilometers (4,655 mi). It borders all other South American countries except Ecuador and Chile and covers 47.3% of the continent's land area. The Amazon is a world-renowned vast tropical forest, home to diverse wildlife, a variety of ecological systems, and extensive natural resources spanning numerous protected habitats. This unique environmental heritage makes Brazil focal point of significant global interest and debate regarding foreign ownership of rural land, deforestation, and environmental protection.

Explorer Pedro Álvares Cabral claimed the area for the Portuguese Empire in 1500. Brazil remained a Portuguese colony until 1808, when the capital of the empire was transferred from Lisbon to Rio de Janeiro. In 1815, the colony was elevated to the status of kingdom upon the formation of the United Kingdom of Portugal, Brazil and the Algarves. Independence was conferred in 1822 with the creation of the Empire of Brazil, a unitary state governed by a constitutional monarchy and a parliamentary system. The ratification of the first constitution in 1824 led to the formation of a bicameral legislature, now called the National Congress

and also marked the introduction of the real property registry system. The country became a presidential republic in 1889 following a military coup. A military junta came to power in 1964 and held power until 1985, after which civilian rule was reinstated. Brazil's current constitution, formulated in 1988, defines it as a democratic federal republic.

The federation comprises the union of the Federal District of Brasília, 26 States, and 5,570 Municipalities. The legal system of all States and the Federal District is governed by the Civil Law system, derived from the French Napoleonic Code, as reflected primarily in the Civil Code.

In practice, this means that just Brazilian State regulations on notarial and conveyancing matters, together with the municipal ordinances on urban property taxation bring over 5,597 different enacted provisions into consideration when acquiring real estate in Brazil!

2. DIFFERENT TYPES OF REAL PROPERTY

The classification of a property depends on its use and it is, therefore, irrelevant where the property is located (i.e. property located in an urban area with municipal zoning regulations will be considered rural property if used for rural purposes). There are two main types of property:

- a) Rural property.
- b) Urban property.

Urban properties can be classified as residential, commercial, and industrial. The ownership of urban property may be classified as fractional ownership, joint ownership in a condominium building or a co-ownership in an ordinary condominium.



All the regulations applicable to property cadastre, rules, restrictions and other requirements depend on the classification of the property.

3. TYPES OF REAL ESTATE DEVELOPMENTS

Brazil law basically recognizes the following types of land development:

a) Urban properties:

- a.1) Allotment - the division of a plot of land into lots with the installation of the necessary infra-structure, i.e. serviced lots (e.g. streets, water, sewage, electricity for transfer to public agencies upon conclusion) prepared and ready for sale. There has been a notable impact on this type of development following the enactment of new Federal Law no. 13,465/17 that now permits a local municipality to control access to allotments, which has resulted in a fierce debate about the legality of access control to such allotments which, as a result, ended;
- a.2) Land division - the division of a plot of land into lots without the installation of infrastructure (because the plot already has access to the necessary infrastructure);
- a.3) Real Estate Development - real estate developments are regulated by Law 4,591/64, thus created by dividing a piece/portion of real estate into several individual/separate and private constructed units, whereby an undivided interest in the real estate is established/registered in each unit. For the development and sale of hotel units with the hotel and lease administrations included the Securities Commission's Normative Ruling nº 602/18 must be also observed;

- a.4) Plots under the condominium regime - brand new type of real estate development also regulated by new Federal Law no 13,465/17, this type of condominium entails division of plots into lots, without improvements, created/developed as individual units with the remaining areas registered as communal property.

b) Rural properties:

- b.1) Allotment - same concept as above;
- b.2) Land division - same concept as above.

The development of urban real estate projects in Brazil typically occurs through a sales process that begins prior to construction of the project where buyers purchase units 'off-plan', i.e. based on architectural plans and models.

A typical urban real estate project would comprise the following stages:

- a) Land Analysis. Mainly involves the calculation of the:
 - a.1) Maximum amount of built area that could be constructed on the land, as prescribed by local zoning and use category legislation;
 - a.2) Unit sale price, which varies according to project and the property location, its distinctiveness, as well as the characteristics of the units on which the analysis is based;
 - a.3) The cost of the project, which primarily comprises construction costs, marketing costs, brokerage expenses and taxes; and
 - a.4) Environmental and zoning requirements pursuant to local regulations (Federal and State regulations) might be also applicable.



- b) Project approval. Any real estate project must be approved by the relevant Municipality prior to the commencement of the project.
- c) Project development. A property developer is permitted to start selling the units of a real estate project only after obtaining regulatory approval and the relevant permits referred to above and after the project development has been registered with the relevant Real Estate Register Office.
- d) Due-Diligence.
- e) Project Launch. Essentially the start of the units' sale. The sale of units may only take place after a project has been approved and the development has been duly registered before the relevant Real Estate Registry Office.
- f) Construction.

4. TYPES OF *IM REM* RIGHTS IN BRAZIL

- a) ownership;
- b) surface;
- c) use;
- d) right-of-way;
- e) enjoyment;
- f) habitation;
- g) right to acquire;
- h) pledge;
- i) right of floor slab ("Direito de Laje", which roughly translates to the Right of the Floor Slab, allows to obtain a distinct title to construction on top of or under another building even though it sits on the same land) - regulated by the new Federal Law no 13,465/17;

j) right to guaranty:

- j.1) mortgage;
- j.2) fiduciary lien;
- j.3) antichresis;
- j.4) seizure.

5. GUIDELINES AND MAIN STEPS IN THE PROCESS OF REAL PROPERTY ACQUISITION

Acquisition of a real estate property in Brazil, whether urban or rural, essentially involves the following steps:

- ✓ Finding a property for sale, possibly with the assistance of a real estate broker/realtor, whose assistance is not mandatory. The broker's fee and payment thereof, which is negotiable between the parties and broker, and may be up to 6% of the purchase price.
- ✓ The purchaser, whether an individual or company, must have a Brazilian Tax Registration Number issued by the Federal Revenue authority. The registration procedure is straightforward and can be carried out by a third party (attorney-in-fact).
- ✓ Execution of a private sale and purchase agreement. This is not a mandatory step, but is recommended given that such an instrument entitles the parties concerned to not only establish all the conditions to be met to conclude the real property acquisition, but also to outline all the obligations with respect to the formalities to be complied with prior to the acquisition, among which, notably, due diligence.
- ✓ Property legal due diligence. It is highly recommended that a legal due diligence on the property is conducted by a lawyer appointed by the purchaser, which would



include a detailed audit of the rights of the seller and his/her predecessors, as well as a research on any encumbrances that may be registered over the property (mortgages, claims, etc.). The property due diligence is a very important step, given that Brazilian Notaries are not obliged to (and hence will not) perform such due diligence, moreover, given that it is possible to waive in the deed of purchase the right to certain information and to obtain the basic clearance certificates. It is important to note that recent changes in Brazilian Law could facilitate the legal due diligence measures given that, among other provisions, the law now states that any claims, encumbrances or liens (with some exceptions) will affect the sale of a real property only if such encumbrances or liens were duly registered and therefore appear in the property ownership record file, with the relevant Real Estate Registry Office (the ownership record file is a mandatory certificate for the execution of the real property sale deed).

- ✓ Technical (e.g. engineering, geological or archeological) and environmental due diligence would also be recommended, depending on the status of the property, its historical data or the prior (or future) use of the property.
- ✓ Execution of the purchase deed before a Notary Public. In Brazil, the acquisition of any real property occurs solely by virtue of a notarial deed (save for certain exemptions, as in the event of the permission obtained for the acquisition of a property for a price lower than the official minimum wage, or in case of participation of a financial institution by means of a private instrument). The Notary Public is usually chosen by the

purchaser, who also pays the notary fees. Both the seller and the purchaser may (ii) appear in person before the notary to execute the deed; (ii) appoint attorneys-in-fact to do so in their name and on their behalf by virtue of a notarized Power of Attorney; or (iii) choose for the digital signing, which will be done by a videoconference held by the Notary Public. The deed must be drawn in the Portuguese language only. The Notary Public will read the deed aloud to the parties. Therefore, a non-Portuguese-speaking party (if attending the execution of the deed in person) will need to appoint and have a translator present. Regarding the digital signing, it is important to mention that electronic signatures in Brazil are regulated through Provisional Measure No. 2200-2 / 2001 (“MP 2200-2”), which created the Brazilian Public Key Infrastructure (“ICP-Brasil”), the national system of digital certification. Therefore, to properly execute a digital deed, the parties must have an ICP-Brasil digital certificate. The issuance of an ICP-Brasil digital certificate requires: (i) a taxpayer registration in Brazil (“CPF”); (ii) a face-to-face meeting before a Certification Authority to collect biometric (fingerprint and face).

- ✓ Payment of the property ownership transfer tax. In general, the property ownership transfer tax (a Municipal tax) must be paid upon the execution of the deed, but the rules on the payment of this tax and its rates vary in accordance with the applicable rules imposed by the municipal authority where the property is located.



- ✓ Registration of the deed of sale with the relevant Real Estate Registry Office (in contrast with the choice of Notary Officer, who may be chosen by one of the parties, the Real Estate Registry Office's jurisdiction is defined by State Law and, therefore, cannot be selected by either party). Under Brazilian law, a purchaser of real property only becomes the property's rightful owner after the notarial purchase deed is duly registered with the competent Real Estate Registry Office, as indicated in the real property ownership certificate.

6. FEES AND EXPENSES RELATED TO THE ACQUISITION OF REAL PROPERTY

Notarial and Real Estate Registry Office fees vary from State to State and are regulated by State law. In each State, the same fees will be charged by every Real Estate Registry Office and Notary Public practicing in that State.

Lawyer's fees can be negotiated and are established by the Brazilian Bar Association in its main fee guidelines. Under the law, a lawyer does not need to be present at the execution of the deed of sale; however, to ensure the validity of negotiations and compliance with the relevant legal formalities, it is advisable to have a lawyer present. Furthermore, the presence of a lawyer also serves to ensure the accuracy of the deed's content in relation to the description of the property, the description of the succession of rights of the seller and his/her predecessors, in addition to other legal requirements.

Depending on circumstances, other costs might be applicable, such as the *laudemium*, applied to marine land (properties located on islands or properties that fall under an occupancy regime or a permit issued by the Federal Government).

7. FINANCING

The most common way to finance the purchase of a real estate property is through a bank loan. To grant a loan, Brazilian banks examine the purchaser's credit history and financial situation in addition to having the current commercial value of the property appraised by a civil engineer.

Upon payment of the purchase price - loaned amount - directly to the seller, the bank secures its interest over the property by registering a guarantee with the Relevant Real Estate Office to guarantee the loan (commonly a mortgage or a fiduciary lien).

8. SPECIFICITIES WITH RESPECT TO RURAL LAND - PROPERTY BOUNDARIES DESCRIPTION AND ITS ENVIRONMENTAL DATA

Brazilian Law prescribes particular provisions in relation to rural land, and anyone with the intention of acquiring rural land must be aware of (i) specific rules/regulations with respect to the description of the boundaries of rural land that detail satellite geo-referenced coordinates in accordance with the proper topographical rules established by the National Institute of Colonization and Agrarian Reform ("INCRA"), and (ii) specific rules/regulations with respect to demarcated preservation areas on such properties and cadastre thereof with the State and the federal environmental agencies.

It is important to note that the description of rural properties by way of satellite geo-referenced coordinates must be certified by INCRA and may lead to other legal measures/requirements with respect to the property regularization, given that the description must be recorded in the property ownership record file. In addition to certification by INCRA as a requirement for the valid execution of a deed of sale of rural land,



registration with the relevant Real Estate Registry Office is also required if the property in question comprises an area of more than 100 hectares in extent.

It is also important to note that the registration of rural property data with the State and the Federal environmental agencies is a further requirement for the execution of deed of sale for the acquisition of rural land, coupled with its registration with the relevant Real Estate Registry Office.

In addition, the rural property must be registered with the Federal Revenue, since the property must have an identification number (“NIRF”).

9. RESTRICTIONS ON REAL PROPERTY ACQUISITION BY FOREIGNERS

Brazilian law does not impose restrictions on urban real property ownership by foreign entities or persons.

However, foreign entities or persons are currently not permitted to own rural real properties without governmental authorization.

It is worth noting that over the course of the last two decades fierce debate has been ongoing in on the issue of property ownership by foreign entities. Up until the end of 2016, in São Paulo State the mere fact that an entity was duly registered with the São Paulo Board of Commerce, with no consideration given to the nationality of its shareholders, was sufficient for such an entity to be treated as a Brazilian entity, hence making it possible for the entity to own rural property in São Paulo State.

However, the Supreme Court suspended this practice. Presently, the position is that a foreign entity is the one under direct or indirect foreign control.

With the edition of the INCRA’s Normative Ruling nº 88/2017, the exigence of INCRA’s pre-

approval on rural real properties acquisition by foreigners was pacified, however, changes on this issue are still expected, considering there is no clear period for implementation. of a final ruling by the Supreme Court, or from the several bills put forward for consideration by the National Congress.

10. IMPORTANT PROVISIONS TO BE CONSIDERED AT TIME OF PURCHASE/ACQUISITION OF A REAL PROPERTY

Right of first refusal: A provision stipulating that in the event of a sale, sale commitment, assignment, or commitment to the assignment of rights in connection with a leased real property, the tenant has the right of first refusal to acquire the leased real property, and that the landlord must bring the transaction to tenant’s knowledge. Further, in case of joint ownership, members of the condominium also have the right of first refusal.

Validity Clause: A type of clause, which if included in a lease agreement and registered at the Real Estate Registry Record, grants the right to a tenant to see out the lease for the entire term should ownership be transferred to a third party.

Restraint of mortgage/Non-encumbrance clause: This type of clause prohibits the encumbering of a property with a mortgage; only applied on specific circumstances.

Non-communio bonorum clause: This type of provision prevents the property from becoming part of a joint estate due to marriage or union, regardless of the regime governing the union or marriage.

Inalienability clause: This clause restricts the owner’s faculty/ability/capacity to dispose of the property.



11. NOTES/OBSERVATIONS ON TAXATION

Real property transfer tax varies between municipalities and, therefore, depends on where the property is located. It is important to note that in case of donation of real property, Municipal transfer tax shall not be levied, but State Donation and *causa mortis* shall be the payable tax instead.

Urban Real Estate Property Tax (“IPTU”). All urban real estate property in Brazil owned by individuals or legal entities as at January 1st of each year, is subject to Urban Real Estate Property Tax payable to the municipality within whose jurisdiction the property is located. IPTU is the main annual tax imposed on urban real estate properties, and the surface area of the real estate property, its location, the value of its constructions etc. are used to calculate such tax.

Rural Real Estate Property Tax (“ITR”). All rural real estate property in Brazil owned by individuals or legal entities as at January 1st of each year, is subject to Rural Real Estate Property Tax, payable to the Federal Government. Calculation of ITR is based on information provided by the property owner to the Federal Revenue (information includes the surface area, the purpose of its use, extent of preserved native forest, agricultural production, among several other considerations).

Tax on income from property rental, or the sale of property (capital gain tax), pursuant to federal tax provisions, apply on real property leases or sales. Given the frequent amendments to tax legislation, it is highly advisable that all property related taxes are revisited and re-calculated as necessary.

12. NOTES ON THE REAL ESTATE REALTOR ACTIVITIES

Under Brazilian law, a Real Estate Realtor must be registered with the relevant agency (“CRECI”). A broker’s participation in a

transaction is not mandatory but if a broker has been hired, even if the broker is not responsible for the effective conclusion of the transaction, regardless whether the transaction is duly concluded, the realtor’s fees would be still be due. The parties may (and should) agree to incorporate a provision in the deed of sale stipulating effective conclusion of the transaction as a prerequisite to the payment of realtor’s commission.

Realtor’s commission may vary in accordance with the arrangement between the party and the broker, with an upper limit of 6% per cent of the purchase price, established by law in general/standard/conventional cases.