

LATIN LAWYER REFERENCE REAL ESTATE 2020

Brazil

Rochelle Ricci and Caio Fink Fernandes
Machado Associados

SEPTEMBER 2019

1 Are foreigners and entities controlled by foreigners permitted to own real estate directly, or are there specific licence requirements or restrictions in place that must be complied with for a non-citizen to own real estate? Are there restrictions on ownership of beachfront or coastal land, or land near beachfront?

Foreign non-resident individuals and legal entities are entitled to acquire urban real estate in Brazil. Both, however, need to be enrolled with the taxpayer registry in Brazil. Therefore, the acquisition of urban real estate does not have to be carried out by a Brazilian legal entity.

Rural real estate may only be acquired by foreign individuals residing in Brazil and foreign legal entities authorised to operate in Brazil, subject to the fulfilment of certain requirements (eg, foreign legal entities may only acquire rural real estate destined to the implementation of agricultural, livestock, industrial or colonisation projects related to their corporate purposes). Limitations apply, however, to the acquisition of rural real estate in certain locations or exceeding certain size.

Initially, Brazilian legal entities (i) whose majority of capital stock is owned by foreign non-resident individuals or legal entities; or (ii) controlled, directly or indirectly, by foreign non-resident individuals or legal entities, are equated with foreign legal entities for the purposes of acquiring rural real estate in Brazil. However, under the interpretation of the laws regulating the acquisition and leasing of rural property in Brazil by some of the relevant authorities, the restrictions usually applicable to foreign companies are also applicable to companies controlled by foreigners.

Additionally, there are restrictions concerning the acquisition of land located at the border area of Brazil by foreigners.

The state owns the property of coastal lands located within 33 metres from the high tide to the land (“navy lands”). However, the equitable ownership of those lands may be acquired by and transferred between foreign individuals and foreign legal entities, subject to the above-mentioned restrictions.

2 Is all real estate capable of being owned as a property right (fee/freehold), or is the land owned by a government or monarch with only the ability to acquire leasehold rights? What other forms of real property ownership exist other than property right or leasehold?

In general, all real estate should be capable of being owned as a property right, but exceptions shall apply, such as coastal lands, beaches, riparian and indigenous areas and areas of environment preservation, which are owned by the state. In rem rights include ownership, surface (superficies), easement, usage, usufruct, habitation, acquisition right of the promisee-purchaser of the property, pledge, mortgage, fiduciary property, antichresis, granting of special use for habitation, granting of usage rights and slab rights. Additionally, certain rights over real estate may be granted through rural leaseholds, urban lease and free-lease agreements.

3 What overriding rights of the public exist that may affect land, such as inalienable rights to access certain natural resources or the use of beaches? Who owns mineral or riparian rights?

Upon necessity or declaration of public utility or social interest, a real estate may be expropriated by the state. Public service concessionaires and public establishments that develop activities delegated by the state may carry out expropriations upon express authorisation in law or contract.

Also, the owner may be deprived of the property in case of requisition due to imminent public danger.

The environment is an asset of common use (public); consequently, ownership of land does not comprise mines, hydroelectric potential, archaeological monuments, among other natural resources. The use and exploitation of waters and other mineral resources are subject to several legal requirements and restrictions.

4 Is title insurance customary to obtain in connection with a purchase or a loan? If so, is it available?

The title insurance is not made available by insurers in Brazil. The purchase or loan of a real estate is usually preceded by a cautious assessment of the title and land by the purchaser or borrower.

In the case of onerous acquisition of a property, the alienor is liable before the acquiror in case of loss of ownership by the acquiror by judicial decision or administrative act acknowledging a previous ownership right of a third party over the property (eviction).

5 Are boundary or other surveys typically completed delineating particular property boundaries, or is reliance placed on registered maps? How are boundary disputes customarily resolved?

The boundaries of particular real estate are evidenced in the relevant property enrolment certificate. Certain rural lands, however, shall mandatorily be subject to georeferencing.

Boundary disputes that are not resolved amicably and administratively between neighbours and before the real estate register (in the circumstances provided for by law) are usually submitted to Judiciary courts.

6 What taxes or other fees are payable in connection with the purchase or sale of real property (eg, notary fees, recording, alien licensing), and what are the amounts of such taxes and other fees?

The remunerated transfer of real property is subject to tax on the transfer of real estate and related rights (ITBI), which rates vary according to the city where the real property is located. In the city of São Paulo, the general rate is 3 per cent. The taxable basis corresponds to the fair market value of the property.

The other fees payable in connection with the purchase and sale of a real property refers to notary fees and recording fees. Such fees vary depending on the state in which the property is located and on the purchase price.

With respect to real estate held under emphyteusis or fee farm (aforamento), in case of transfer of the equitable ownership, a laudemium fee is also payable.

7 Which party customarily pays taxes and fees in connection with a purchase/sale of real property – the purchaser or the seller? What is the allocation of responsibility between a purchaser and seller of all taxes and fees payable to consummate a conveyance of real property?

In the case of ITBI, municipal laws, such as in the case of São Paulo, usually determine that the taxpayer is the purchaser of the property in case of the transfer of real property.

The other fees are generally paid by purchaser, although the parties may freely agree otherwise.

Regarding the transfer of equitable ownership, the laudemium fee (5 per cent of the updated value of the land) is due by the seller.

Relatively to brokerage fees, the broker remuneration is usually paid by the seller or by the broker's hiring party. However, the topic may be freely negotiated between the parties.

8 Can real estate be indirectly acquired by purchasing the shares or ownership interests of a corporation or other entity that owns real estate? What taxes and fees would be payable upon a purchase of shares of a company that owns real estate as compared to a purchase of the real estate directly?

Real estate may be indirectly transferred by the sale of share of a corporation or other entity that owns the real estate. In this case, the real estate is not deemed to have been transferred and, therefore, no tax or fee over a real estate transfer are applicable. The capital gain generated from share deals is subject to taxation in Brazil as detailed in question 17.

The other fees refer to minor amounts destined to the register of the corporate forms and documents, to the extent applicable, before the Trade Board.

9 What taxes and fees are paid on the conveyance of personal property accompanying a conveyance of real property, and in what amounts? Is it more favourable to allocate purchase price towards personal property or real property for tax purposes?

Brazilian tax law does not provide for any distinction between personal property and real property. As the taxable basis of the ITBI usually corresponds to the fair market value of the property, the allocation of the price for the personal property and the real property would not be relevant.

Individuals must declare in their annual income tax return all assets with acquisition cost higher than 5,000 reais, regardless of the nature of the asset. The calculation of the capital gain generated upon the sale of the asset is calculated based on the acquisition cost informed in the tax return.

Generally, there is no fees paid on the conveyance of furniture and utensils belonging to the property. However, the conveyance of certain kinds of movable assets, such as vehicles, are subject to registry fees before the competent bodies. The conveyance of the certain rights as a part of the same deal, such as mineral rights related to the property, is also subject to registry fees and prior authorisation by the competent bodies.

10 What recurring annual fees or real estate taxes are payable in connection with the ownership of real property?

The ownership or possession of any real estate located in urban areas is subject to the annual levy of municipal urban property tax (IPTU). The taxable basis is the fair market value of the property at a rate that may vary according to the municipality in which the property is located and the use and price of the real estate. In the city of São Paulo, IPTU rates range from 1 per cent to 1.5 per cent with discounts or additions granted based on the market value and use of the relevant property.

The ownership or possession of rural property (real estate located outside the urban zones of the cities) is subject to the annual levy of federal tax on rural properties (ITR). The taxable basis shall be calculated according to specific rules. ITR rates may vary according to the total area of the property and level of use of the areas that can be exploited for agricultural purposes. Small-sized properties exploited by the owners, who do not have any other real estate, are exempt from ITR.

With regard to real estate held under emphyteusis or fee farm (aforamento), an annual fee (foro) correspondent to 0.6 per cent of the value of the property must be paid by the holder of the equitable ownership.

11 Are preliminary agreements, memoranda of understanding or other concession agreements typically negotiated between purchasers/developers of real property and the government? What types of matters are incorporated into such preliminary agreements, memoranda of understanding or concession agreements?

Preliminary agreements and memoranda of understanding between private individuals or entities and the government in connection with real estate deals are extremely rare in Brazil. The concession, construction and other agreements entered with the government are generally preceded by public biddings in accordance with the Brazilian Bidding Law (Federal Law No. 8,666/93).

12 What rights of first refusal or other rights exist by law in favour of third parties or tenants of real property?

Brazilian legislation grants urban property tenants and rural property leaseholders the right of first refusal for the acquisition of the sale of real property. Also, rural property leaseholders have the right of first refusal for renewing the lease in parity conditions with interested third parties.

Tenants in either residential and non-residential leases may be entitled to renew the lease agreement in certain cases and upon the fulfilment of specific requirements.

13 How is real property conveyed – by deed or other instrument of conveyance? What is the procedural process for completing a conveyance? Is there a registration or recording process?

The conveyance of real estate whose amount is higher than 30 times the minimum salary in force, which corresponds to 29,940 reais in 2019, shall be made through a public deed. In specific cases other documents may replace the public deed for the purposes of conveyance of real properties (eg, amendment to bylaws, when the conveyance is made to a company by its stakeholder, deed of distribution or court decisions).

The relevant document (eg, public deed, amendment to the by-laws, deed of distribution, court decision etc) shall be recorded in the property's enrollment before the real estate register.

14 When is title actually and officially conveyed to a purchaser – upon execution of a deed or other instrument of conveyance, upon submission of the instrument of conveyance to a recording office or registrar, upon acceptance of such instrument of conveyance for registration or recording, or upon the happening of some other event?

Pursuant to the Brazilian law, the conveyance of real estate ownership is only effective after the relevant instrument of conveyance (eg, public deed, amendment to the by-laws, court decision, etc) is recorded in the property's enrollment before the real estate register.

15 What types of governmental liens or encumbrances on title could result in a forfeiture of the land? Real estate taxes, government-owned utilities?

Lawsuits and proceedings against the owner may be recorded as encumbrances in the real property's enrolment before the real estate register.

Tax authorities may register an encumbrance in case of tax execution of taxes unpaid.

Public utilities and services may be shut down when unpaid. The failure to pay such utilities and services does not lead directly to the forfeiture of the land. However, the collection of which may lead to the auctioning of the real estate towards solving the relevant debt.

16 Upon a sale of real property, would any portion of profits or proceeds be required to be paid to any third party? For example, are employees entitled to a share of profits?

The sale of real property itself does not require that any profits or proceeds arising thereof is paid to third parties. Real estate brokers that assist the parties in the deal are entitled to a commission which is usually a percentage calculated over the deal's amount. Employees may be entitled to a share of a company's profits as a whole, but not related to the sale of a specific asset.

17 Upon a sale of real property, what taxes must be paid in connection with any gain, and are there withholding taxes? Are taxes different if the seller is an entity?

From a corporate taxes' perspective, as a rule, the capital gain (difference between the sale price and the value for which the property is registered) earned by a Brazilian legal entity from the sale of real property is included in the taxable basis of corporate income tax (IRPJ) and social contribution on net profit (CSLL) levied at a combined rate of up to 34 per cent. The ascertainment of the taxable basis of IRPJ and CSLL varies depending on tax system to which the company is subject to for the calculation of these taxes (actual profit system or deemed profit system).

The capital gain (difference between the sale price and acquisition cost) deriving from the sale of real property by (i) individuals domiciled in Brazil; and (ii) non-residents is subject to progressive income tax rates of 15 per cent to 22.5 per cent.

The legal entity and the individual domiciled in Brazil are the taxpayers of IRPJ/CSLL and the income tax, respectively, levied on the capital gain arising from the sale of property.

In the case of disposal of real property located in Brazil by a non-resident, the purchaser, if domiciled in Brazil, or its representative, when the purchaser is domiciled abroad, is responsible for the withholding of the withholding income tax (WHT) levied on the capital gain ascertained on the transaction.

18 Are there any environmental regulations, and are environmental assessments customarily performed prior to acquiring real property?

Environmental obligations in connection with real properties are considered proper rem obligations. Therefore, the owner of a real estate may be held liable for environmental damages in connection with the property, even if such damages were caused by the former owner. The acquisition of a real property is usually preceded by a cautious environmental due diligence carried out by purchaser, depending on the activities previously performed in such property.

19 Are there building, land use and zoning codes?

Yes, the regulations over the building, land use and zoning are enacted by the municipalities of the Brazilian territory. The Brazilian Civil Code also establishes rules on right to build, right of vicinage, easement and forced passage, passage of cables and pipes, boundaries and right of enclosure (walls and fences construction).

20 Are there laws permitting or contemplating condominiums or otherwise subdividing properties, or creating multiple ownership existing on one plot of land or building?

Yes, the Brazilian Civil Code foresees several kinds of condominiums, namely: voluntary condominium, mandatory condominium, building condominium, plot of land condominiums, and multi-property condominiums.

21 Are there any restrictions on, or specific legislation relating to, subsurface rights and air rights?

The land property embraces the corresponding air space and subsurface, in height and depth useful for its exercise, provided that the owner shall not oppose to activities carried out by third parties at a height or depth the owner has no legitimate interest in.

However, the property does not embrace certain assets established in law, such as mineral deposits, mines and other natural resources, archaeological monuments and hydraulic energy potentials. At certain heights, restrictions to the use of the air space enacted by the civil aviation authority shall apply.

22 Are there any laws relating to the preservation of views or light?

The Brazilian Civil Code limits property rights in certain cases to avoid conflict between neighbours.

For instance, the owner of a building has the right to have ceased prejudicial interferences to the safety, quiet and health of its inhabitants caused by a neighbour property.

Also, the owner shall not open windows or build balconies within less than one and a half meter from the neighbour land. In rural zones, buildings shall not be constructed within less than three metres from the neighbour land.

It is worth mentioning that a person is prevented from exercising a right in an excessive manner in relation to the economic or social purpose of the right, the good faith and the good custom.

The rules in connection with building condominiums established in Brazilian Civil Code also impose some restrictions (for instance, the impossibility to alter the form and colour of the external parts of the buildings).

Finally, the provisions of building, land use and zoning codes enacted by the municipalities may also apply.

23 Is a lender for a real estate project in your jurisdiction required to register or be licensed in such jurisdiction?

There is no specific register or license required to the lender for a real estate project. However, financial institutions shall be licensed by the Brazilian Central Bank to operate in Brazil.

24 What determines the priority of a mortgage, charge- or guaranty trust – the date of the loan, the date of execution of the mortgage, charge or guaranty trust, the date such mortgage or charge is actually recorded or registered, or some other factor?

The priority of a mortgage is defined by the order in which its registry is required before the real estate register. However, the mortgage is only effective as from its registry in the property's enrolment.

25 What taxes or fees are payable by a borrower or by a lender in connection with a loan secured with real estate in your jurisdiction?

The granting of loan by a Brazilian company to a legal entity or individual is subject to the levy of Tax on Financial Transactions charged on credit (IOF-Credit). The methods to calculate the tax vary depending on the characteristics of the transaction, especially if the principal amount and the term of the loan are determined or not.

The taxpayer of IOF-Credit is the borrower, but the grantor is liable for withholding the IOF-Credit.

In the case of external loans, the currency exchange transaction performed for the entry of funds into Brazil as a loan granted for an average minimum term of 180 days or less (or liquidated before said term) is subject to Tax on Financial Transactions (IOF-Exchange) at a 6 per cent rate. A zero per cent rate applies when funds are lent for an average minimum term longer than 180 days and liquidated after said period.

As regards payment of interest, this income will be subject to withholding income tax (WHT):

- at regressive rates ranging from 22.5 per cent (loans with term up to 180 days) to 15 per cent (loans with term longer than 720 days), if the grantor is domiciled in Brazil; and
- at a 15 per cent rate (increased to 25 per cent if remittance is made to tax havens), in case the creditor is a non-resident. Double tax treaties signed by Brazil may reduce the WHT rate.

Specific rules for the deductibility of the interest expenses from the taxable basis of IRPJ and CSLL due by legal entities subject to the actual profit shall be observed in case of loans granted by a related party abroad or a party domiciled in a tax haven or is subject to a privileged tax regime.

26 What typical remedies does a lender with a security in real property in your jurisdiction have in the event of a default by its borrower?

The remedies vary depending on the security. The mortgage lender shall file a judicial foreclosure, the property shall be auctioned, and the auction proceeds shall be used to pay the outstanding debt. The fiduciary creditor (in case of fiduciary property security) is entitled to consolidate the ownership of the property and promote the property's auction in a non-judicial procedure, regardless of a judicial foreclosure.

In both cases, if the auction proceeds are higher than the outstanding debt, the lender shall deliver the exceeding portion to the debtor.

27 Is there judicial or non-judicial foreclosure in your jurisdiction, and what is the foreclosure process generally?

There is both judicial and non-judicial foreclosure procedures in Brazil. However, the non-judicial foreclosure is only available to the fiduciary creditor (in case of fiduciary property security). The mortgage lender shall mandatorily file a judicial foreclosure.

The mortgage lender shall file a judicial foreclosure, the property shall be auctioned, and the auction proceeds shall be used to pay the outstanding debt. The fiduciary creditor is entitled to consolidate the ownership of the property and promote the property's auction in a non-judicial procedure, regardless of a judicial foreclosure.

In both cases, if the auction proceeds are higher than the outstanding debt, the lender shall deliver the exceeding portion to the debtor.

28 What rights does a tenant have by law that cannot be varied by agreement or a lease?

According to Brazilian Lease Law, all sections of an urban lease agreement that aim to suppress the purposes of such law, namely those that suppress the tenant's renewal rights or that impose pecuniary obligations towards the enforcement of such rights shall be deemed void. In that context, any waiver by the tenant shall be deemed void to the extent it is intended to limit or suppress the rights established in referred law.

The provisions of rural leasehold agreements that are contrary to the Land Statute and relevant regulation shall also be deemed void, and the rights granted by such law and regulation cannot be waived.

29 How long can someone own property as leasehold? What statutory or legal rights does a long-term leasehold owner have with respect to its property?

Brazilian legislation does not establish maximum terms for rural leasehold and urban lease agreements. Long-term lease agreements may entitle the tenants in non-residential leases to renew the lease agreement, subject to the fulfilment of other requirements.

30 What are the most common reasons for a dispute or a conveyance of real property in your jurisdiction not to be completed?

The most common reasons refer to defects in connection with the property's title or previous debts of the seller and/or lawsuits filed against it (especially of labour and tax natures) which might result in encumbrances to the property in the future or even in the invalidity of the sale, in the case the sale is deemed to have frauded seller's creditors rights.

31 Does your legal system incorporate or defer to the laws of another country?

Brazilian legal system does not incorporate or defer to the laws of other countries in connection with the acquisition of real estate, except for applicable provisions of the 1951 Refugee Convention. Only the Brazilian judiciary authority shall be competent to judge lawsuits related to real estate located in Brazil.

32 Is there a standard schedule of legal fees for real estate transactions? If so, what is it, and is it based on a percentage of the transaction value or some other methodology?

There are no specific legal fees determined to real estate transactions. However, the Brazilian bar association (OAB) establishes, for each state, a standard schedule of minimum legal fees in connection with legal assistance, which applies. For instance, in the state of São Paulo, the minimum fees for contract drafting in 2019 is of 3,378.30 reais.



Rochelle Ricci
Machado Associados

Rochelle Ricci is a partner of the contracts, real estate and M&A areas, with 17 years of experience in legal advice for the most varied segments, such as infrastructure, technology, education, and services. Her deep knowledge of civil and contractual law and her experience in litigation allow her to work with a complete range of contracts and transactions and assist clients in the most diverse phases and developments of the business relationship, from the planning and structuring of private bids and due diligences and the negotiation and renegotiation of contracts, to the strategic follow-up and management of contracts. Rochelle also acts in the compliance consulting area, and is recognised by her clients for her reliability and ability to anticipate risks and provide solutions that are agile and aligned with the clients' business and objectives.

Education: Postgraduate degree in civil procedure, Pontifícia Universidade Católica de São Paulo (PUC/SP) (2005); Bachelor of laws, Pontifícia Universidade Católica de São Paulo (PUC/SP) (2002).



Caio Fink Fernandes
Machado Associados

Caio Fink Fernandes is a partner at Machado Associados in the corporate, contracts (including real estate) and M&A area. He specialises in contracts, mergers and acquisitions and corporate restructuring, such as M&As, spin-offs and amalgamations. His practice is based on a thorough understanding of his clients' business and a client-oriented practice. He has notable strengths in negotiation, deep knowledge of contractual and civil law and exceptional sense of business.

Education: Postgraduate degree in business contracts, Fundação Getúlio Vargas (FGV) (2013); Bachelor of laws, Universidade Presbiteriana Mackenzie (2009).



Our law firm was established in 1990 to offer first-class legal services, with efficiency, security, and reliability. Today we are one of the leading law firms in Brazil, highly respected in the demanding international scenario.

We specialise in the main corporate law areas, providing services to national and international clients of all sizes and economic sectors. Since the start, we are acknowledged in the market as one of the leading firms in the tax area by our clients, peers and the most renowned international publications. Our excellence in the tax segment was extended to our other practice areas, which enjoy equal recognition and reputation.

We believe that our skilled work and our close relationship with our clients adds value to their business. We believe that law is not a commodity. The provision of legal services is strategic and requires unconditional dedication, continual education and unrestricted respect of ethics. Developing safer solutions in an environment surrounded by legal insecurity: this is the challenge posed and that we took on.

We are headquartered in São Paulo, and we also have offices in Rio de Janeiro and Brasília. We rely on the work of correspondents throughout Brazil and maintain productive relationships with the most distinguished international firms.

Our firm is formed by a unique team of lawyers dedicated to our clients' success. Many of these lawyers work at Machado Associados since its establishment.

Av. Brig. Faria Lima,
1656 – 11º andar
01451-918 – São Paulo – SP
Tel: +55 11 3819 4855
Fax: +55 11 3819 5322

Rochelle Ricci
rricci@machadoassociados.com.br

Caio Fink Fernandes
cff@machadoassociados.com.br

www.machadoassociados.com.br