Commercial real estate in Brazil: overview

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A Q&A guide to corporate real estate law in Brazil.

The Q&A gives a high level overview of the corporate real estate market; real estate investment structures, including REITs; title; tenure; sale of real estate; seller's liability; due diligence; warranties; real estate tax and mitigation, including VAT and stamp duty/transfer tax; climate change targets; restrictions on foreign ownership; real estate finance; leases; planning law; and proposals for reform.

To compare answers across multiple jurisdictions, visit the *Corporate Real Estate Country Q&A tool*.

This Q&A is part of the global guide to corporate real estate law. For a full list of jurisdictional Q&As visit *global.practicallaw.com/realestate-guide*.

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?

The corporate real estate market over the last 12 months was affected by political uncertainties in Brazil. However, since November 2018, the real estate market began to recover due to public expectation of positive consequences from the presidential election. This has resulted in increased confidence in the economy. For this reason, the sale of real properties grew and surpassed the results of the previous four years. A sizeable part of this growth was driven by the sale of real estate for low-income families included in the government programme "Minha Casa, Minha Vida".

New trends of property sharing, such as co-housing, co-working and co-living have emerged. At the end of 2018, the following laws were published, which are currently in force:

- Federal Law No. 13,777 regulating timeshares. This law amends and introduces new provisions in the Civil Code and the Public Registers Law, creating the legal regime of timeshare and its registration. The system of timeshare allows the same property to be held in a shared manner by several multi-owners, with a fractional division of time for use between them. It also provides for an individual record for each unit of time corresponding to each multi-owner in the Real Estate Registry Office.
- Federal Law No. 13,786 governing termination due to default of the buyer or even the seller of real estate under

construction, bringing about important legal certainty. This Law established the consequences of a default. It also established a grace period of 180 days in favour of the seller to deliver the real estate to the acquirer. In addition, it enforces the inclusion of a summary table setting out the main obligations in contracts regarding the real estate under construction.

Significant deals were made in industrial condominiums, mainly for logistic purposes. In 2018, for instance, Brookfield Properties entered the logistics parks segment in Brazil, with the acquisition of a portfolio of approximately 190,000 sqm of BOMA area in São Paulo, worth BRL425 million. In general, this kind of operation was carried out within the scope of real estate investment trusts (REITs) equity composition (*see Question 2*). Other complex real estate development negotiations were aimed at "stressed assets", which are assets owned by companies undergoing judicial reorganisation, banks that provide debt guarantees, and companies linked to political corruption.

Real estate investment

2. What structures do investors typically use for real estate investment in your jurisdiction and what are the main advantages and disadvantages of each (for example, flexibility and tax transparency)?

Common structures

Investors typically use special purpose vehicles incorporated as Brazilian companies for real estate investment. These vehicles are created to regulate rights and obligations between their partners and segregate the assets of other companies in the same group of companies. They also enable accounting and tax flexibility for investors. In addition, the investor partners may enter into an investment agreement or shareholders agreement to regulate specific matters.

Real estate investment funds

- Real estate investment trusts are funds that invest in real estate projects, which include acquisition of property rights or acquisition and sale of bonds related to the real estate market (*fundos de investimento imobiliário*) (REITs). They can be organised as open-end, closed-end, and/or as exclusive REITs. In addition, REITs may be publicly traded and raise capital through an initial public offering, always in compliance with the applicable laws. They are regulated by:
- Federal Law No. 8,668/1993, which regulates the set up and tax regime of Real Estate Investment Funds. This law also assigns the supervision over set up, management and operation of such funds to the Brazilian Securities Commission (CVM).
- Normative rulings issued by the CVM, such as the CVM Normative Ruling No. 472/2008, which regulates the setup, management and operation of Real Estate Investment Funds. This normative ruling stipulates documents to be provided for the approval of, among other things:
  - the set up;
  - trading of fund accounts in regulated markets;
  - quota subscription and distribution;
  - regulation of funds;

  - general meetings;
  - management;
  - equity capital, that is formed by real properties or rights related to real properties;
  - disclosure of information;
  - charges, for instance management fees and performance fees, if applicable, taxes and legal expenses, among others;
  - legal transformation;
  - mergers;
  - consolidation;
  - spin-off;
  - liquidation; and
  - funds for qualified investors.
- Resolutions of the National Monetary Council (CMN).
- Other tax laws.

The use of REITs has increased, especially to invest in commercial assets, shopping malls and other funds.

The main advantage of REITs is the opportunity they offer to investors, allowing anyone to have access to income from various real estate businesses without having to invest directly in them. Moreover, the use of REITs, generally, lower the risk of investment, as the highly specialised manager will allocate the capital to a set of real estate properties, therefore diversifying the investments. In addition, investors benefit from professional management of their resources and dilute costs among all quota holders. On the other hand, the fees charged, and some restrictions imposed by the funds, such as minimum terms for investment or minimum amounts to be invested, may reduce profitability or create entry barriers to attract new investors.

Dividends received by investors in REITs are exempt from taxation as long as all of the following conditions are met:

- The trust's shares are traded exclusively in a stock market.
- The trust's shares are held by at least 50 investors.
- The investor holds a maximum amount of 10% of the trust's shares or of the trust's earnings.

The exemption applies to dividends received by an individual. If the investor is a legal entity, the dividends will be subject to a 20% income tax rate.

An exemption for the taxation of the trust itself, is available, if the following conditions are met:

- At least 95% of the trust's earnings must be distributed to shareholders in each semester on a cash-basis accounting method.
- The trust must not invest in ventures whose constructor, developer or investor is also a shareholder of the trust, holding more than 25% of the trust's shares. Otherwise, the trust will be taxed as a legal entity – (the basis of calculation of the tax and the rates will vary depending on the taxation regime chosen by the company).

Institutional investors

Institutional investors often use joint ventures or REIT structures together with private investors and real estate companies. Some examples of institutional investors are: pension funds, financial institutions and life insurance companies. Institutional investors can use the following methods to purchase real estate:

- Purchase equity stakes in special purpose vehicles, such as REITs.
- Acquire corporate debt instruments (debentures). The earnings received from corporate debt instruments are exempt from tax on financial transactions, but are subject to income tax at regressive rates ranging between 22.5% and 15%, depending on the term of the investment. The highest rate will apply to investments with terms shorter than 180 days and the lowest rate will apply to investments longer than 720 days.
- Acquire real estate receivables certificates (CRIs). The investment in real estate receivables certificates is exempt from income tax and from tax on financial transactions.

Private investors

Private investors include high net-worth individuals and funds controlled by investors, real estate developers, foreign investors (including sovereign wealth funds), and private equity funds. Private investors can join special partnerships or unincorporated joint ventures (*Sociedade em conta de participação*) that own or acquire real estate.

Usually, the private investors will participate in the partnership or joint venture as a "silent partner" (*sócio oculto*). This means that while they are entitled to profits, they will not be subject to the liabilities of the partnership or joint venture and therefore are subject to a "special liability regime". This partnership is achieved through the execution of a contract between the parties (unlike other types of business vehicles that need to conclude numerous documents and file them in several agencies). At least one of the parties must be a legal entity, known as the ostensible partner, which must always be a legal person who will be primarily responsible for the business, financial transactions and statements of the partnership. A disadvantage of this vehicle is related to the nature of the existence of the partnership, since it is not a legal entity in and of itself. Therefore, the partnership has no legal personality, nor can it have its own assets or appear before third parties. Moreover, the silent partner can only oversee the management of the business, without being involved in the company's operations, under penalty of being jointly liable.

Other forms of investment in real estate in Brazil are:

- Asset purchases or share purchases of companies holding real estate (see further details in *Question 11* below).
- Auctions. It is common to find good value and low cost on real estate properties via auction. A disadvantage is that it is common for a bidder to wait a long time to obtain effective possession of the real estate acquired in auction.
- Real estate funds (as detailed in this question above).

> 3. What are the main sources of finance and types of investors for real estate investment in your jurisdiction? Does your government encourage overseas investment into real estate in your jurisdiction, for example through real estate investment legislation?

Company financing

Bank loans are the main source of finance for real estate investment in Brazil. Banks usually demand a guarantee of payment, by way of a mortgage or fiduciary lien (*alienação fiduciária*) on real estate property. For the acquisition of real estate property, companies can also enter into long-term financing agreements for which banks assume the risk.

In addition, companies can issue debt in the form of promissory notes with a shorter timeframe than bank loans, or debentures that have longer-term securities.

Some real estate projects have access to project finance, where financing is guaranteed by the future cash generation of the project and the assets involved in the transaction. The advantage of this type of financing is that it does not affect the balance sheet of the company. However, a disadvantage is that is a complex and time-consuming financial structure that requires risk studies and several contracts between the participants in the project.

Institutional and private investors

Institutional and private investors are a main source of finance in real estate (see further details in *Question 2* above).

Foreign investment

Foreign investment in Brazilian real estate is generally welcomed and encouraged by the government, which may grant tax incentives to investors. Depending on the impact of the real estate project, municipal and state authorities may create a special proceeding or at least a concerted effort for project approval and the obtaining of respective licenses, quicker than for regular projects, if the project is a matter of public interest.

In addition, the National Immigration Council (CNIg), the agency chaired by the Ministry of Labour, published Resolution No. 36, on November 22, 2018, which regulates residence permits for foreigners who invest in real estate in Brazil. To obtain a residence permit, the foreigner must acquire urban property in Brazil, be it built or under construction, in the amount of at least BRL1 million (in case of real estate properties located in the North or Northeast of Brazil, at least BRL700,000). To reach the minimum investment value, a foreigner may purchase more than one property. For higher value real estate, financing of an amount that exceeds the minimum investment is also permitted.

Please see *Question 4* below regarding restrictions on foreign ownership and lease of real estate in Brazil.

Restrictions on foreign ownership or occupation

> 4. Are there restrictions on foreign ownership or occupation of real estate (including foreign ownership of shares in companies holding real estate)? Are there restrictions on foreign guarantees or security for ownership or occupation and on lending for the purchase of real estate?

There are some restrictions on ownership and occupation of real estate by foreign individuals and companies in order to protect national security or agricultural and natural resources.

Foreign individuals without permanent residence in Brazil and foreign legal entities (incorporated outside Brazil) may not buy or lease rural property. According to Brazilian rules, real estate property is divided into urban and rural property and the main criteria for the definition of rural property is its location and its use. The most common activities characterising rural property are agriculture and livestock.

On the other hand, foreign individuals with permanent residence in Brazil and foreign companies that are authorised to operate in Brazil can acquire rural property, subject to certain limitations (*see below*). On August 24, 2010, the then President of Brazil sanctioned an opinion from the Attorney-General of the Federal Government (AGU Legal Opinion), which determined that Brazilian legal entities under foreign control are subject to limitations on acquiring or leasing rural property, in accordance with previously established law (*Article 1, Federal Law 5,709/1971*).

Among the restrictions imposed by Brazilian rules are:

- Foreign legal entities authorised to operate in Brazil and local subsidiaries controlled by foreigners, regardless of the size of the rural property, must obtain prior approval for rural property acquisition or leasing from the Ministry of Agriculture and the applicable federal government bodies (for example: the Institute for Rural Settlement Agrarian Reform for agricultural projects (INCRA)). These entities must also use the rural property in accordance with its corporate purposes, to implement agricultural, livestock, industrial or agricultural colonisation projects, the latter referring to government projects that provide rural property and encourage their development. Other federal government bodies may also be called upon to review the application depending on:
    - the type of project (for instance, industrial projects); and
    - whether the land is located in certain regions of Brazil subject to monitored development.
- Foreign individuals with permanent residence in Brazil can acquire rural property without prior consent of the federal authorities, if the land does not exceed three modules of indefinite exploration (MEI). If the size of the land is between three and 50 MEI, a foreign individual with permanent residence must get federal authorisation for the acquisition or lease of the property. However, foreign individuals with permanent residence in Brazil cannot acquire rural properties exceeding 50 MEI (*Article 3, Federal Law 5,709/1971*). MEI is a unit of measurement in hectares, determined by INCRA that currently varies from 5 to 100 hectares, depending on the location of the property**.**
- Congress must authorise the acquisition or lease of rural real estate with an area of over 100 MEI.

The total area acquired or leased by foreigners subject to the above restrictions must not exceed one quarter of the total area of a given municipality. In addition, persons of the same nationality cannot hold a title of more than 10% of the total rural area of the relevant municipality.

It is debatable whether the constitution of *in rem* guarantee over rural property is subject to the same aforementioned restrictions, especially when the guarantee is a fiduciary lien (*alienação fiduciária*). This is because the conditional ownership is transferred to the creditor until the debt is paid. Furthermore, in the event of the guarantee's foreclosure, the creditor must sell the real estate property to a third party, except if it has fulfilled the requirements above.

It is debatable whether the constitution of *in rem* guarantee over rural property is subject to the same aforementioned restrictions, especially when the guarantee is a fiduciary lien (*alienação fiduciária*). This is because the conditional ownership is transferred to the creditor until the debt is paid. Furthermore, in the event of the guarantee's foreclosure, the creditor must sell the real estate property to a third party, except if it has fulfilled the requirements above. Nevertheless, according to Law No. 13,097, dated January 19, 2015, financial institutions are not required to obtain authorisations in the event of the constitution of any *in rem* guarantees, such as mortgages and fiduciary liens (*alienações fiduciárias*).

This area may be revised under Bill No. 2,963/2019 (*see Question 43, Acquisition of rural property by foreigners*).

Title to real estate

5. 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?

Real estate is comprised of the soil and all that is added to it, both by natural or artificial means. Each and all real estate, rural or urban, has its own title. Each real estate record (*matrícula*), which can be issued in the form of a certificate by the Real Estate Registry Office, represents only one real estate property (*Federal Law No. 6,015/1973*). Each real estate record (*matrícula*) includes the land and the buildings or constructions existing on it. If a new construction is added to the existing property, it must be registered on the same real estate record (*matrícula*).

6. How is title to real estate evidenced? What is the name of the public register of title and the authorities responsible for managing it? Is electronic access and electronic conveyancing available?

The title that shows evidence of the ownership of a real estate property is the real estate record (*matrícula*). The public registry responsible for issuing the certificate of the real estate record (*matrícula*) is the Real Estate Registry Office, which is managed by the responsible authorities. Please see *www.anoreg.org.br* for further information about each responsible authority.

Electronic conveyancing for real estate properties in Brazil is not available. Some Brazilian states, however, provide electronic access to consult and request real estate record certificates (*certidões de matrícula*) and other documents related to the property.

7. What are the main information and documents registered in the public register of title? Can confidential information or documents be protected from disclosure in the public register of title?

The main documents registered with the Real Estate Registry Office are those related to:

- Acquisition and sale of real estate properties.
- Leases.
- Restrictions on the property.
- Liens.
- Mortgages, or any kind of encumbrance or relevant information regarding the properties or their owners.

In addition, the real estate record certificate (*certidão de matrícula*) issued contains a specific description of the real estate property, including area measurements, type of property (that is, urban or rural), and specific location, among others.

Access to the Real Estate Registry Office is public and, therefore, it is not possible to treat such information as confidential information.

8. Is there a state guarantee of title? Is the authority that manages the public register liable to pay compensation for any errors it makes in relation to title registration? Is title insurance available and is it commonly used?

There is no state guarantee of title from the Real Estate Registry Office.

If the Real Estate Registry Office makes any errors in relation to a title registration which causes damage to third parties, the Real Estate officer is held responsible for compensation. Minor errors are usually fixed at no cost by the Real Estate Registry Office.

There is no title insurance available in the Brazilian real estate market.

9. How can real estate be held (that is, what types of tenure and other main ownership rights exist over land)?

The main right over real estate property is full ownership.

The property can also be granted by means of a lease and other agreements entered into by the parties (for instance, a real estate free lease, which means to contract the use of a property without charging rent, which is similar in general terms to a lease).

In rem rights over a property are also available, such as: surface rights (*direito de superfície*) and rights of use (*usufruto*) (*Article 1225, Brazilian Civil Code*).

A property can be owned by one or more persons (common property) and it is also possible to divide buildings into fractions or independent units, which is known as “condominiums” (*condomínio edilício*).

There are other types of tenure which are not as common, such as:

- Fideicommissary substitution, in which the ownership of the real estate property passes to one heir or beneficiary, who then holds it in trust until their death, when the real estate property passes to the second heir or beneficiary.
- Emphyteusis which establishes the right of useful domain (*domínio útil*) over the real estate property, perpetually. It was abolished by the current Brazilian Civil Code of 2002. However, the previously constituted *emphyteusis* still remain valid.
- *Aforamento* or occupation right (*direito de ocupação*) over real estate properties held by the Federal Government, such

as those located in a coastal area.

Sale of real estate

Preliminary agreements

10. What types of preliminary agreements are typically used in the sale of real estate? Are they legally binding?

The typical preliminary agreement for the sale of real estate property is the purchase and sale commitment (*promessa de compra e venda*), which is legally binding. The purchase and sale commitment must be registered before the Real Estate Registry Office, so that it can be enforceable against third parties. This preliminary agreement is regulated by Articles 462 to 466 and Articles 1417 and 1418 of the Brazilian Civil Code.

Another type of preliminary agreement is the option of purchase (*opção de compra*). It is similar to the purchase and sale commitment and is legally binding. However, it cannot be registered with the Real Estate Registry Office. Therefore, in case of breach of contract by the seller, the buyer can only implement contractual penalties or seek damages.

Preliminary agreements are typically used in the early marketing stage and commercial negotiation, in order to establish the main conditions, including price, conditions and terms of payment and other obligations, as well as the execution of the public deed and transfer of the real estate property.

Sale contract

11. Briefly outline the typical main provisions of a corporate real estate sale contract and main real estate provisions of a typical share purchase agreement.

The main provisions of a corporate real estate sale contract are as follows:

- Parties.
- Scope.
- Price.
- Terms and conditions.
- Conditions precedent (especially related to legal and technical due diligence).

- Transfer of possession.
- Execution of the public deed of purchase and sale.
- Tax and environmental liabilities.
- Representations and warranties.
- Governing law.
- Dispute resolution.
- Jurisdiction.

The main provisions of a typical share purchase agreement are as follows:

- Parties.
- Recitals.
- Definitions.
- Scope.
- Price.
- Payment terms and conditions.
- Conditions precedent.
- Representations and warranties.
- Indemnities.
- Confidentiality.
- Governing law.
- Dispute resolution.
- Jurisdiction.
- Termination clauses.
- Tax and environmental liabilities.
- Miscellaneous, as notices, assignment, language and amendment, among others.

Due diligence

12. What real estate due diligence is typically carried out before an acquisition and what key areas does it cover? Which documents are typically reviewed? Which specialist advisers are

usually involved and which reports do they typically produce?

Real estate due diligence is typically carried out before a real estate acquisition and the key areas are: real estate, environment, tax, labour, and civil litigation. Depending on the complexity of the transaction, technical environmental due diligence is highly recommended, to check problems such as, soil contamination, which may give rise to liability for the party that is acquiring the real estate property.

The due diligence covers issues relating to the real estate property, the seller of the property and its predecessors in the last ten years.

The typical documents and issues reviewed are as follows:

- Real estate record certificates (*certidões de matrícula*), deeds and contracts relating to the property.
- Proof of payment of:
  - taxes relating to the property; and
  - water, electricity and gas consumption bills.
- Evidence of non-existence of condominium debts (where applicable).
- Certificates of pending administrative and judicial claims relating to the property, the owner and the former owners in the past 10 years.
- Debts and pending obligations of the owner and the property relating to tax, environment, labour and social security.
- All legal requirements concerning the property (such as registrations, authorisations and licences).

Usually, the following specialists are involved in the due diligence process:

- Lawyers.
- Accountants.
- Environmental experts.
- Architects.
- Engineers.

These experts usually produce due diligence reports regarding balance sheets and financial statements, environmental contamination reports, reports containing urban planning parameters permitted for the real estate, structural surveys and environmental inspection reports.

Sellers' warranties

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? What are the main limitations on warranties, for example are they typically qualified by disclosure?

The following warranties are typically given by a seller to a buyer in the sale of corporate real estate:

- Liability for property taxes up to the date of transfer of possession of the real estate to the buyer, even if subsequently collected.
- Seller's obligation to keep the real estate free of charge, with authorisation to the buyer to pay any outstanding debts and discount it from the purchase price (if paid in instalments).

Real estate warranties are neither subject to nor qualified by disclosure, since they are often included in the public deed of sale and purchase. Some purchase and sale commitments (*promessa de compra e venda*) include confidentiality undertakings, however both warranties and other obligations negotiated under these preliminary contracts may be subject to and qualified by disclosure.

It is not common to ring-fence any kind of warranties (including real estate warranties) in the context of a share sale, but the parties may limit the indemnification obligations to certain amounts, terms and conditions, depending on the negotiation.

Liability

14. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?

According to the Brazilian Civil Code, the seller is responsible for eviction (*evicção de direito*) in the event of the buyer's loss of the ownership of the property caused by previous purchase issues. The buyer has the right to claim damages against the seller if the property is lost to a third party after the completion of the deal. The Brazilian Civil Code allows the parties, by express provision, to strengthen, reduce or exclude liability for eviction. The seller is also liable for real estate debts related to the real estate property that originated before the completion of the deal.

15. Briefly outline the environmental legislation and potential liability for a buyer in a purchase of real estate. Is it common to carry out environmental surveys and searches and to obtain environmental insurance? How is environmental liability typically dealt with in the sale contract?

An owner or occupier of a real estate property may be jointly liable with the former owner for repairing environmental damage at the property (under civil liability), even if the owner or occupier has not caused the damage. This is due to the fact that, in Brazil, environmental civil liability exists irrespectively of intent and anyone who has contributed directly or indirectly to the damage, by an act or omission can be held liable. Additionally, case law states that the responsibility to repair environmental damage remains with the property ("propter rem" obligation). Therefore, it is possible to hold the current owner or occupier of the property responsible for damage caused by former owners (*see Question 16*).

When the property to be purchased has already been used for polluting activity (for example, industrial activity), it is common to carry out an environmental technical investigation to verify the existence of damage or the possibility of contamination in the area. Such assessments are important to support the decision regarding the acquisition of the property and to address liability and indemnification between the parties in the purchase and sale agreement.

Environmental insurance is still not very common in Brazil. The majority of environmental insurance is obtained in cases of highly polluting activities with a high risk of incidents that could cause significant environmental damage.

In purchase and sale agreements involving environmental damage, the parties usually establish that the buyer is liable for any damage that may be caused after the acquisition of the property and that the seller will remain liable for damage incurred up to the date of sale and transfer of the property. However, the matter may be dealt with in different ways, depending on negotiations between the parties (the buyer may, for example, assume liability for past damages, thereby reducing the sale value of the property).

16. Can an owner or occupier inherit liability for other matters relating to the real estate even if they occurred before it bought or occupied it? Can a seller or occupier retain any other liability relating to the real estate after it has disposed of it?

An owner can inherit liability for other matters relating to the real estate property, even if they occurred before the purchase due to *propter rem* obligations, which are transferred to the new owner with the transfer of the property. *Propter rem* obligations include condominium debts, property taxes and environmental issues (*see Question 15*, and even the occupier can inherit environmental liability).

Similarly, the seller can retain *propter rem* obligations after disposing of the real estate property. From an environmental perspective, even the occupier can retain liability.

Completion arrangements

17. What are the typical arrangements and main documents required for completion of the sale? When does title transfer and what are the formal legal requirements to execute the sale documents, transfer the real estate and register the change of title? Is notarisation required?

The signature of a purchase and sale public deed is the typical arrangement for the transfer of a real estate property. This agreement must be signed before the public notary in all transactions in which the property price is over 30 times the Brazilian minimum wage, which is determined by the Federal Government and is BRL998.00 in 2019. Property transfer is only completed on registration of the public deed or instrument of transfer with the relevant Real Estate Registry Office. Public Notary and Real Estate Registry Office fees vary depending on the state in which the public deed is signed and registered. Usually, all fees and taxes are paid by the buyer, but the parties may agree otherwise.

To execute the purchase and sale public deed, it is necessary to provide the following documents:

- Identity document and individual taxpayers' registration documents if the parties are natural persons, or the corporate documents if the parties are legal entities, including a power of attorney and other corporate authorisations (if applicable).
- Up-to-date real estate record certificates (*certidões de matrícula*) and clearance certificates (*certidão de ônus reais e ações*) regarding the property, issued by the relevant Real Estate Registry Office.
- A labour debt clearance certificate issued by the Labour Court.
- A clearance certificate of federal taxes (if the seller is a legal entity) issued by the Federal Revenue.
- A certificate of urban property tax issued by the Municipality.
- A certificate regarding payment of condominium fees issued by the condominium (if applicable).

Preliminary agreements are common between the contracting parties in order to settle the main arrangements (for instance, price, payment conditions, penalties, and so on) to be carried out prior to signing the purchase and sale public deed.

Real estate tax

18. Is stamp duty/transfer tax (or equivalent) payable on the purchase of real estate? Who pays, what are the rates and are there any exemptions? Does it apply to the transfer of shares in a company holding real estate and at what rate?

The purchase of real estate property is subject to the real estate transfer tax (*Imposto sobre a Transmissão de Bens Imóveis)* (ITBI).

As the ITBI is a municipal tax, the rate, the taxpayer and the basis for calculation of the tax vary depending on the municipality where the property is located. Usually, the rate ranges between 2 and 4 per cent of the purchase price of the property. The taxpayer is the acquirer of the property and the basis for calculation is the market value of the property as established by the municipality or the transfer value, whichever is higher.

The transfer of a property to a company as paying-up capital or a transfer that results from mergers are exempt from ITBI, except when the company's business purpose involves the purchase, sale or rental of real estate property.

There is no ITBI levied on the transfer of shares in a company owning real estate property.

19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios? What is the general approach of the tax authorities in your jurisdiction to such schemes?

There are no methods commonly used to mitigate real estate tax liability, except legal and tax due diligence, obtaining representations and warranties of good faith by the seller and clauses that indemnify the acquirer in the event of the seller's default. Taxation and tax liability will vary on a case by case basis.

See *Question 2* for the structures that investors typically use for real estate investment.

20. 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?

There is no VAT applied on the sale or purchase of real estate property in Brazil. However, legal entities are subject to social contributions (PIS and COFINS) on the sale of real estate property when the property being transferred is classified as a current asset of the legal entity. However, these corporate taxes are characterised as VAT.

21. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

The urban property tax (*Imposto sobre a Propriedade Predial e Territorial Urbana*) (IPTU) is a municipal tax levied on the ownership of real estate property. The IPTU is assessed annually and is calculated based on the value of the property at progressive rates, which is determined by the value, the location and the use of the property. Typically, rates range between 0.5 and 4 per cent and are higher for commercial properties.

As IPTU is a municipal tax, the exemptions will depend on the legislation of each municipality. Commonly, properties affected by flooding and real estate properties owned by retired owners are exempt from taxation.

Moreover, the Federal Constitution establishes a tax immunity of real estate properties owned by foundations, worker unions, non-profit education and social assistance institutions.

Climate change issues

22. Are there targets or incentives to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria?

National Policy on Climate Change (Law No.12,187/2009) establishes among its objectives, the reduction of greenhouse gas emissions derived from different sources. This law provides that the executive branch of the government must establish sectoral plans of mitigation and adaptation to climate change, aiming at achieving a low carbon economy in several sectors, including real estate construction. However, there is so far no specific sectoral plan in relation to the reduction of greenhouse gas or climate change for real estate construction, so far.

Several Brazilian municipalities have fiscal incentive policies aligned with environmental preservation, granting, for example:

- Tax rebates for buildings that encourage measures improving energy efficiency.
- Water saving and reuse.
- Reduction of greenhouse gas emissions.
- Construction of green areas.

The National Policy for the Conservation and Rational Use of Energy (Law No. 10,295/2001) provides that the government must develop tools to promote the energy efficiency of constructed buildings. Currently, there are technical regulations set out in the Buildings Energy Efficiency Program, which enable buildings to obtain a "National Energy Conservation Label".

This label records the level of energy efficiency of a building (from low efficiency to high efficiency) and is available upon request of the owner of the building. It is issued by a body accredited by the Brazilian National Institute of Metrology, Standardization and Industrial Quality (INMETRO). The label can be granted for residential, commercial and public buildings.

Despite the lack of specific environmental requirements imposed on the real estate construction sector, there is a growing interest of Brazilian construction companies to obtain sustainability certificates granted for projects that adopt sustainable practices, such as the Leadership Energy and Environmental Design (LEED), which requires compliance with criteria related to the use of water and energy efficiency, for example.

23. Are provisions relating to the energy efficiency of buildings commonly included in contracts for the sale of real estate or in leases (for example, green leases)?

Including provisions relating to the energy efficiency of buildings in contracts for the sale or the lease of real estate is not a customary practice in Brazil.

However, INMETRO regulates specifications to classify commercial, public and residential buildings in terms of energy efficiency, aiming to influence the design of more efficient buildings (*Ordinance INMETRO No. 50/2013*).

According to this ordinance, commercial and residential buildings must have a Brazilian Energy Conservation Label (ENCE), which must be displayed at a location visible to all the individuals who use and visit the building. In respect of residential buildings, the label must be delivered to the future owner of the stand-alone unit.

The Ministry of Planning, Budget, and Management of the federal government published Normative Ruling No. 2/2014, which extends the use of ENCE on public real estate projects and new federal public buildings.

Further, INMETRO, Eletrobras and PROCEL Edifica developed, in partnership, the PROCEL Edifications' Seal, a voluntary affiliation tool that aims to identify buildings that achieve the best energy efficiency in a specific category, motivating the consumer market to buy and use properties more efficiently.

Real estate finance

Secured lending involving real estate

24. Briefly outline the typical security package required by lenders in relation to real estate lending. How are the most common forms of security interest relating to real estate created and perfected (that is, made valid and enforceable)?

Generally, real estate loans are usually guaranteed by mortgage or fiduciary lien (*alienação fiduciária*) of the real estate property. Additionally, the lenders may require a personal guarantee, bank guarantee or performance bonds.

Mortgages are governed by special rules provided in Articles 1473 to 1501 and other general rules of the Brazilian Civil Code. A mortgage must be executed by public deed and its transfer, in case of default of the borrower, is processed before the Court.

Fiduciary liens (*alienações fiduciárias*) are regulated by Federal Law No. 9,514/1997. They can be executed by public deed or by private instrument, with notarised signatures. The signature process is faster than a public deed.

Both types of guarantee must be registered in the real estate record (*matrícula*) of the property with the Real Estate Registry Office, to be valid and enforceable against third parties.

There is no mortgage tax or fiduciary alienation (*alienação fiduciária*) tax, but notary fees are charged on the registration of both guarantees.

25. What other real estate related measures do lenders typically take to protect themselves against default by the borrower?

Lenders may request a special guarantee from the borrower, which is a collateral warranty, performed by signing a bond or comfort letter.

Another measure in real estate financing is a cross default clause. It may be granted when various loans are granted by the same lender to different companies of the same economic group. In the event that one of the companies defaults, all other loan agreements can be accelerated, allowing the lender to collect the full amount of the debt in all the contracts.

Commonly, parties also negotiate the acceleration of debt upon default of payment of one or more instalments of the debt, insolvency, transfer of borrower's rights to third parties and other events. In addition, a lender may request property insurance and establish other obligations of conservation of the real estate property, in order to reduce the risk of its depreciation.

Moreover, it is common for lenders to conduct full legal due diligence both on the real estate and on the borrowers (*see Question 12*).

26. Can lenders incur environmental liability? What measures do lenders typically take to manage potential environmental liability?

Although there is no express legal provision setting out the environmental liability of lenders, many scholars and public prosecutors consider that lenders can be liable for repairing or indemnifying damages caused by activities financed by them. This view is supported by the legal definition of "polluter", which encompasses those who are directly or indirectly responsible for any activity that causes environmental damage.

Additionally, the National Environmental Policy (Federal Law No. 6,938/1981) stipulates that financing and governmental incentives must be approved in reference to environmental licensing and compliance with the rules and standards issued by the National Environmental Council (CONAMA). Requests for accountability of lenders may be made pursuant to this law.

Considering these risks of liability, lenders have been increasing their measures to evaluate the social and environmental risks of projects that they finance.

A resolution issued by the Central Bank of Brazil (Resolution No. 4,327/2014), provides guidelines for the establishment and implementation of the Social and Environmental Responsibility Policy by financial institutions and other institutions authorised to operate by the Central Bank.

This Resolution stipulates that social and environmental risks must be identified by the financial institutions as a component of the various risk modalities to which they are exposed. The Resolution also sets the need to manage the social and environmental risks verified in the institution's activities and operations. This risk management may increase institutional control over the financed projects. Moreover, the obligation of having a social and environmental responsibility policy may increase lender's environmental liability.

27. Briefly outline the main remedies for lenders in relation to the secured real estate if the borrower defaults on the loan. What is the effect of the borrower's insolvency on the lender's remedies?

Remedies

The main remedy for lenders in relation to secured real estate where a borrower defaults on the loan, is the foreclosure of the debt secured by the real estate.

Mortgage payment collection must be processed before a court. After the payment deadline, on non-payment and subject to the terms of the mortgage contract, the mortgaged real estate is seized. This is followed by a mandatory judicial evaluation and judicial auction of the real estate property. It is a time-consuming process, subject to appeal and other judicial remedies by the borrower. Fiduciary lien collection, however, is faster, performed in the Real Estate Registry Office and allows for an extrajudicial auction.

Effect of insolvency

A distinction must be drawn between a judicial reorganisation and a bankruptcy winding-up. A lender's claim secured by a mortgage against a company under judicial reorganisation is subject to the terms of the judicial reorganisation, including the stay of any execution against the debtor for an initial period of at least 180 days (which may be extended by the court). The stay period usually remains in effect until the debtor's reorganisation plan is confirmed, which occurs after the creditors' deliberation on its terms. A creditor secured by a mortgage is part of a specific class of creditors: creditors with asset-backed securities. The approval of the reorganisation plan of this class depends on a majority on both the value of the creditors and the number of creditors.

If a lender's claim is secured by a fiduciary guarantee, on the other hand, the claim is free from the terms of the reorganization, except that essential goods may not be withdrawn from the debtor during the stay period, impacting on the creditor's ability to immediately seize its guarantee. Once a reorganisation procedure is in place, a judicial authorisation is required for the debtor to offer one of its assets as a security, either as a mortgage or as a fiduciary guarantee.

In case of bankruptcy of the borrower, claims which are secured by mortgages, along with other asset-backed securities, rank second in the hierarchy of creditors which are subject to the terms of the winding-up procedure, preceded only by labour claims (*Article 84, Federal Law No. 11,101/2005*). Claims which are secured by fiduciary guarantees, on the other hand, allow for filing of a restitution lawsuit against the estate, immediately claiming back the property which secures the credit.

28. Briefly outline key additional issues for lenders in relation to construction and development projects.

In real estate financing for construction and development projects, a lender usually sets a trigger for the release of the first credit instalment to the borrower, linked to a minimum percentage of sale of the units of the project, provided that a minimum percentage of the agreed scope of work has been reached.

New releases of credit instalments are only carried out if the corresponding stage of the construction has been completed. Therefore, construction progress must be measured by the lender or a third party contracted by him, which incurs additional time and costs for the lender.

Lenders should be aware of additional key considerations and responsibilities of real estate property owners, such as:

- Local urban and zoning evaluation.
- Environmental impact assessments.
- Expropriation project and law, which entitles municipal, state or federal authorities to compulsorily acquire the property of a private real estate, upon fair compensation. Therefore, prior to the signature of the loan agreement, it is advisable to request certificates issued by the abovementioned authorities or, alternatively, a real estate owner statement attesting the nonexistence of expropriation project and the law related to the financed real estate property.
- Licenses required for construction and restrictions regarding historic and cultural heritage of the property.
- Tax issues, especially federal taxes. It is advisable to request an updated debt clearance certificate issued by the federal revenue service from the real estate owner, constructor and borrower prior to each release of credit instalments to the borrower.
- Labour issues, regarding all employees hired for the building construction, including subcontractors, whose liability may lie with the lender in case of default by the borrower. It is advisable to request an updated debt clearance certificate of unemployment guarantee fund (FGTS) from the real estate owner, constructor and borrower, prior to the signature of the loan agreement.

Additional important regulations can be found in:

- Federal Law No. 4,380/1964, which creates the financial system for home ownership of social interest (SFH).
- Federal Law No. 9,514/1997, which creates the real estate financing system (SFI), aiming to promote real estate financing in general.
- Federal Law No. 11,977/2009, which creates mechanisms to encourage the production and acquisition of new housing units to low income population (known as "*Minha Casa Minha Vida*").

Other real estate financing techniques

29. Are other real estate finance techniques commonly used in your jurisdiction? For example, real estate securitisation and sale and leasebacks.

Real estate securitisation is commonly used as a real estate finance technique.

This operation is carried out specifically by securitisation companies. They are classified as non-financial institutions, whose purpose is the acquisition of real estate receivables and their securitisation, through the issuance and placement in the financial and capital market of real estate receivables certificates (CRI).

Sale and leasebacks are also used as a real estate financing technique. This technique is more commonly used for the installation of factories and logistics warehouses.

In addition, built-to-suit leases are also common, which are long-term leases where the landlord buys the property to construct premises or customise a property to meet the tenant's interests.

Real estate leases

Negotiation and execution of leases

30. Are contractual lease provisions regulated or freely negotiable? Which legislation applies?

The main provisions in a lease agreement are stipulated by the legislation applicable to the transaction. However, some clauses and conditions can be negotiated by the parties.

When real estate property is leased for urban purposes, the lease is regulated by Federal Law No. 8,245/1991. When the property is leased for rural purposes, the lease is regulated by Federal Law No. 4,504/1964 and Federal Decree No. 55,891/1965.

Some property leases are governed by other specific laws. For example, leases of properties owned by the Federal Union, the states and the municipalities, are regulated by public law. Leases of parking spaces are regulated by the Brazilian Civil Code.

31. What are the formal legal requirements to execute a lease? Does the lease have to be executed by certain parties or as a deed? How do the formalities differ for a company, partnership and for individuals?

A lease agreement must observe the same legal requirements applicable to contracts in general. It does not have to be signed by public deed and it can be agreed in writing or orally. It is, however, strongly recommended that the lease be executed in writing to avoid future misunderstanding between the parties. Further, it is advisable that the parties have their signatures certified by a notary public.

There are no distinctions in the applicable formalities for a company, partnership and for individuals. As a practical point, when companies execute lease agreements, it is necessary to verify the corporate and contractual documents to confirm that the signatory has the power to represent and bind the company.

Rent payments

32. How are rent levels usually reviewed and are there restrictions on this? Is stamp duty and VAT (or equivalent) payable on rent? Is a rent security deposit required and does it have to be managed in a certain way?

Rent levels are reviewed annually, by application of one of the different readjustments indexes published monthly by the Brazilian government, which can be freely chosen by the parties to the lease agreement. Law 8,245/1991, that governs urban leases, does not allow parties to unilaterally change the rent. However, both parties are also entitled to request a judicial review to adjust the rent to the market value three years after the last rent adjustment agreed by the parties or determined by a judicial decision.

There is no stamp duty and VAT payable on rent. However, individuals must pay tax on income deriving from rent at progressive rates ranging between 0% and 27.5%, depending on the amount received. Legal entities that perform real estate activities must pay:

- Corporate tax (IRPJ and CSLL) on income deriving from rent.
- Social contributions (PIS and COFINS) on revenue deriving from rent.

If there is no rise in the rent level following a three-year duration of a lease, the landlord or the tenant can request the review of the rent level by filing a lawsuit.

There is no security deposit in lease agreements. The law provides that in cases when there is no other means of guarantee of the lease, the tenant can make a payment in cash of an amount no bigger than three months of lease.

Length of term and security of occupation

33. Is there a typical length of lease term and are there 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?

Federal Law No. 8,245/1991 that governs urban lease, does not provide for a minimum duration of a lease agreement. The parties are entitled to stipulate the term of a lease for as long as they wish and even for an indefinite period. However, this law provides that temporary leases cannot be executed for longer than 90 days (*Article 48*).

In respect of tenants of non-residential leases, protection of the goodwill, giving the tenants the possibility of renewing a lease through a compulsory renewal action, is provided by Federal Law No. 8,245/1991.

Disposal

34. What restrictions typically apply to the disposal of the lease by the tenant? Can the tenant assign or sublet the lease with the landlord's consent? Can tenants share their premises with companies in the same group? What is the effect of a legal reorganisation or transfer/sale of the tenant on the lease and on a guarantee of the lease?

Federal Law No. 8,245/1991 stipulates that a tenant cannot assign, sublet or free lease the real estate property, even for companies in the same group, except when the parties stipulate such permission in the contract. For this reason, if it is the tenant's intent to share their premises, it is advisable to stipulate this in the lease agreement. Furthermore, if the landlord's consent was requested in writing, the landlord has a 30-day limit to respond. In the event of no response, the consent is deemed to have been granted.

Where a legal reorganisation or transfer or sale of the tenant occurs, there are no implications for the lease agreement if there are no clauses in the lease that prohibit such operations. Notwithstanding this, it is common practice to stipulate the landlord's consent both to the change of control and legal reorganisation by the tenant (for instance, in complex commercial contracts and leases in shopping centres).

35. Does a landlord or tenant retain any liability under the lease after the lease is assigned?

Generally, the landlord or the tenant do not have or retain any liability under the lease after it is assigned, unless otherwise agreed by the parties.

Repair and insurance

36. Who is usually responsible for keeping the leased premises in good repair and for insuring the leased premises? Are there provisions for the ownership of lease improvements?

The tenant is responsible for keeping the leased premises in good repair and to return the property, at the end of the lease, in the same state in which the tenant received it, excepting normal or reasonable wear and tear (*Federal Law No. 8,245/1991*).

The landlord is responsible for the fire insurance of the leased premises, except where otherwise agreed by the parties.

All improvements made by the tenant are owned by the landlord. However, except where otherwise agreed by the parties:

- Necessary improvements carried out by the tenant, even if they are not authorised by the landlord, must be

compensated by the landlord.

- Useful improvements carried out by the tenant must be indemnified, as long as they have been authorised by the landlord.

A tenant will not be compensated for luxury improvements (*benfeitorias voluptuárias*) carried out on the property.

Landlord's remedies and termination

37.What remedies are available to a landlord for a breach of the lease by the tenant? On what grounds can the landlord usually terminate the lease and what restrictions and procedures apply? What is the effect of the tenant's insolvency under general contract terms and insolvency legislation?

The main remedy available to a landlord for breach of the lease by the tenant is an eviction action (*ação de despejo*), to recover possession of the property. The landlord can also enforce a guarantee of the lease granted by the tenant, claim penalties stipulated in the lease and claim damages, subject to proof from the landlord.

Generally, pursuant to the terms of the lease, a tenant's failure to pay rent and lease charges constitutes a contractual and legal breach. In this case, the landlord can immediately file an eviction action and terminate the lease. In addition, the landlord can judicially collect the unpaid rent, lease charges, contractual penalties and any damages.

Under insolvency legislation, an insolvent tenant can either seek to restructure its operations or face involuntary liquidation bankruptcy suits from its creditors. The restructuring might occur by means of a judicial reorganisation or an extrajudicial reorganisation. A tenant's insolvency does not automatically cause the lease's termination, unless the lease contract establishes the termination of the contract in the event of insolvency or bankruptcy. However, a court-administrator can decide if the lease contract should be terminated or not according to bankruptcy interests.

If the leased real estate property is sold, the contract can be terminated by the buyer within the first 90 days following registration of the title with the Real Estate Registry Office. For this purpose, the landlord must notify the tenant granting a 90-day term to deliver the real estate property. The buyer's right to terminate is not applicable, if the lease is in force for a defined term, it stipulates that it will remain in force in the event of sale and it is registered with the Real Estate Registry Office.

Judicial reorganisation procedure

In a judicial reorganisation procedure, lease contracts are not terminated and all existing credit at the time of filing is subject to the reorganisation procedure's rules, including rent. Owning credit against a restructuring debtor allows for the creditor to vote on the acceptance or rejection of the debtor's reorganisation plan.

The filing of a judicial reorganisation procedure suspends any lawsuit brought against a debtor for an initial period of at least 180 days. This period may be extended by the courts. The interplay between the effects of a judicial reorganisation and actions for eviction gives rise to controversy among scholars and judicial courts. On the one hand, the lessor's property rights must be protected. On the other hand, the whole reorganisation system revolves around its main principle: preserving the business activity, thereby allowing some discretion to bankruptcy courts to grant debtors a real chance at overcoming their financial crisis. Accordingly, there is still some divergence among judicial courts on whether a debtor may be evicted whilst

under the protection of the stay period.

However, there is a strong tendency towards the view that the stay period prevents the lessor from executing an eviction order against a debtor. Any credit arising after the filing of the procedure, including rent that becomes due after the petition for restructuring, is not subject to the rules of the reorganisation.

Extrajudicial reorganisation

An extrajudicial reorganisation is applicable in less acute financial crises than a judicial reorganisation. The extrajudicial reorganisation happens by means of an agreement signed between a debtor and its creditors, which is subsequently filed before a judicial court so that it can be confirmed. The extrajudicial reorganisation can:

- Be voluntary.
- Be binding consenting creditors exclusively.
- Be imposed on dissenting creditors (a "cram down") (as long as the reorganisation agreement was signed by creditors owning at least 60% of the total amount of credit in each of the classes of creditors set forth in the reorganisation plan).

Although there is no stay period in an extrajudicial reorganisation, there are judicial precedents that prevent a tenant from being evicted during the procedure.

Bankruptcy

Under a bankruptcy procedure, the judicial administrator, who becomes the manager of the estate, has two options to continue or terminate the lease contract. If the judicial administrator opts for continuation, the rent due prior to the adjudication of bankruptcy must be paid in accordance with the distributions to creditors. However, the rent that becomes due after the adjudication has a priority over the creditors of the estate. If the judicial administrator opts to terminate, the lessor is not entitled to contractual penalties and its credit may only be paid in accordance with the distributions made by the estate. Both a reorganisation and liquidation bankruptcy can grant the creditor a better position regarding distributions if the creditor is secured by a guarantee.

38. Can the tenant withhold rent payments in certain circumstances, for example for serious damage to the leased premises? Can the tenant terminate the lease in certain circumstances?

Generally, Brazilian legislation does not allow a tenant to withhold the payment of rent, except if otherwise agreed by the parties.

A tenant is allowed early termination of the lease where the tenant either:

- Pays the contractual penalty, proportional to the period of performance of the agreement.
- Where there is no stipulated penalty, pays the penalty that has been determined in court.

Further, the tenant can terminate the lease if the property is not regular. (for example, if the property does not have the construction completion licence or if it presents constructional defects that restrict the regular use of the property).

Planning and development controls

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

Municipal, state and federal authorities can purchase business premises compulsorily by expropriation (*desapropriação*). This is an administrative procedure under which the public authorities or their delegates can on the basis of prior declaration of public need, public utility or social interest, impose the loss of the real estate property on the owner, replacing it with just compensation. The compensation paid must correspond to the market price of the property (business premise or building).

Authorities may also expropriate buildings in case of default by the owner in respect of their obligation to undertake conservation works deemed necessary for the safety of people and goods, or for restoration purposes of properties certified as historical sites or having cultural value. Federal Decree-Law No. 25/1937 regulates this matter. Municipal and state authorities are also entitled to create rules regarding the preservation of properties certified as a historic site or having cultural value.

Additionally, some municipality laws authorise expropriation if the real estate property does not exercise the social role or purpose of property, such as agriculture, livestock or building construction for housing or trade purposes. This expropriation is implemented by progressive real estate taxes charged for non-built or sub-utilised real estate properties.

Otherwise, there is the right of pre-emption, which confers on the municipal public authority preference for the acquisition of urban real estate, in case of sale of the real estate property between private individuals. Municipal law will delimit the areas in which the right of pre-emption will apply and will set a term of validity, not exceeding five years, renewable for a one-year period after the initial term expires.

40. What authorities regulate planning control and which legislation applies? Is there specific protection for special categories of buildings such as historic buildings?

Municipalities regulate planning control. Federal Law No. 10,257/2001, known as City Statute (*Estatuto da Cidade*), sets out general urban policy guidelines that are regulated by municipalities.

Municipalities often create:

- A master plan law (*plano diretor*), which is the basic instrument of urban development and expansion policy.
- A building code (*código de obras*), which sets out the rules to be followed in the design, licensing, execution, maintenance and use of construction, buildings and equipment, within the limits of the real estate.
- Land use and occupation law, which contains the principles and guidelines for the use and occupation of urban space, with the main objective of ensuring the development of the city in a balanced and sustainable way.

There are also restrictions, obligations of maintenance, and other special protections for certain categories of buildings,

enforced by federal, state and municipal authorities. These have the function of protecting, valuing and disseminating cultural heritage, which includes furniture, real estate, buildings, monuments, neighbourhoods, historical centres, natural areas and intangible assets, among others.

41. What planning consents are required for building works and the use of a building?

Planning consents required for building works and the use of a building are regulated by municipal authorities and local legislative power. However, different consents may also be imposed by local authorities.

Municipalities often require the approval of a construction project, subject to the parameters of the local building code and land use and occupation laws. This approval may involve environmental licenses, analysis by traffic authorities (land, underground or air), state fire brigade, sanitary surveillance, verification of absence of interference by water, electricity, gas, telephone and other agencies, and, in some cases, environmental protection authority approval. Furthermore, it is necessary to obtain a building permit before beginning construction.

Regarding the use of a building, it is also necessary to obtain an occupancy permit (*habite-se* or *certificado de conclusão*) from the municipal authority. This procedure must be preceded by the issue of a certificate of completion of construction and the production of other corporate documents and information, such as bylaws and specification of which activities will be carried out on the property, in order to start operating a company in real estate property.

Finally, it should be noted that, in 2019, federal provisional measure 888 was published, which intends to reduce bureaucracy in the procedures related to obtaining a construction permit and a business licence, among other measures aiming to strengthen economic freedom.

42. What are the main authorisation and consultation procedures in relation to planning consents?

Initial consents

Planning consents begin with the issuance of a certificate of directives by the municipal authority, which contains the main binding parameters of use and occupation of land, in case of land subdivision. This procedure may require donation of areas to the municipality, to install public equipment, as well as green areas and public roads.

The approval of the master plan of the land subdivision before the municipality may require:

- Environmental licenses.
- Analysis by traffic authorities.
- Consent by state authorities.
- Presentation of the physical financial schedule of the infrastructure construction.

- A guarantee (lien, mortgage, among others) to conclude the construction.

Once the master plan is approved, a construction permit is issued, subject to supervision. Each municipality has its own regulations and so approval times can vary. However, an initial is usually issues within a minimum of 30 days.

Once completed, the construction is inspected and subject to the issuance of an occupancy permit (*habite-se* or *certificado de conclusão*).

Before beginning the sale of lots, the developer must register the subdivision before the competent Real Estate Registry Office. This will allow for the opening of real estate records (*matrículas*) for the specific lots. The terms of conclusion of the infrastructure construction must also be registered before the competent Real Estate Registry Office.

Third party rights and appeals

Third parties may present an appeal before the municipality, Real Estate Registry Office or a court against the planning approval or register of land subdivision. This appeal can be made on the grounds that the planning consent is illegal, for example, if it is approved for an environmentally protected area, and therefore the consent must be revoked.

Reform

43. Are there proposals to reform real estate law and are they likely to come into force and, if so, when?

There are some bills of law in progress, but none that are certain to be approved. The main ones are related to the following matters:

Acquisition of rural property by foreigners

Bill No. 2,963/2019 stipulates for the sale or lease of rural Brazilian lands to foreigners, provided that they constitute a company in Brazil (subject to the current restrictions (*see Question 4*)). The proposal includes limitations on the purchase of land in border areas and in the Amazonian biome. In addition, the sum of the rural areas owned and leased to foreign groups must not exceed 25% of the area of the municipalities where they are located.

Short term leases and home-sharing on mobile applications

Bill No. 2,474/2019 prohibits the execution of lease agreements in condominiums, especially those related to short term leases and home-sharing on platforms or mobile applications (*see Question 9*), except if these types of lease are authorised by express provision in the condominium by-laws. The prior consent of two-thirds of condominium members is necessary to override condominium by-laws. This decision will be subject to a vote at a meeting convened for this purpose. In addition, the owner of the real estate property is liable for the damages caused by the occupier.

Reverse Mortgage

Senate Bill No. 52/2018 establishes the creation of the reverse mortgage. It is intended for the elderly and the credit to be granted will be secured by the mortgaged property. In exchange, banking institutes will grant the owner a monthly income for life, under the condition of becoming, in the future, the owner of the mortgaged real estate. After the death of the borrower,

the debt is paid off with the sale of the real estate property. If there is a balance left, it will be paid to the heirs.

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