

Acquisition of Rural Real Estate by Brazilian Companies Controlled by Foreigners is Accepted without Restriction in the State of São Paulo

A December 2012 opinion of the Inspector General's Office of the Courts of Justice of the State of São Paulo exempts real estate registrars and notary publics from applying the restrictions imposed by Federal Law No. 5,709, of November 26, 1974, relative to the acquisition of rural real estate by Brazilian legal entities controlled by foreigners. The restrictions include size limitation on the rural real estate being acquired and acquisition authorization from either the Ministry of Agriculture or the Ministry of Industry and Commerce, depending on the intended use for the property, as well as acquisition authorization from the National Defense Council should the property be located along the Brazilian border. The opinion reflects the September 12, 2012 writ of mandamus decision of the Special Body of the Courts of Justice of São Paulo, which challenged the National Council of Justice (CNJ) and the Attorney General of the Union (AGU) position on the matter.

On July 13, 2010, the CNJ Office of Inspector General issued an opinion recommending that state inspector general offices instruct real estate registrars and notary publics to apply the restrictions set forth in Federal Law No. 5,709 regarding the acquisition of rural real estate by Brazilian companies controlled by foreigners. Effectively, thus, real estate registrars and notary publics had to require that rural real estate purchasers provide proof of acquisition authorization from the competent federal body. Further, real estate registrars and notary publics had to submit a list of recent acquisitions of rural real estate by foreigners, including Brazilian companies with the majority of their quotas or shares held by foreigners, to state inspector general offices and to the National Institute for Rural Settlement and Agrarian Reform (INCRA)/Ministry of Agrarian Development.

AGU Opinion LA-01, approved by the President of the Republic on August 23, 2010, supported the CNJ Office of Inspector General opinion, stating that Section 1, Paragraph 1 of Federal Law No. 5,709¹ was not revoked by the Federal Constitution of 1988 and, therefore, that Brazilian companies controlled by foreigners are subject to the restrictions imposed by Federal Law No. 5,709.

The opinion of the Inspector General's Office of the Courts of Justice of the State of São Paulo and the decision of the Special Body of the Courts of Justice of São Paulo held, however and contrastingly, that differentiating Brazilian legal entities based on the nationality of their controlling stakeholdership is unconstitutional, including for reason of the same being deemed unconstitutional under the Sixth Constitutional Amendment of 1995.

Notwithstanding, the effects of the opinion of the Inspector General's Office of the Courts of Justice of the State of São Paulo and the decision of the Special Body of the Courts of Justice of São Paulo are limited. Firstly, these holdings apply only to State of São Paulo real estate registrars and notary publics. Secondly, there are additional obligations before federal bodies (necessarily bound to adhere to the AGU determination) that must be met under various laws, decrees and ordinances for the acquisition of rural real estate. For example, Rural Property Tax (ITR) must be paid, registration of the acquired rural real estate must be regularly updated with INCRA, and georeferencing of the property must be conducted in accordance with Executive Branch stipulations. Should these obligations not be met, INCRA Certificate of Registration of Rural Property (CCIR) issuance may be withheld, consequently preventing the partition, lease, mortgage or sale of the real estate.

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¹Section 1 – Foreign citizens living in Brazil and foreign legal entities authorized to perform their activities in Brazil may acquire rural real estate only as provided herein.
Paragraph 1 – Brazilian legal entities with the majority of their capital stock held by foreign citizens who are resident abroad or legal entities that have their offices abroad are also subject to the regime provided herein.

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The situation described above highlights the potential conflict that may arise between the CNJ Office of Inspector General and the inspector general offices of the Courts of Justice of the various Brazilian states, due to the overlap of competences of these bodies, should other state inspector general offices opine similarly to the Inspector General's Office of the Courts of Justice of the State of São Paulo. As these offices have yet to hold a position on the matter, real estate registrars and notary publics other than those of the State of São Paulo will continue to adhere to the CNJ Office of Inspector General opinion and, thus, impose the restrictions provided by Federal Law No. 5,709 to Brazilian companies under foreign control.

It is also noteworthy to mention that the 2010 CNJ Office of Inspector General opinion directly impacted on Brazilian banks under foreign control. Since the issuance of said opinion, these banks faced difficulty in registering rural real estate as collateral as real estate registrars and notary publics considered the same to be subject to the restrictions imposed by Federal Law No. 5,709 and, therefore, dependant on the authorization of federal bodies. The Brazilian Association of International Banks thus requested that the CNJ Office of Inspector General review its opinion to allow for such registration, even when granted on behalf of a Brazilian bank under foreign control. By way of formal response, the CNJ Office of Inspector General then declared that its opinion concerned only the acquisition of rural real estate and that the registration of rural real estate as collateral was not subject to the restrictions set forth in Federal Law No. 5,709, which restrictions would apply only in the case of foreclosure. The CNJ Office of Inspector General declaration is not binding relative to rural real estate located along the Brazilian border, however, which may only be offered as collateral if authorized by the National Defense Council.

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