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# THE REAL ESTATE LAW REVIEW

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THIRD EDITION

EDITOR  
DAVID WATERFIELD

LAW BUSINESS RESEARCH

# THE REAL ESTATE LAW REVIEW

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# THE REAL ESTATE LAW REVIEW

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Third Edition

Editor  
DAVID WATERFIELD

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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# EDITOR'S PREFACE

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Building on the success of the previous editions of *The Real Estate Law Review*, the third edition now extends to some 40 jurisdictions, and we are delighted to welcome new contributors from key countries around the world. *The Real Estate Law Review* seeks to enable practitioners and clients to meet the challenge of keeping abreast of the rapidly evolving global real estate market. Each chapter offers an up-to-date and accessible summary of the key legal and practical developments in the relevant jurisdiction, and a vital snapshot of the important market drivers, trends and opportunities. Together, the chapters provide an invaluable overview of international real estate.

It is no longer possible to look at domestic markets in isolation; real estate has become a global industry, and *The Real Estate Law Review* reflects that status. An awareness of the global real estate market and an understanding of the practices and requirements of overseas investors are vital if practitioners and their clients are to take advantage of investment trends and opportunities as they develop.

*The Real Estate Law Review* continues to provide an overview of the state of the international real estate market, including the types of investor, the sources of funding and those assets that are in demand. In general, the focus remains on prime properties in the world's leading global cities as investors continue to seek a safe haven for their capital. Although this remains the case with London, investors are starting to see opportunities in the wider UK market, and we are generally more optimistic than at this time last year. However, positive recent news, data and forecasts must still be considered in the light of continuing economic and political challenges, including the next US fiscal cliff, uncertainty in emerging markets and the stability of the eurozone.

Once again, I wish to express my gratitude to the distinguished practitioners from across the globe who have provided invaluable contributions to this edition. As ever, I would also like to thank Gideon Robertson and his team for their sterling efforts in compiling this third edition of *The Real Estate Law Review*.

**David Waterfield**  
Slaughter and May  
London  
February 2014

## Chapter 27

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# PORTUGAL

*Filipa Arantes Pedroso*<sup>1</sup>

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

The definition of property in Portugal follows that of other continental legal systems based on Roman law and the French Civil Code, encompassing not only freehold but also other rights of guarantee and of acquisition. Therefore, the definition of property includes full possession and exclusive use and disposition. In Portugal, there are no trusts,<sup>2</sup> except in the Free Zone of Madeira, where it is possible to incorporate a trust. A person can also own the title to a property while another person has the right to temporarily take the profits and the right to use and manage the property.<sup>3</sup> In addition, it is possible for a person to construct or maintain (permanently or temporarily) a building on land owned by another person, or to plant and maintain crops on such land.<sup>4</sup>

A property may be owned by one or more persons (common property),<sup>5</sup> and it is possible to divide buildings into segments (floors, etc.), which in Portugal is called horizontal property.<sup>6</sup>

### ii Registration system

The purchase and sale of a property (arable land and plots of land or buildings) must be executed by a notary or a lawyer, or the commercial and industrial office or the registry

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1 Filipa Arantes Pedroso is a partner at Morais Leitão, Galvão Teles, Soares da Silva & Associados.

2 A fiduciary relationship regarding property and subjecting the person with title to the property to equitable duties to deal with it for another's benefit.

3 Article 1439 et seq. of the Civil Code (*usufruto*).

4 Article 1524 et seq. of the Civil Code (*direito de superfície*).

5 Article 1403 et seq. of the Civil Code (*compropriedade*).

6 Article 1414 et seq. of the Civil Code (*propriedade horizontal*).

officers. Certain documents are required for the purchase and sale of a property, notably a licence for use of a building, or a construction licence in the case of urban land. Both documents are issued by the municipality in which the relevant property is located.

The purchase and sale of property must be registered with the Property Registry in order to produce effects against third parties; the Property Registry is part of the Portuguese state. Registration is compulsory with regard to any facts that create, recognise, acquire or modify any real estate rights. The right that is first registered prevails over any subsequently registered rights.

### **iii Choice of law**

The law applicable to the possession, title to property and other real estate rights is defined by the state in which the property is located;<sup>7</sup> therefore, Portuguese law is applicable to the creation, recognition, acquisition or modification of any real estate rights in Portugal.

In the indirect acquisition of real estate, share deals, share purchases and sale agreements may be subject to any other law that has a connection with the persons or companies involved; however, if the company or special purpose vehicle is a Portuguese entity, Portuguese law requirements concerning the sale of shares or of any other participation such as quotas (participation in a company not represented by shares but registered at the Commercial Registry), or units in real estate investment funds, must be complied with.

## **II OVERVIEW OF REAL ESTATE ACTIVITY**

The Portuguese economy was seriously affected by the financial crisis, which undermined the country's economic activity. In an uncertain financial market, the evolution of the Portuguese economy continues to be determined by the necessity of budget consolidation and the strengthening of the process of adjustment to macroeconomic growth with repercussions on economic growth and employment. This situation led to the bailout request to the EU, European Central Bank and International Monetary Fund. The measures required by the memorandum of understanding entered into between those entities and the Portuguese government were adopted, and signs of recovery were visible during the third quarter of 2013.

The real estate investment market was one of the sectors significantly affected by the financial crisis, but recovery is expected in 2014.

Tourism continues to be a main priority for the government. Tourism increased in 2013 by more than 8 per cent, and Lisbon was awarded the best location for city breaks by the European World Travel Awards. China, Russia and Brazil have contributed to the increase of tourism worldwide, and notably in Portugal, Spain, Greece and Italy. Portugal's general tourism offering is very diversified, and its climate and hospitality are highly valued by tourists. However, Portugal's ambitious health tourism project has not advanced as expected. The cross-border health-care Directive,<sup>8</sup> which seeks to facilitate

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7 Article 46(1) of the Civil Code.

8 Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border health care.

access to safe and high-quality health care across EU Member States and promotes cooperation between Member States, has not yet been implemented; the Directive laying down measures to facilitate recognition of medical prescriptions issued in another Member State complements the cross-border health-care Directive, and both are key for the development of Portugal's health and wellbeing tourism project.

### III FOREIGN INVESTMENT

There are no restrictions concerning the ownership of real estate by non-resident or foreign investors; they are treated the same as Portuguese nationals or residents. Tourism and activities declared to be of relevance to tourism according to the applicable legislation may be granted tax incentives. Companies established in Portugal may be entitled to a special investment support regime, notably exemption from property transfer tax (IMT) and stamp duty on the acquisition of land and property if considered a relevant investment.

### IV STRUCTURING THE INVESTMENT

Real estate can be acquired directly, in an asset deal, or indirectly, in a share deal.

The asset deal is subject to IMT at a rate of 6.5 per cent on the price or patrimonial value (whichever is higher) for urban property (buildings and land for construction), or 5 per cent for rural property (arable or agricultural land). The rate is higher in the case of offshore properties established in certain countries and listed in the applicable law.

The asset deal is also subject to stamp duty at a rate of 0.8 per cent on the price or book value, whichever is higher. Value added tax (VAT) is not applicable; if, however, certain conditions are met, the owner may renounce this VAT exemption, allowing the seller to deduct the VAT paid during construction or any other VAT applied during the course of the business.

The most popular investment vehicles for share deals are commercial companies: the public limited liability company (SA) or private limited liability company (Lda). Other common investment vehicles are the real estate investment fund (FII) and real estate investment company (SIIMO).

In the case of commercial companies, if the real estate is already owned by the company, the above-mentioned transfer taxes (IMT and stamp duty) do not apply when the company is sold; if, however, the company is a quota company (Lda), transfer taxes will apply if the company has only one shareholder or if one of the shareholders holds a participation of more than 75 per cent. Income from real estate is subject to general corporate income tax (IRC) if the property belongs to a company. This tax, at a rate of 25 per cent in 2013, is accrued on a percentage of the taxable profit at the following rates:

<i>Percentage</i>	<i>Taxable profit</i>
Zero per cent	Up to €1.5 million
3 per cent	Over €1.5 million and up to €7.5 million
<i>Taxable profit over €7.5 million</i>	
3 per cent	Over €1.5 million and up to €7.5 million
5 per cent	Over €7.5 million

If the property is owned by a person, the income of the property can be included in the overall income of such person and be subject to the applicable tax rate, which ranges from 14.5 per cent to 48 per cent, or be subject to a tax rate of 28 per cent. The owners of real estate are subject to municipal tax (IMI), which rate ranges from 0.3 per cent to 0.8 per cent of the value of the property (a special rate of 7.5 per cent is applicable for properties owned by companies located in tax havens). The IMI tax is paid every year in April, July and November if the tax due is higher than €500. Stamp duty of 1 per cent is due if the value of the residential property is above €1 million.

Any capital gains obtained by the sale of the real estate are also subject to IRC, but 50 per cent may be deductible if, during the following two years, the capital gains are reinvested. Dividends paid by the resident companies or resident individuals are subject to tax at a rate of 28 per cent; non-residents from the EU are exempt from paying taxes in Portugal if their shareholding (shares held for more than one year) amounts to at least 10 per cent, in line with the Parent-Subsidiary Directive. There are various agreements in force in Portugal to avoid double taxation.

FIIIs can be open or closed-end funds depending on whether they are incorporated by public or private subscription. FIIIs do not have legal capacity, and therefore are managed by management companies or credit institutions. The incorporation of a management company requires the authorisation of the Bank of Portugal, while the incorporation of an FII requires the authorisation of the Securities Market Commission (CMVM) and is then subject to its supervision. SIIMOs have legal capacity and can have variable capital (SICAVI), with a similar regime to the open-end FII, or fixed capital (SICAFI), which has the same regime as a closed-end FII.

In the acquisition of real estate, the open-end FII and SICAVI are exempt from IMT and stamp duty. Closed-end FIIIs and SICAFIs whose units are held by qualified investors or by financing institutions pay only 50 per cent of IMT and stamp duty. Regarding the property income of the FII and SIIMO, tax at a rate of 25 per cent applies to the net income, which does not include conservation and maintenance, and IMI. The FII and SIIMO may not deduct the interest of the financing obtained for the acquisition or construction of real estate. The capital gains tax rate is 25 per cent over half of the positive difference between gains and losses made. The management company must pay this and income tax in April of the following year.

The income held by non-residents in Portugal distributed by the FII and SIIMO is exempt from tax in Portugal.

## **V REAL ESTATE OWNERSHIP**

### **i Planning**

The Portuguese planning and licensing legislation is for the most part contained<sup>9</sup> in the Basic Law of Political Planning of the Territory and Urbanism, in the legal regime applicable to territorial management instruments and in the legal regime for licensing and development (the RJUE). The municipalities play an important role in the planning

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9 Notwithstanding the Constitution, which contains planning and development principles.

and licensing of real estate projects. Planning in Portugal is carried out in accordance with previous options contained in plans. Therefore, in the development of a real estate project it is important to analyse the applicable rules of territorial management, notably the special plans and the municipality plans.

The rules for the licensing of a real estate project are contained in the RJUE, and aim, in general terms, to confirm whether the project complies with the applicable law. The municipalities are responsible for the licensing of projects, but there are other entities that need to be consulted, and in certain cases their opinions are binding (e.g., the Tourism Authority regarding tourism projects). When construction is complete, a licence must be obtained that confirms that it was concluded in accordance with the approved designs and the terms of the construction licence. This user licence certifies that the relevant building or part can go into use. Tourism projects also need to comply with the legal regime for the installation, operation and functioning of tourism projects.

Certain retail commercial establishments and groups of establishments that have selling spaces above certain thresholds (2,000, 3,000 or 8,000 square metres) require special licences, generally called commercial licences.

## ii Environment

The Environmental Liability Law,<sup>10</sup> based on the polluter-pays principle, establishes that, if any damage to the environment occurs or there is a threat of damage due to a private or public economic activity, the entity responsible must take the necessary measures to repair the damage or prevent other damages (administrative liability), and must also repair all damages suffered by the individuals affected by such activities (civil liability).

Criminal liability can arise from damage to the environment such as contamination of soil, which is considered a criminal offence and is punishable by up to three years' imprisonment or a fine equivalent to 600 days of imprisonment, according to the Criminal Code.

## iii Tax

The acquisition of real estate is subject to IMT at a rate of 6.5 per cent on the price or book value, whichever is higher, for urban property (buildings and land for construction) or 5 per cent on the price or patrimonial value, whichever is higher, for rural property (arable land). The acquisition of a property is also subject to stamp duty at a rate of 0.8 per cent on the price or patrimonial value, whichever is higher.

Properties are also subject to IMI, paid every year in three instalments in April, July and November,<sup>11</sup> at a rate of between 0.5 per cent and 0.8 per cent for urban properties that were not evaluated in accordance with the IMI Code, and between 0.3 per cent and 0.5 per cent if the property was evaluated in accordance with the IMI Code. Rural properties are subject to a rate of 0.8 per cent. Properties owned by certain offshore entities listed in the applicable law pay 7.5 per cent.

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10 Decree Law No. 147/2008 of 29 July.

11 If the amount due is below €250, it is paid in April; if the amount due is above €250 and equal to or below €500, it is paid in two instalments, one in April and the other in November.

The housing stock was evaluated during 2012 and 2013, and the taxable value is now close to market values. Valuation is updated regularly (yearly for commercial real estate and once every three years for residential real estate, as foreseen in the applicable law).

#### iv Finance and security

A loan agreement secured by a mortgage is the most common financing and security for real estate projects in Portugal. A mortgage grants the creditor the right to be paid a certain amount with priority over other creditors without any special privilege. The mortgage is created by an authenticated private document or by a deed executed by a notary public. The mortgage must be registered at the Property Registry to be effective.

Other security, such as a pledge, is also quite common and usually required in addition to the mortgage by the financing party. If the property is owned by a company, there is a pledge of shares or quotas; the pledge of quotas must be registered at the Companies Registry. The requirements for a pledge of shares depend on the type of shares: bearer, nominative or book entry shares. A pledge of credit rights such as leases, bank accounts, insurance policies or construction contracts is also quite common. The creditor will usually require a pledge over the credit rights that the debtor is entitled to and that represent the main revenue of the project being financed. In certain conditions, the pledge can be qualified as a financial pledge. Personal security is also usually required by the financing party to the shareholders or parent company of the company owning the property.

Financing and security granted in Portugal or to Portuguese companies is subject to stamp duty on the amount of the financing or the maximum amount secured. If security is accessory to a finance agreement and granted simultaneously, the security is not subject to stamp duty, meaning that stamp duty only applies to the amount of the financing. Stamp duty rates are 0.4 per cent if the financing or security is for less than one year, 0.5 per cent if the term is between one and five years, and 0.6 per cent if it is longer than five years.

## VI LEASES OF BUSINESS PREMISES

Six years after the enactment of the New Urban Lease Regime,<sup>12</sup> a reform<sup>13</sup> entered into force on 12 November 2012. Lease agreements must be in writing. If a property is sold, the leases do not terminate and are automatically assigned to the new owner of the property. There are two types of leases: housing and commercial. Housing leases no longer have a minimum term, and when parties are silent on this point the lease shall be considered as having been entered into for a fixed term of two years. The main terms of commercial leases continue to be freely agreed between the parties, notably regarding the duration, termination and opposition to the extension. The maximum duration of a commercial lease is 30 years, and if the parties do not establish a duration, the law

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12 Approved by Law No. 6/2006, 27 February, which entered into force on 28 June 2006.

13 Law No. 31/2012, 14 August.

provides a default a five-year period; the tenant can terminate the lease with one year's notice.

The parties can also freely agree the responsibility for the maintenance of the leased premises; however, if the agreement does not specify otherwise, the landlord will be responsible for maintenance. The amount of the rent and other costs are also freely agreed between the parties.

The assignment of a lease agreement is subject to the consent of the landlord except in the case of a transfer of an ongoing business, where the lease is included. In this case, the landlord has a right of pre-emption, unless the parties have agreed otherwise. The tenant, however, has a pre-emption right in the sale of a leased premises to a third party, provided that it has been in the leased premises for more than three years; in this case, the parties may not agree otherwise.

Any party may terminate the lease in the case of default of the other party. Termination by the landlord must be declared by a court decision, except in cases of opposition of the tenant to works ordered by public authorities; non-payment of the rent, costs and expenses for two months; or a late payment of more than eight days for more than four times in a row or four times in a period of 12 months. In the first two situations, termination is effective upon communication to the tenant except if, in the following month, the tenant pays the amounts due with a penalty (50 per cent of the amounts due) or allows the works requested. This means that at the very least the tenant remains in the leased premises for three months: two months for the landlord to terminate, and another month prior to paying, not paying or agreeing to the works (a three-month delay counted from the landlord's notification). Law 31/2012 has also introduced a special procedure to expedite the eviction of a lessee and return of the property to the rental market. This reform maintains the existing eviction procedure for the termination of a lease whenever the law imposes the use of the judicial route for that end. Additionally, the Law has introduced the previously mentioned special eviction procedure as a means to terminate effectively the rental agreement, regardless of the rental's purpose, whenever the tenant does not vacate the leased property on the date set by law or determined by the parties for that effect.

Through this procedure, in addition to requiring the vacation of the leased property, the lessor may also cumulatively request the payment of rents, costs and expenses that are the responsibility of the tenant. The law has created the National Office for Leases (the BNA), which has jurisdiction throughout the national territory, to manage the special eviction procedure. The installation and definition of the rules of the BNA and the eviction procedures are ruled by Decree Law 1/2013 of 7 January.

The use of spaces in shopping centres, retail parks, commercial galleries, outlets, offices located in office parks or warehouses located in retail parks that fulfil certain requirements are not considered lease agreements; therefore, the above-mentioned legislation does not apply, as these are non-typified contracts (i.e., contracts not ruled by a specific law). The users of these spaces are not considered simple tenants, as their establishments benefit from common services provided by the management company, notably publicity, security and maintenance of common spaces. In these cases, pre-emption rights, assignments of ongoing business, pledges of lease rights and termination processes do not apply.

## VII DEVELOPMENTS IN PRACTICE

Law No. 31/2012 of 14 August (see Section VI, *supra*) seeks to improve access to housing, foster labour mobility, improve the quality of housing, make better use of the housing stock, and reduce the incentives to acquire houses as opposed to lease houses. Law 30/2012 was implemented (also on 14 August) to facilitate works in leased premises.

Decree Law No. 307/2009 of 23 October was amended by Law 32/2012 of 14 August to simplify and introduce flexibility in administrative procedures concerning the creation of areas of renovation, simplify the control of renovation works and include in the concept of renovation certain isolated operations in buildings or parts of buildings, even if located outside the areas of renovation, provided that the construction is more than 30 years old and merits a renovation designed to provide adequate performance and security characteristics.

Under the golden residence permit legislation, a golden visa<sup>14</sup> allows foreign nationals, namely from non-Member States of the EU, to apply for and obtain a residence permit in Portugal when certain type of investments are made (e.g., investments in the acquisition of a property for a minimum amount of €500,000). Around 400 golden visas were issued during 2013, mainly to Chinese parties acquiring property.

## VIII OUTLOOK AND CONCLUSIONS

Implementation of the new lease law was an important step concerning the rental market, which is expanding considerably because of the difficulties of obtaining financing to buy houses. Rents are now stabilising in both the housing and commercial markets.

Portugal showed signs of growth by the end of 2013, and so the bailout may be terminated in 2014. The banks are still being carefully monitored, and stress tests undertaken by the relevant European entities. Tourism grew in 2013, and contributed 8 per cent to the exports of Portugal. However, tourism resorts that were in the pipeline have not seen the light of the day. According to the National Strategic Plan for Tourism 2013/2015, enhancing and developing tourism resorts and infrastructures, focusing on the elderly and health care will continue to be priorities.

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14 Dispatch No. 11820-a/2012 of 4 September 2012, as amended by Dispatch No. 1661-A/2013 of 28 January 2013.

## Appendix 1

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# ABOUT THE AUTHORS

### **FILIPA ARANTES PEDROSO**

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Filipa Arantes Pedroso joined the firm in 1979 and became a partner in 1987. She is head of the corporate and real estate practice group.

She is very active in mergers and acquisitions and company law, having acted for relevant national and international clients. She has also been very active in the project finance area.

In the area of real estate, Ms Arantes Pedroso has been responsible for the firm's major projects concerning the structuring of real estate transactions, tourism projects and incorporation of real estate management companies and real estate funds.

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