



ISSUES RELATING TO COMMERCIAL LEASING

BRAZIL Demarest e Almeida

CONTACT INFORMATION

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1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.

None.

2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).

There is no specific term established by the Lease Law regarding the lease agreements. Therefore, the term may be defined by the parties, according to their interest, it being permitted the agreement of a lease for an indeterminate term.

Leases which term is equal or greater than 10 (ten) years must be executed by the spouse if the landlord is married.

3. Describe any laws requiring landlords to allow a tenant to renew its lease.

With regard to commercial leases, please note that the Lease Law (Law no. 8245/91) guarantees, among other things, that commercial leases with a determinate term grant the tenant certain protections, among them the right to renew the lease for an equal term if all the conditions for the exercise of such right are met (the "Renewal Right"). The conditions are: (i) the contract to renew is executed in written and for an determinate term; (ii) the minimum

term of the agreement or the sum of the aggregate terms of uninterrupted written agreements is at least 5 years; and (iii) the lessee is exploiting its business, in the same line, for a minimum and uninterrupted term of 3 years. The fact that all conditions for application of the Renewal Right are met does not mean that the renewal will always occur automatically. In case the landlord refuses to respect the Renewal Right, the lessee will have to claim its right in Court, through a proper legal claim (the “Renewal Claim”). The Renewal Claim must be filed by the lessee within the penultimate semester of the term of the lease agreement.

4. Describe any restrictions on rent that may be charged for to a tenant.

The parties are free to fix any index for the rent restatement. However, it is forbidden to fix the rent in foreign currency or to link it to the exchange gain variation or to the minimum wage.

In addition, the Lease Law establishes the right of the parties to, after the 3rd year of the term of the agreement, request a judicial revision of the rent amount, in order to adjust it to the market price (which may be lower or higher than the one in course).

The value of the rent of the sublease may not be higher than the value of the rent of the original lease.

5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.

According to Brazilian Law, tenants may always early terminate lease agreements, upon a 30-days prior written notice and the payment of the contractual fine, which is usually paid proportionally to the elapsed period of the agreement.

6. Describe any laws allowing tenants to assign or sublease without landlord’s consent.

The tenant may sublease in whole or in part and free-lease the leased premises or assign the rights and obligations of the agreement to a third party provided that it is not prohibited by the lease agreement. A new lease with new rights and obligations is created between the tenant and the subtenant. The subtenant has the right to require that the tenant not only complies with the terms of the sublease but also complies with the obligations contracted by the tenant in the original head lease. The tenant will of course continue as regards the landlord to be bound by the terms of the head lease.

An assignment of the lease consists of a direct assignment of the rights and obligations under the lease. An assignee of the lease is thus subrogated directly in the rights and obligations of the previous tenant who, as from the date of the assignment ceases, to be so obliged or have any rights under the lease, provided the landlord expressly so agrees, either when granting the lease or upon consenting to the assignment. If there is no express agreement of the landlord, the previous tenant will remain bound under the lease together with the assignee.

7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.

Landlord may restrict the sublease or assignment. The parties have to reach an agreement and insert a specific provision in the contract which will be valid during the whole lease.

8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?

Disputes between landlords and tenants are typically resolved by litigation. The proceeding is ordinary and the court must order the eviction after analyzing the grounds for the eviction.

The landlord is entitled to claim the eviction of the tenant from the leased property upon events such as non-payment of rent, change of purpose of the lease agreement, expiration of the term or damage in the property. Tenant has to be given a written notice stating the reason for termination of the lease. Failure of tenant in leaving the property authorize landlord to file an eviction lawsuit requesting the termination of the lease and the eviction of the tenant. In the event of lack of payment, tenant may avoid termination and eviction upon payment of all unpaid rents and costs related to it, such as penalties, interests and attorneys' fees.

Court proceedings may take from months to years, depending on many factors such as the causes of the damages or the eviction and the evidence offered by the parties. Eviction orders are generally obtained in a reasonable short period whether the reasons are sufficient evidenced.

9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?

No.

10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.

Usually any security deposits that are granted to landlords in Brazil are deposited directly in their own accounts and are offset in the end of the lease, upon a discount from the amount of the rent for the last three months of the agreement.

As regards the guarantees for payment of the rent, the Lease Law defines three possible types of guarantee: (i) pledge; (ii) surety ("Fiança"); or (iii) lease insurance. The landlord has the right to choose the type of guarantee to be used but only one type is allowed (landlord cannot may required more than one). Finally, note that the a guarantee is not mandatory in the lease agreement. It is possible to execute a lease agreement without guarantee, in case this is the will of the parties. In general the surety is the most requested and most accepted type of guarantee most requested or accepted by the landlord but the use of lease insurance is increasing in Brazil.

11. Describe any required statutory or other legal disclosures to be made to all tenants.

There are none.

12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.

There are no taxes on rent in Brazil. Brazilian leases usually establish that tenants are responsible for the payment of the taxes levied on the property during the term of the lease.

13. Describe any limitations on the ability of landlords to exercise self-help.

Exercising of self-help is not allowed in Brazil. Any measure to evict tenant and recover the property has to be taken with due observance of a judicial process.

14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

In principle, remedies must be expressly stated.

In Brazil rent is usually paid within the first 5 days of the subsequent month and lack of payment is considered breach of contract and is considered as grounds for an eviction lawsuit.

As a general rule, the Lease Law provides that the Tenant may terminate the agreement at any time, provided that Landlord is given proper written notice with at least 30 days in advance, and provided that Tenant pays the fine which was contractually agreed.

Specifically with regard to build to suit contracts, the agreement may provide that the rents are accelerated in the event that the tenant decides to leave the property before the end of the agreement's term. Such provision, however, has to be clearly stated in the agreement.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.

The lease law provides some specific cases in which the eviction order may be granted by an injunction, with a term of 15 days for tenant to leave the property, upon a deposit guarantee from landlord in the amount of 3 monthly rents. Such cases are provided for in Section 59 of the Brazilian Lease Law (Law no. 8.245/91).

16. Describe any formal requirements for the execution of a lease.

The tenant has to be given a written notice stating the reason for termination of the lease. If the tenant does not leave the property within the time specified in the notice, the landlord may bring an eviction lawsuit to evict him before a civil court. The proceeding is ordinary and the court must order the eviction after analyzing the grounds for the eviction.

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

In order to be enforceable against third parties, leases must be recorded with the competent Real Estate Registry Office. One of the main effects of the recordation of leases is the guarantee of the continuance of the lease in case the property is sold (or transferred, i.e., by means of a foreclosure). In order to obtain the above mentioned guarantee, it is necessary that the lease agreement: (i) is contracted for a determinate term; (ii) contains a specific clause establishing the new owner's obligation to respect the agreement; and (iii) is recorded with the Real Estate Registry Office. The other relevant effect is related to the right of first refusal which is granted to Tenants in equal conditions with third parties, in the event of sale of the property during the agreement. The landlord has the obligation to notify the tenant in case of

any negotiation regarding the sale of the property and tenant shall have a 30-days term as of receipt of the notice to exercise its right. In the event Tenant is deferred with regard to such right, if the agreement is recorded Tenant shall be able to deposit the price and have the property assigned to it.

18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?

There are no restrictions provided the right of first refusal is observed. Please refer to the answer of question 17 above.