

A BRIEF COMPARISON OF LEGAL REGULATIONS ON SHOPPING CENTERS IN BRAZIL AND PORTUGAL

REAL
ESTATE

BRAZIL

According to the Brazilian legal regime, the use and the occupation of land, as well as urban zoning, are regulated by municipal rules. As a rule, there is no specific regulation applicable to *shopping centers*. Prior to the beginning of the construction works, it is mandatory to obtain a Construction Permit from the competent municipality, which allow the obtaining of the Occupancy Certificate, once construction works are completed. Along with these permits, for regular operation, shopping centers require a fire inspection certificate, as well as an operating permit issued by the local municipality. Depending on the municipal legislation, the referred permit may be issued for the shopping center or for each one of the shops. Other permits may be required by the competent authorities depending on the type of project and the municipality in which the project is located.

A shopping center may be established on a property represented or by one land title (one autonomous unit) or under a building condominium system (a horizontal property in the Portuguese Law, or the so called “condomínio edilício” in Brazilian Law), in which each shop has its own registration. In both cases, the shopping center can be held by different people in a civil condominium in which each co-owner have an ideal fraction of the entire *shopping center* or of each shop, as appropriate.

In general, the shops are leased, being that the conditions of these agreements can be freely established between the parties in the terms provided by article 54 of the lease law (Law 8.245/91).

In this manner, it is customary that each shopping center has the following instruments which regulate it: **(a)** Civil Condominium Convention, (*pro indiviso*) that describes the relation between the co-owners, establishing, among others, the quorum for new investments, the distribution of profits and expenses, and the exercise of preemption rights (right of first refusal) between the co-owners; **(b)** Declaratory Term of General Lease Rules, which deals with the relation between the tenants and the entrepreneurs of the shopping center; **(c)** Internal Regulation which establishes the operation rules of the shopping center; **(d)** Statute of Retailers Association and Promotion Fund and

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Promotion Fund, which establishes the relations between the retailers with special focus on how to promote the shopping center jointly with the owners of the shopping center.

We point out below some of the clauses, which are usually established in the Declaratory Term of General Lease Rules:

- (a) Change of control clause: establishes that the tenant will need a previous authorization from the landlord in order to change its corporate control. This clause has already been discussed in court and in certain situations it was considered as a valid clause, given that the change of corporate control of the tenant may affect the quality of the services and/or products offered by the shop and, consequently, also affect the tenant-mix of the shopping center, which is a relevant element for the success of the shopping center.
- (b) Transfer rate: In the event that the landlord allows the change of corporate control of the tenant, or an assignment agreement, or the sublease of the shop, the tenant shall pay to the landlord a certain amount.
- (c) Non-competition Clause: Without previous authorization of the landlord, the tenant may not open, within a certain distance of the shopping center, a new shop with the same activity developed by him in the shopping center. A few shopping centers establish that in the event of breach of this clause, not only the landlord can terminate the agreement, but also choose to charge a percentage over the amount of gross sales of the new shop. There is no solid jurisprudence related to the validity of this clause.
- (d) Rental: There is a variable rental (percentage on the value of the sales of each shop) and a minimum rental, being due the highest amount between them. In December (Christmas) the minimum rent shall be considered in double and in May shall be accrued to 50% (Mother's Day).
- (e) Supervision: In case of doubt over the amount of the sales stated by the tenant, the landlord reserves itself the right to audit the sales of the latter.

We stress that these are negotiable clauses which may differ in each shopping center.

Moreover, in the beginning of each lease, it is common to charge the tenants a co-participation rate due to the expertise of the management and the clients attracted by the shopping center.

Finally, the development of shopping centers is a market which remains in a large expansion in Brazil and given its complex structure, the investors shall be alert not only to legal rules but also to the instruments normally used to make it viable.



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PORTUGAL

In the terms set forth in Law 12/2004, as of 30 March, the shopping centers which have a gross lettable area equal or exceeding 6.000 sq.m are subject to an administrative authorization of installation, as well as the approval of the location, to issue where appropriate by the competent regional commission or by the competent municipality (article 4 and 5 of Law number 12/2004, as of 30 March). The acts of authorization of the installation of commercial complexes that are covered by the referred law are subject to a payment of a rate.

In what concerns the agreements entered into between the shopkeepers and the owner or management entity of the shopping center, they are described as non-standard or unnamed contracts, which are freely regulated between the parties in the exercise of their private autonomy, having only as a limit the application of the general contractual terms provided in the Decree-Law 446/85, of 25 October.

In relation to the legal terms of the management of a shopping center, there is an internal regulation which establishes the relation between the shopkeeper and the service provider, on one hand, and the regulation between the owner and the management entity, on the other hand. Beyond the internal regulation there is also a shopkeeper manual which aims to describe the conditions in which the spaces are delivered by the promoter to the shopkeepers, as well as to define the procedures relating to the permit of architectural projects or the execution of works. Occasionally, incorporated associations represent the shopkeepers before the owner or the management entity of the shopping center.

As regards the clauses that are generally part of the utilization contracts, we may list the following:

- a) Payment: as a rule, the payment has a fixed and a variable component the latter being charged over the revenues arising from the operation of the shop;
- b) Assignment of the contractual position: the utilization contracts are *intuito personae*, as a consequence, in general, the assignment of the contractual position is not allowed. However, in the contracts in which the assignment is allowed by agreement between the parties, a written agreement of the management entity or the owner of the shopping center, as well as the payment of compensation to these entities based on the amount of the monthly payment is always mandatory;
- c) Period of the contract: as a rule, the contracts remain in force for a period of six or more years. The shopkeeper is not allowed to terminate the agreement during the term of the agreement under penalty of having to indemnify the management entity of the shopping center;

- d) Guarantees: a bank guarantee on first demand which has to be valid during the period of the contract in order to ensure the payment of the rent is required from the shopkeeper;
- e) A penalty clause is applicable in case of non-compliance by the shopkeepers, such as the default of payment or shop closure during the period of normal opening hours of the shopping center. The referred penalties are established in respect to the fixed rent through the application of a determined coefficient. In the event of repeated and serious failure, the management entity may terminate the contract by written notice, having the right to immediately enter the shop, if the shopkeeper does not voluntarily deliver the shop.

The clauses may change not only from shopping center to shopping center but also from shop to shop, in contracts called “anchor shops”. These shops attract a relevant number of clients to the shopping centers and the negotiating conditions are more favorable than the contracts with shops less relevant for the shopping center. In Portugal there is a lot of experience in the construction and management of shopping centers which enables investors to make investments with reasonable legal certainty as regards the utilization of contracts by shopkeepers.

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