



Real Estate

in 31 jurisdictions worldwide

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Acquisition of real estate

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

Brazilian legal system is a civil code system. The Federal Constitution is the major law of the country and, among other things, it defines the fundamental rights that citizens are entitled to, among which the right to the private property (subject to such right being exercised with due regard to the public welfare). In addition to the Federal Constitution, federal laws, state laws and municipal laws, and applicable rulings, generally govern all rights and duties of Brazilian citizens and entities. Real estate matters are governed by the Civil Code and other federal, state and municipal laws. Lawsuits involving real estate matters are processed in accordance with the Civil Procedure Code. Under such Code, a party may obtain an injunction to either prevent an action or cause an action to be taken. The courts do not rule in equity but case law is a very important source for the construction and interpretation of the laws. Parol evidence is admissible but is not deemed the most important evidence in a lawsuit. The Civil Code provides that oral contracts are legal and binding on the parties except as provided otherwise in the law.

2 Recording conveyance documents

What are the legal requirements for recording conveyance documents?

Federal laws rule nationwide on the legal requirements for recording real estate transactions and conveyance documents. Documents involving real estate conveyance of title must be in writing and drawn up as public deeds (except for few circumstances where they may be object of private instruments). A public deed is prepared and signed before a public notary. Real estate transactions are only effective before third parties upon registration of the relevant documents with the competent real estate public registry (REPR – each REPR covers a defined territory in a given municipality). The record file existing in the REPR in respect of a given real estate property is the only possible legal evidence of ownership thereof. The REPR only records conveyance documents if they are submitted for registration together with public clearance certificates making evidence that there are no outstanding tax debts in the name of the seller and in respect to the real estate property being conveyed, and the record files in the REPR in respect to the relevant real estate property show the seller as the owner of the property.

The conveyance of a real estate property is subject to the municipal tax on transfers of real estate properties at the rate of 2 per cent. The tax basis for ITBI is the value of the transaction or the value of the real estate property, whichever is the highest. Registration of the conveyance documents with the REPR triggers the payment of fees. Purchaser is usually in charge of paying taxes and fees, which may be minimised in case of tax exemptions set forth under the law.

3 Foreign investors

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

As a general rule, there are no restrictions on foreigners holding real estate property in the cities (urban lands). However, the direct or indirect acquisition of real estate properties (urban or rural) by foreigners in the boundary zone of Brazilian territory (an area that runs parallel to the boundary line at a distance of 150km), is subject to prior approval by the Brazilian National Defence Council. Also, there are certain specific restrictions on foreigners owning rural land all over the country. The main restrictions include:

- exploitation of Brazilian lands by foreigners must first be approved by the Brazilian Agriculture State Department (INCRA);
- the area of the rural land owned by foreigners in any Brazilian municipality may not exceed 25 per cent of such municipality's total rural land area; and
- foreigners of the same nationality cannot own rural land representing more than 40 per cent of the total rural land area considered for foreigners in any Brazilian municipality.

There are currently (last quarter of 2008) certain discussions going on as to whether or not said restrictions also apply in respect to Brazilian companies held by foreign investors. Acquisition of rural land or land in the boundary zone of Brazilian territory in breach of the applicable laws shall be deemed null and void.

4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about return of capital?

Remittances of funds to and from Brazil are subject to the exchange control of the Central Bank of Brazil (Central Bank). Such control includes remittance of funds from abroad, to Brazil, for acquisition of a real estate property, and future remittance of rents, profits and return of capital from Brazil.

5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

The following general liability falls on owners of real estate properties: ownership must be exercised subject to the public welfare and also be focused on preservation of the environment, the ecological balance, historic sites and artistic works; the owner of a real estate property is liable to pay the taxes levied on the property and to indemnify third parties (including, but not limited to, purchasers, neighbours and tenants) for losses resulting from damages caused by the real estate property itself, including damages deriving from tort.

With respect to tenants, real estate owners shall hold tenants harmless from defects or construction deficiencies of the real estate property. Tenants themselves are liable for the maintenance of the real estate property and for damages caused as a result of their use of the property, including environmental damages (as further detailed below). Lease agreements usually also provide that tenants will reimburse owner for all taxes and condominium expenses levied on the property during the lease term.

Brazilian legislation on environmental protection is among the most complete in the world. Liability (civil and criminal) for damages caused to the environment falls onto the polluter (who may or may not be the owner of the real estate). However, the owner (or the occupant) of the real estate property shall be called to respond – under civil or criminal law – for any damage to the environment of the property or in connection thereto whenever the actual polluter is unknown. Should that happen, the owner (or the occupant, or both) may avoid liability by appointing the actual polluter. On the other hand, in case it is proven that the owner (or the occupant) had knowledge or could have had knowledge of the pollution caused by a third party and has not taken the steps necessary to stop or to prevent it (including by denouncing it to the authorities), the owner (or the occupant) may be deemed an ‘indirect’ polluter, or a co-polluter, and may be held liable under civil law (to indemnify or to remedy the damage) and under criminal law.

Whenever an entity is the polluter, besides it being held civil or criminally liable, also its managers, officers or administrators may be held personally liable under civil and under criminal law if it is proven that they were aware of the pollution and had not taken measures to avoid it.

In the case of change of control of an entity that is the owner of a polluting or polluted real estate property, the purchaser of the entity cannot avoid the entity being held liable by third parties and the authorities for pollution occurring prior to the purchase. Should this be the case, personal criminal liability will remain with the managers, officers or administrators in office at the time the pollution has taken place and shall not pass on to the new controller.

6 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Real estate properties may be insured against fire, robbery and climate hazard but they cannot be insured against environmental problems. Owners cannot protect themselves from liabilities under the law but they may implement certain structures that create a protective first shield from third-party claims. Also, purchasers may obtain hold harmless covenants from sellers under private agreements (which will bind the parties but will not bind third parties, including authorities). In the criminal sphere, there is no possible structure to transfer liability to a third party, not even by means of private agreements.

7 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction?

Transactions involving Brazilian real estate properties must be governed by Brazilian law, and disputes deriving therefrom must be ruled by Brazilian courts at the location of the relevant real estate property. Brazilian courts shall declare themselves competent to rule disputes involving real estate properties at their location even if the parties have contractually chosen another jurisdiction.

8 Subject-matter jurisdiction

Does subject matter jurisdiction exist? Who are necessary parties? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

As referred to in question 7, only Brazilian courts of the location of the property are competent to decide on disputes involving Brazilian real estate property matters. The parties to a case will be the parties which may have an interest in the dispute. In case of a litigation involving a foreign party plaintiff, such foreign party must post a bond for court costs and fees and must be represented by local counsel. Except only for such obligation to post a bond, a foreign party shall be treated just like a local party and have no other extraordinary obligations. Service of process must be prepared and issued by the court and services between the parties are not legally valid. Out-of-jurisdiction service must occur by means of rogatory letters, either between two jurisdictions in Brazil or between a jurisdiction in Brazil and another jurisdiction outside Brazil. Rogatory letters from Brazil to a jurisdiction abroad or vice versa must be processed through the Brazilian Ministry of Foreign Affairs unless the foreign party maintains a Brazilian attorney in Brazil empowered to receive services.

9 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Brazilian investment entities usually take either the form of a company or the form of an investment fund. Foreign investors may invest either way. Only exceptionally are foreign entities authorised by the Brazilian president to directly do business in Brazil. Incorporation of a Brazilian entity or formation of a Brazilian investment fund must meet certain specific requirements and the concept of pass-through entities for taxation purposes does not exist in Brazil. Therefore, all entities referred to herein – corporate entities or investment funds – are taxed in Brazil.

In principle, all Brazilian entities referred to in question 10 properly shield ultimate owners from liabilities. Except for circumstances described under the law that permit the ‘piercing of the corporate veil’, partners shall not be liable for obligations assumed by the legal entity as a result from regular acts. In principle, only fraud, illegal actions or ultra vires acts would ultimately expose the partners to liabilities held by the legal entity.

10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

Although Brazilian law provides for several types of corporate entities, most of the Brazilian companies are incorporated as limited companies or corporations. Limited companies are simpler and less costly to run than corporations. Corporations are usually chosen for joint venture structures and *limitadas* are preferred when the corporate control is to be held by one specific group.

Particularly in respect to real estate investment structures, a specific additional type of partnership is commonly used: the SCP, which is organised under the umbrella structure of either a limited company or a corporation. The activities of a SCP are carried out solely by the ostensible partner and the participant partners only share in the corresponding results.

There are two types of investment funds most used by real estate foreign investors: the real estate investment fund (FII) and the equity investment fund (FIP). Both funds are regulated and inspected by the

Brazilian Security Exchange Commission (CVM). The FII is formed as a closed-end condominium of several investors (joined in a public distribution) with the specific purpose of investing in a certain specific real estate development and of receiving future profits from the sale or lease of units thereof. The FIP is also formed as a closed-end condominium of several investors (either joined in a public distribution or in a private arrangement) with the specific purpose of investing in securities exchangeable or convertible into shares of publicly traded or closely held corporation.

11 Organisational formalities

What are the organisational formalities of creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

In order to create a Brazilian entity, a prospective partner must appoint a Brazilian resident attorney-in-fact to represent it as partner in the relevant legal entity and to receive service in case of a dispute involving such equity participation. The corporate documents must be written in Portuguese, must be subject to Brazilian law and Brazilian courts, and must be filed with the local board of trade. In order to operate, the legal entity must further enroll with federal and municipal tax authorities.

In order to invest in a FII or in a FIP, non-resident investors must meet requirements set forth by the National Monetary Council. Funds must be filed with the CVM. Investors must appoint a local legal representative or an authorised institution to operate through the Central Bank as the co-responsible party with the representative, appoint a local custodian and enter into an agreement with a Brazilian bank authorised to operate in the foreign currency exchange market.

12 Documentation

Does your jurisdiction or customs recognise a non-binding form of agreement? Is there a form of non-binding agreement before a contract? Is it customary to take the property off the market while negotiation of a contract is ongoing?

Under Brazilian law, any document signed between two parties (in the format prescribed by law, if applicable) shall bind the parties for the purposes prescribed in the document itself, except if it provides that any of the parties may terminate the agreement for no cause and at any time. A letter of intent, therefore, binds the parties as to their intent and their obligation to pursue their intent. It is customary that the parties agree on temporary exclusivity provisions, in which case the owner will not be permitted to offer the property to third parties during a certain period of time, generally the time necessary for due diligence and negotiation of the contract.

13 Contract of sale

What are typical provisions in a contract of sale?

Very typical provisions in a contract of sale are: full information on the parties, description of the property as per the file of the REPR, price and payment terms, documents reviewed or to be reviewed as part of due diligence, representations and warranties, broker fees and indemnification covenants. Also, sales contracts usually provide that the parties may not repent but the transaction may be terminated by any party in case of breach by the other party, in case of non-satisfactory results from the due diligence review and in case of force majeure. Termination provisions may provide for penalties, indemnification awards and return of down payment amounts as the parties may agree.

Typical down payment varies from 5 per cent to 20 per cent of the total price and it is not customary that it is held in escrow

although the parties may agree so, in which case a bank account is chosen to hold the funds until closing. Usually it is the seller that directly receives down payment and is only due to return it in case of termination of the agreement by cause on the part of the seller.

Minimum Representations and warranties are in respect of good title, the property being free of liens, tax and other pre-closing liabilities, occupancy and environmental liabilities existing (or not) at closing. As to title search and other due diligence aspects, please refer to question 18.

14 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Please see question 5 as to the general rule on responsibility for environmental remediation or clean-up. Where the owner (or the occupant) of a real estate property is forced to clean up, it is entitled to recourse against the polluter for the losses and damages incurred. Notwithstanding this, seller and purchaser may contractually agree to differently share and assume any such liability between them, in which case any such provisions shall only be effective between the parties and not enforceable on third parties (including the environmental authorities). Any such contractual clauses or covenants usually provide for long-term environmental obligations that survive the term of a contract. Covenants vary whether or not the environmental liabilities are known on the date of closing of the transaction, but typical minimum covenants include hold harmless provisions, obligation to meet requests by environmental authorities and specific performance provisions. All risk of losses until closing is usually borne by seller.

15 Leases

What are typical representations and covenants regarding leases? Do they cover brokerage agreements and do they survive closing? Are estoppel certificates customarily required and can estoppel certificates substitute for representations?

Sellers usually extensively give representations and warranties to purchaser in respect of circumstances involving leases as, for instance, that the leases are valid and effective and will (or not) survive closing, that lease agreements have (or not) been fully complied with prior to closing by both owner and tenant, that brokerage fees are due (or not), that there are no subtenants and no subtenants rights by third parties, that tenant and condominium co-owners have not exercised, and have no intention to exercise, the right of first refusal to purchase the property on the same conditions negotiated with purchaser, that security will (or not) remain valid and in force and whether, or not, tenant is entitled to mandatory renewal of the lease upon termination of the on-going term. Upon sale of the property, tenants must be notified thereof.

Lease agreements that have a surviving clause and, further, are valid for a determinate period of time and are registered with the competent REPR, shall survive the sale of the property to third parties (including a sale in public auction as a result of the enforcement of a mortgage or a chattel mortgage). Tenants are entitled to the right of first refusal to purchase the property in identical conditions offered by third parties except in case of donation, exchange of properties, corporate reorganisation or contribution of assets or, further, sale by force of a judicial order. The purchaser may request the seller to obtain written certificates from the tenants and the condominium co-owners confirming that they have no intention to exercise their right of first refusal. Leases of rural land, flats and resort properties are subject to specific rules and laws and may involve different representations and warranties by owner.

16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

Leases are neither subordinated to mortgages nor superior in priority to mortgages upon foreclosure. Should the property be mortgaged to a third-party creditor and should such creditor enforce the mortgage, the property will be sold in a public auction and tenant will be entitled to remain in the property should the lease agreement meet the applicable conditions (as mentioned in question 15).

17 Delivery of security deposits

What steps are taken to ensure delivery of security deposits to a buyer? How common is it to get a security deposit under a lease? Do leases customarily have periodic rent resets?

Leases are usually guaranteed (by tenants) by means of either a third party surety (most usual) or a three months' security deposit (second usual) or, still, an insurance policy (less usual). A surety shall in principle survive the sale of the property according to the terms of the agreement. Security deposits are made by delivery of the funds to the owner that must keep the funds segregated in a specific and stand alone savings account. Upon sale of the property, owner must transfer the funds to purchaser, who shall open a new savings account. An insurance policy must be amended to substitute purchaser for the seller. Rents are usually readjusted on an annual basis.

18 Due diligence

What is the typical method of a title search and is it customary to order searches? Is there something akin to title insurance and opinion letters? Does your jurisdiction provide statutory priority for recorded instruments?

Title search is easily implemented upon obtainment of a copy of the record files in the competent REPR. Title search shall refer to the past 20 years and must indicate a continuous chain of ownership ending at the seller. Title search is mandatory and does not have a significant direct cost – usually seller supplies search documents to purchaser. Title insurance is not a practice, but opinion letters are usually supplied by attorneys assisting the purchaser. Recorded instruments have, by force of law, statutory priority. Although legal transfer of title only occurs by means of registration of the public deed of conveyance of the property (except in few circumstances where the law permits conveyance of property by means of private instruments), private instruments with a firm commitment of purchase and sale may also be registered with the relevant REPR for purposes of guaranteeing priority on behalf of the committed purchaser.

Further to title search, due diligence usually includes the obtainment of clearance certificates on taxes and social charges, and also on lawsuits, in the name of the sellers and previous owners, and in the name of the property, for the past 20 years. The seller usually supplies original copies of the certificates for the purchaser's review. The acquisition of rural land requires additional due diligence.

19 Reviews

Is it customary to arrange an engineering or an environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

The purchaser usually undertakes the physical review of the property in order to confirm measures, good standing conditions and possible environmental problems. Prior engineering and environmental reviews by purchaser are customary in respect to either commer-

cial or industrial properties and, also, rural land. The scope of the reviews may be freely determined by the interested parties but prospective purchasers generally require thorough and complete reviews to correctly assess pre-existing liabilities in case of closing of the transaction. Environmental reviews usually undergo different levels (basically levels I, II and III) as required by the prospective purchaser. Representations and warranties and indemnification provisions are common practice. Insurance is not available to cover damage to the environment.

20 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lawyers usually review leases. Key issues generally are those listed in question 15, with special focus on the right of first refusal and the surviving right of the lease agreement in case of sale of the property, the term of the lease and possible mandatory renewal provisions, wear and tear, security, tenants' rights to remodel and conditions of the property at termination. Leases and management agreements are not subordinated to mortgages (please refer to question 16).

21 Other agreements

What other agreements does a lawyer customarily review?

Lawyers may review brokerage and management contracts, condominium agreements, loan agreements, escrow agreements, deeds for conveyance of title, guarantee contracts (mortgages, sureties, pledges and others).

22 Closing

How does a lawyer customarily prepare for a closing?

Preparation to closing involves drafting of agreements and reviewing of due diligence documents and information. Closing checklist generally includes review and collection of tenants' and co-owners' waivers to rights of first refusal, transfer of tenants security deposits or amendment of insurance policies, issuance of notifications to tenants, collection of tax and social charge certificates, corporate authority and approvals. Public deeds for conveyance of the property, loan documents and guarantee contracts, including mortgage public deeds, are signed at closing.

Financing**23 Form of lien**

What is the method of creating and perfecting liens?

Liens are created either by private instruments or by public deeds. Liens that affect real estate (in rem lien) must be created by public deed, except in case of a chattel mortgage, which may in principle be created by private instrument. Liens that affect moveable assets, including securities, accounts and intangibles, and sureties, may be created by private agreements. Liens are valid between the parties upon execution of the relevant agreement or deed but only bind the target property or moveable asset, and generate effects against third parties, upon registration thereof with public registries. Documents with in rem liens must be registered with the competent REPR and documents that create liens on moveable assets or sureties or other personal guarantees must be registered with the Deeds and Documents Public Registry. Fees are due at the time of registration. Liens which burden equity quotas (for limited companies) or shares (for corporations) must additionally be registered with the Board of Trade or in the corporate books, as applicable.

24 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Foreign loans (either secured by collateral or not) must be electronically registered with the Central Bank, through the online information system. As part of such registration, the foreign lender must be registered before the Central Bank's corporate enrolment system (CADEMP) and with the Brazilian Federal Revenue Service (CNPJ). The mere registration with CADEMP or CNPJ (or both) does not subject foreign lenders to local taxes nor qualify the lenders as doing business in Brazil.

A foreign loan transaction may be contracted free of interest. Should, however, interest be due, interest payments shall be subject to Brazilian withholding income tax at the rate of 15 per cent (25 per cent if the beneficiary is resident in a tax haven jurisdiction). Tax on Financial Transactions at a rate of 5 per cent will be levied upon the entrance of the funds in Brazil for foreign loan transactions with an average maturity term of less than 90 days.

A lien on a real estate property may be established by the debtor on behalf of the lender by means of a mortgage or a chattel mortgage (as detailed in question 23).

Mortgages and chattel mortgages may be assigned to a replacing creditor and fees will again be due when the assignment is registered with the REPR. There are no restrictions on any assignment.

25 Interest

Is interest charged on a spread over LIBOR, Euribor or an equivalent? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

Interest rates may be freely chosen by the parties among a floating rate (LIBOR, Euribor, etc), a fixed rate or a combined rate (floating rate plus a fixed spread). However, the Central Bank may consider the proposed interest as non-compatible with prevailing market conditions and order the rate to be decreased by the parties. In addition to the interest rate, parties must register before the Central Bank's system the transaction fees and expenses, such as front-end fee, commitment fee, structuring and syndication fee and administrative fee (all fees are subject to the Central Bank's approval).

26 Enforcement

How are remedies enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding?

The loan agreement shall provide for the circumstances that will entitle the creditor to enforce the collateral – it may be any default by debtor or it may be only a monetary default, depending on what the parties agree. Creditor can never take possession of the property or the asset given as collateral. Instead, such property or asset (or both) must be sold in a public auction.

Enforcement of a mortgage must be made by means of a judicial procedure. Final court decision will cause the property to be sold in a public auction. Judicial enforcement of a mortgage may take from five to 10 years.

Enforcement of a chattel mortgage does not require a judicial procedure and usually takes from three to six months (except if any of the parties starts any judicial procedure in parallel (for example, challenging the enforcement), in which case it may take longer). In order to enforce the chattel mortgage, creditor must sell the property in a public auction.

In any case of enforcement of a mortgage or a chattel mortgage, the debtor may redeem the property prior to the auction. Should the auction actually take place, the monetary results therefrom will be used to pay the creditor and the balance, if any, will be released to the debtor.

27 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

By force of law, a lender can never receive possession of a property given as collateral. Therefore, the lender will never be entitled to collect rent from the property, unless the debtor also institutes an 'anti-*chresis* guarantee' on behalf of creditors as mentioned in question 30.

In order to protect its collateral, lender must record or register it before the competent REPR. Such registration also entitles the creditor to enforce the collateral.

Additionally, if the debtor ever takes actions aiming at reducing the enforceability of guarantees, the creditor may file a preliminary injunction procedure (judicial action) to stop such actions.

28 Recourse

Do the security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy filing?

If no collateral is established, a lender may have recourse to all of the assets of the borrower by means of a judicial procedure. Once the debt is recognised as due, the judge shall determine that as many assets of the borrower as necessary be seized to secure the debt.

Should a collateral exist (like a mortgage, a chattel mortgage or a pledge) the collateral itself will qualify as a privileged security *vis-à-vis* the seizure of other assets. Therefore, if a lender institutes a judicial action to collect its credit, the judge will first determine that the collateral be enforced and only after that will he or she authorise other assets to be seized.

A surety entitles the creditor to start a collection judicial action against the guarantor at the same time it starts an action against the debtor.

29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

It is typical for lenders to require a cash management system and to take reserves as they guarantee lenders' control over the use, destination and time of disbursement of the funds in connection with the financing, usually based upon certain conditions and pre-established criteria.

30 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

In general, real estate purchase and sale transactions are guaranteed by the purchaser by means of a mortgage or a chattel mortgage of the target property on behalf of the seller, but other types of guarantees are also used like a pledge or fiduciary assignment of credits, moveable assets or securities, letters of credit (for significant transactions), promissory notes, sureties and other personal written guaranties (by parent companies, for example). Guarantees of completion and performance bonds are used in built-to-suit transactions. In respect of certain transactions it is possible to obtain insurance. Holdbacks and escrow agreements are also used in connection with

Update and trends

It is currently (November 2008) ongoing in congress a project of law intended to update and change the existing urban real estate development law. The project is under discussion nationwide and is intended to be of the essence to guarantee a democratic use of urban areas in benefit of all citizens. One of the main aspects of the project is to permit irregular constructions to be regularised and, therefore, to transform such irregular constructions into properties with market value.

It is also expected for the next three or four months a revised interpretation or construction of the law that rules on rural land. According to the prospective new interpretation, all restrictions currently applicable to foreign individuals shall be extended to Brazilian entities held by foreigners.

Despite the international financial crisis, there is still space in Brazil for construction of medium to large residences or commercial units and, moreover, for construction of small residences for class C and D citizens.

outstanding conditions to be met by seller. Each such guarantee or protection may be established either as standalone or in conjunction one with the others. Owners may also establish a mortgage or a chattel mortgage to secure other types of loans or debts not related to the real estate property itself. As to the enforcement of guarantees, see question 26.

Further, an anti-chresis guarantee on behalf of the creditor may be established by the owner so as to permit creditor to exploit the property (including by leasing it) and satisfy its credit with the income generated by such exploitation, until the income totals the full amount of the secured debt.

31 Covenants

What are commonly used covenants in loan documents? What is the difference depending on asset classes?

Under real estate financing agreements the complexity of the covenants depends on the particulars of each transaction. Some specific covenants may depend on whether the property is intended for commercial, residential or industrial use. Typical covenants by debtor refer to:

- compliance with incorporation documents and material agreements;
- retention of accounting firm, disclosing of financial statements and material information and maintaining updated and accurate accounting books and records;
- maintaining valid and effective all licences, permits and authorisations;
- compliance with all applicable laws, rules and regulations, including labour, civil, environmental, corporate and tax laws and holding lender harmless from any and all claims in respect thereto;
- maintaining valid, effective and definitive title and possession rights on its property and not creating any lien thereon; and
- indemnifying lender for any loss that lender may incur as a result of a pre-existing liability or a breach of the loan agreement, including a breach to any Representations and warranties section thereof.

32 Financial covenants

What are typical financial covenants?

Financial covenants in real estate financing agreements may include obligations of the borrower in respect to:

- minimum net worth, minimum current ratio, minimum collateral ratio, minimum debt service coverage ratio and maximum level of indebtedness;
- correct use of the financing proceeds;
- distribution of dividends;

- non-subordination of the obligations under the financing agreement;
- registrations with Central Bank;
- transactions with affiliates;
- corporate reorganisations, joint ventures, profit-sharing or royalty agreements;
- changes of by-laws;
- prepayment of other long-term debts; and
- annual expenditures.

33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction?

Brazilian bankruptcy law provides for three main proceedings applicable to companies that are insolvent: voluntary or involuntary bankruptcy, judicial reorganisation and extra-judicial reorganisation.

In case of bankruptcy, the debtor is dismissed and the assets are collected and sold. The amount of the sale is shared among the creditors, according to a privileged order established by law, as follows:

- i labour credits, up to the limit of 150 Brazilian minimum wages, and credits derived from work accidents;
- ii credits with secured guarantees up to the value of the asset (the amount over this limit will be considered as an unsecured credit);
- iii tax credits;
- iv credits with special privilege;
- v credits with general privilege;
- vi unsecured credits;
- vii contractual penalties; and
- viii subordinated credits.

The reorganisation procedure (judicial or extra-judicial) is applicable when the company is still able to overcome the economical and financial crisis. In this case, the company, its business, assets, agreements and employments are preserved in the interest of creditors.

34 Secured assets

What are the requirements of creation and perfection of a security interest? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Please refer to question 23 with respect to the requirements of creation and perfection of a security interest.

Control of the collateral is not usually necessary to perfect a security interest. However, the majority of the financing agreements provide for restrictions in connection with the use and management of the collateral by debtor, including, among others, establishing any additional lien on the same property.

35 Single-purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy filing, has the concept been upheld?

SPEs are usually established by the property owners or developers but not necessarily upon a requirement of the lender. However, in certain structured loan transactions, in particular those involving securitisation, lenders may require the borrower to be an SPE.

Brazilian legislation does not provide for a specific regime for an SPE. SPEs, therefore, are Brazilian entities that have one sole specific

purpose. The basic requirement is that the company must have at least two partners, either Brazilians or foreigners.

An SPEcific regime, different from an SPE, exists and may produce a segregation result similar to the results of an SPE. Upon registration before the competent REPR and filing of an option form with the Brazilian Internal Revenue Department, a developer may, at its discretion, determine that a given real estate development (including the land, construction and other assets and rights related therewith) be treated separately, apart from other assets of the developer. Such assets cannot be assessed by developer creditors (including tax authorities) not related to the relevant real estate development.

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