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INTERNATIONAL LAWYERS NETWORK



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



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRAZILIAN LAW

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 seventh 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

Although the right of individuals and private entities to own a real estate property in Brazil is guaranteed by the Brazilian Federal Constitution, ownership rights are not absolute since it is subject to restrictions on land use and to the principle of 'social function of property' (in Portuguese, *Função Social da Propriedade*).

The concept of 'social function of property' in Brazilian law refers to the principle that property rights must be exercised in a way that serves the broader interests of society and support economic and environmental sustainability.

In practical terms, this means that private property must fulfill certain social obligations, such as ensuring productive use, avoiding speculation, and respecting labor and environmental standards. Property owners are required to manage their property in a manner that benefits not only themselves but also the community at large, contributing to social cohesion and equitable development. The



property not used in accordance with its social purpose is subject to expropriation procedure by relevant authorities.

In Brazil, the ownership of a real estate property is formalized by the land title, which must be duly registered with the Real Estate Registry Office responsible for its specific territorial jurisdiction. Consequently, if the transfer of title is not registered as required, the acquirer cannot be declared its legal owner and is considered merely a possessor.

Properties can be primarily classified depending on their location or intended use. There are two main types of property:

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

The classification of a property as urban depends on its inclusion within the urban perimeter established by municipal planning regulations. A property located outside the urban perimeter, or one that, despite being within the urban perimeter, is used for rural activities, will be classified as rural.

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.

The importance of identifying a property as rural or urban lies in the fact that each classification is subject to distinct legal frameworks, particularly concerning aspects such as land use, land tenure, environmental regulations, registration, taxation, and restrictions on acquisition or leasing by foreigners.

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, ruled by Law no. 6,766/79.;
- 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, which stipulated the division of a parcel of a property into several individual and private units. The division establishes a register for each unit. Additionally, for the development and sale of hotel units including hotel and lease management, it is also necessary to comply with the Securities Commission's Normative Ruling nº 602/18;
- a.4) Plots under the condominium regime - regulated by 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) Subdivision - rural subdivision refers to the division of a larger rural property into smaller parcels, typically for agricultural, forestry, or similar uses. This process is governed by specific legal and regulatory framework that ensures such divisions adhere to environmental, land use, and zoning laws applicable to rural areas. Rural subdivisions must also adhere to specific guidelines that aim to protect natural resources and maintain the sustainable use of the land. This type of subdivision is distinct from urban subdivisions primarily in its purpose and the regulatory standards it must meet, focusing on rural and agricultural productivity and sustainability.;

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;

a.4) Environmental and zoning requirements pursuant to local regulations (Federal and State regulations) might be also applicable);

a.5) Due Diligence – Legal and Technical due diligence involves the examination and evaluation of all legal documents and technical aspects related to a property. This audit aims to ensure that the property complies with all relevant laws and regulations, and that there are no legal encumbrances or issues that could affect the project development. It includes reviewing the title, zoning compliance, permits, and any legal disputes or liens associated with the property. Additionally, the technical audit assesses the physical condition of the property, checking for structural integrity, compliance with building codes, and any potential environmental hazards. This process helps potential buyers make informed decisions and mitigate risks associated with property acquisition.

b) Project approval. Any real estate project must be approved by the relevant Municipality prior to the commencement of the project.

c) Project development and Financing. Registration of the Project Development at the Real Estate Registry Office and obtaining financing through the financial system or capital markets. This process requires an in-depth analysis of the financing mechanisms available and the security measures that can be put in place to assure lenders. It's essential to assess



the viability of different financing options, including loans, bonds, or equity offerings, and understand the legal and regulatory requirements for each. The study also involves evaluating the types of collateral that can secure the financing, such as mortgages, pledges, or other assets, to ensure the interests of all parties are safeguarded and the project can proceed smoothly.

d) Project Launch. The beginning of the units' sale. It is permitted to start selling the units of a real estate project only upon securing obtaining the necessary permits as previously mentioned and following the registration of the project development with the relevant Real Estate Register Office.

e) Construction.

4. TYPES OF *IN REM* RIGHTS IN BRAZIL

- a) ownership;
- b) surface rights;
- c) use;
- d) easement;
- 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);
- j) special concession of use for housing purposes (granted by the Government);

- k) concession of use (also granted by the Government);
- l) mortgage;
- m) fiduciary lien;
- n) antichresis;
- o) 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 research on any encumbrances that may be registered over the property (mortgages, claims, etc.). The Brazilian Notaries do not have the authority to conduct a legal due diligence, and the certificates and documents required for signing the deed of sale are not the same as the documentation necessary for the audit. Despite this, it is important to note that under the Law any claims, encumbrances or liens (with some exceptions) will impact the sale of a real property only if they have been duly registered in the property ownership records at the relevant Real Estate Registry Office. The ownership record, essential for executing the real property sale deed, must include these details. However, given that the law exempts some situations and is relatively recent, conducting a legal due diligence remains highly recommended.

- ✓ Technical (e.g. engineering, geological or archeological) and environmental due diligence. It 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 estate property occurs solely by virtue of a notarial deed (save for certain exemptions). The Notary Public is usually chosen by the purchaser, who also pays the notary fees. Both the seller and the purchaser may (i) appear in person before the notary to execute the deed or appoint attorneys-in-fact to do so in their name

and on their behalf by virtue of a notarized Power of Attorney; or (ii) 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.

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).

At present, it is also possible to secure financing through credit instruments linked to the capital markets, particularly when the acquired property is designated for real estate development purposes. This financial approach leverages market-driven tools to support and enhance investment in property projects, aligning with specific legal and financial frameworks conducive to real estate expansion.

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 cadaster 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. This certification is a prerequisite for accurately documenting the property's details in the ownership record file, which is integral to the property regularization process. In addition, for the valid execution of a deed of sale involving



rural land, not only is INCRA's certification necessary, but registration with the relevant Real Estate Registry Office is also mandatory for properties exceeding 25 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 of rural land, coupled with its registration with the relevant Real Estate Registry Office.

In addition to the Rural Property Registration Certificate (CCIR) before INCRA, the rural property must also be registered with the Federal Revenue, since the property must have an identification number ("CIB") before the Rural Real Estate Registry (Cadastro de Imóveis Rurais – CAFIR) controlled by the Federal Revenue.

Nowadays the National Rural Real Estate Registry (Cadastro Nacional de Imóveis Rurais - CNIR) comprises integrated data from the INCRA's National Rural Real Estate Registry (SNCR) and the Federal Revenue Service's Rural Real Estate Registry (CAFIR).

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, the acquisition and leasing of rural properties by foreign individuals and entities are subject to specific restrictions aimed at controlling foreign ownership of agricultural land. These regulations, codified in Law No. 5,709/1971, stipulate that foreign entities and individuals must obtain approval from INCRA or the Congress (depending on the size of the property) before purchasing or leasing rural land. The law sets limits based on the size of the property and its geographical location, often

requiring that such acquisitions align with national security and development goals. Furthermore, amendments and interpretations of the law over time have introduced additional complexities, such as distinctions between foreign individuals residing in Brazil and foreign corporations established under Brazilian law, further tightening control over how and where foreigners can invest in Brazil's rural real estate

It is important to mention that there are two ongoing lawsuits in the Brazilian Supreme Court debating the application of the law and its restrictions. The outcome of this judgment, which is currently suspended, could potentially alter the scenario and how the law is applied.

10. 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 that the aforementioned regulation does not establish deadlines for the public authorities to review approval requests, which creates a significant level of uncertainty in transactions involving rural properties. **IMPORTANT PROVISIONS TO BE CONSIDERED AT TIME OF PURCHASE/ACQUISITION OR LEASE 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 a real property, Municipal transfer tax shall not be levied, but State Donation and *Causa Mortis* Tax 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 of whether the transaction is duly concluded, the realtor's fees would 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.

A 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.