



CHAMBERS
Global Practice Guides

Real Estate

Portugal – Law & Practice

Contributed by

Morais Leitão, Galvão Teles,
Soares da Silva & Associados, RL

2017

PORTUGAL

LAW & PRACTICE:

p.3

Contributed by Moraes Leitão, Galvão Teles, Soares da Silva & Associados, RL

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL

CONTENTS

1. General	p.5	4.3 Regulatory Authorities	p.11
1.1 Main Sources of Law	p.5	4.4 Obtaining Entitlements to Develop a New Project	p.11
1.2 Main Market Trends and Deals	p.5	4.5 Right of Appeal Against an Authority's Decision	p.12
1.3 Proposals for Reform	p.5	4.6 Agreements With Local or Governmental Authorities	p.12
2. Sale and Purchase	p.6	4.7 Enforcement of Restrictions on Development and Designated Use	p.12
2.1 Categories of Property Rights	p.6	5. Investment Vehicles	p.12
2.2 Laws Applicable to Transfer of Title	p.6	5.1 Types of Entities Available to Investors to Hold Real Estate Assets	p.12
2.3 Effecting Lawful and Proper Transfer of Title	p.6	5.2 Main Features of the Constitution of Each Type of Entity	p.12
2.4 Real Estate Due Diligence	p.6	5.3 Annual Entity Maintenance and Accounting Compliance	p.13
2.5 Typical Representations and Warranties	p.6	6. Commercial Leases	p.13
2.6 Important Areas of Law for Investors	p.6	6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time	p.13
2.7 Soil Pollution or Environmental Contamination	p.6	6.2 Types of Commercial Leases	p.13
2.8 Permitted Uses of Real Estate under Zoning or Planning Law	p.7	6.3 Regulation of Rents or Lease Terms	p.13
2.9 Condemnation, Expropriation or Compulsory Purchase	p.7	6.4 Typical Terms of a Lease	p.14
2.10 Taxes Applicable to a Transaction	p.7	6.5 Rent Variation	p.14
2.11 Legal Restrictions on Foreign Investors	p.8	6.6 Determination of New Rent	p.14
3. Real Estate Finance	p.8	6.7 Payment of VAT	p.14
3.1 Financing Acquisitions of Commercial Real Estate	p.8	6.8 Costs Payable by Tenant at Start of Lease	p.14
3.2 Typical Security Created by Commercial Investors	p.8	6.9 Payment of Maintenance and Repair	p.14
3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders	p.8	6.10 Payment of Utilities and Telecommunications	p.14
3.4 Taxes or Fees Relating to the Granting and Enforcement of Security	p.8	6.11 Insuring the Real Estate That is Subject to the Lease	p.14
3.5 Legal Requirements Before an Entity Can Give Valid Security	p.9	6.12 Restrictions on Use of Real Estate	p.14
3.6 Formalities When a Borrower is in Default	p.9	6.13 Tenant's Ability to Alter and Improve Real Estate	p.14
3.7 Subordinating Existing Debt to Newly Created Debt	p.10	6.14 Specific Regulations	p.15
3.8 Lenders' Liability Under Environmental Laws	p.10	6.15 Effect of Tenant's Insolvency	p.15
3.9 Effects of Borrower Becoming Insolvent	p.10	6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations	p.15
4. Planning and Zoning	p.11	6.17 Right to Occupy after Termination or Expiration of a Lease	p.15
4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning	p.11		
4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction	p.11		

PORTUGAL LAW & PRACTICE

Contributed by *Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL* **Authors:** Filipa Arantes Pedroso, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

6.18 Right to Terminate Lease	p.15
6.19 Forced Eviction	p.15
6.20 Termination by Third Party	p.15
7. Construction	p.16
7.1 Common Structures Used to Price Construction Projects	p.16
7.2 Assigning Responsibility for the Design and Construction of a Project	p.16
7.3 Management of Construction Risk	p.16
7.4 Management of Schedule-Related Risk	p.16
7.5 Additional Forms of Security to Guarantee a Contractor's Performance	p.16
7.6 Liens or Encumbrances in the Event of Non-Payment	p.16
7.7 Requirements Before Use or Inhabitation	p.17
8. Tax	p.17
8.1 VAT	p.17
8.2 Mitigation of Tax Liability	p.17
8.3 Municipal Taxes	p.18
8.4 Income Tax Withholding for Foreign Investors	p.18
8.5 Tax Benefits	p.19

Contributed by *Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL* **Authors:** Filipa Arantes Pedroso, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL practice covers construction, real estate financing, real estate investment and projects, real estate investment funds, tourism projects and the use and management of properties. The firm is well positioned to face the demands and challenges of the modern real estate market and has a proven record in developing innovative solutions. The team's expertise includes: creating structures for real estate investment operations in the form of companies, real estate investment funds and real estate companies; real estate investment operations, mergers and acquisitions and per-

formance of the respective due diligence; monitoring the installation, the exploitation and the operation of tourism projects; preparing and negotiating real estate agreements, purchase and sale agreements, sale and lease-back agreements, call options, swaps and surface rights; preparing and negotiating public works contracts agreements, designs and necessary supervision; preparing and negotiating real estate use and management agreements, such as hotel management agreements, lease agreements, use assignment and beneficial rights; and real estate financing operations and the preparation of respective guarantees

Authors



Filipa Arantes Pedroso heads the corporate and real estate practice group. She regularly writes for industry publications.



Rita Ferreira Vicente is a partner in the corporate and real estate team. She regularly contributes to industry publications.



Maria Quintela is a partner specialising in tax. She is a member of the Portuguese Tax Association and the Portuguese Association of Tax Consultants.



Rui Ribeiro Lima is principal associate at the firm. His practice covers real estate, urban planning and environment, administrative and public procurement. He is a member of Ad Urbem – Association for the Development of Urban Planning and Construction Law (admitted in 2009).

1. General

1.1 Main Sources of Law

The main source of real estate law is the Portuguese Civil Code based on Roman law and the French Civil Code encompassing not only freehold but also other rights of guarantee and acquisition. The definition of property includes full possession and exclusive use and disposition. The law applicable to possession, title to property and other real estate rights is defined by the country in which the property is located, therefore Portuguese law is applicable to the creation, recognition, acquisition or modification of any real estate rights in Portugal.

1.2 Main Market Trends and Deals

The year 2015 was an excellent year for real estate, with some major international players investing in real estate in Portugal, notably from the USA, China, Spain and Brazil, the investment coming from the USA being the most prevalent in terms of the volume and number of transactions. The main investments were in commercial real estate, notably office buildings and retail (shopping centres, retail parks, stan-

dalone units, etc). Investment in hotels has also increased, not only due to the acquisition of the Tivoli hotels by the Thai group Minor International (MINT), but also due the enormous increase in tourism, notably in Lisbon and Oporto. In general the demand was mainly for rented assets with long-term and solid tenants. This growth seems to be continuing as in the first three months of 2016 investment has grown more than in the same period last year. The biggest investment was made by a French private investor, which acquired Campus Justiça (the courts of Lisbon), whose tenant is the Portuguese state. Various sale-and-leasebacks of the hypermarkets of the Sonae group also account for a significant volume.

It is not certain that this growth will continue at the same pace while external and internal factors are affecting the Portuguese economy.

1.3 Proposals for Reform

Last year the law concerning UCITS (OIC), which includes real estate funds, was changed and is now similar to other European countries. As concerns the tax regime, the inves-

tor is now taxed and the fund is only taxed with stamp duty (0.0125% on its global net value). However, the legislation concerning REITs, which has already been implemented in Spain with enormous success, has not yet been implemented in Portugal. It is difficult to say whether this government is going to follow up this matter.

2. Sale and Purchase

2.1 Categories of Property Rights

Apart from full ownership or freehold, there are other categories of property rights that can be acquired, as follows:

- Surface right (*direito de superfície*), which is the right to construct or maintain (permanently or temporarily) a building on land owned by another person or entity, or to plant and maintain crops on such land. When surface right terminates, the owner of the land becomes the owner of the building incorporated in the land.
- Right of use (*usufruto*) is the right to, temporarily, take profits and the right to use and manage a property whose title belongs to another entity. Such right terminates with the death of the beneficiary or within 30 years in the case of a company.

A property can be owned by one or more persons (common property) and it is also possible to divide buildings into segments or independent units, which in Portugal is called “horizontal property”.

2.2 Laws Applicable to Transfer of Title

The main legislation concerning real estate is in the Civil Code. The transfer of any type of real estate is executed, in writing, by a notary, a lawyer, or the commercial or industrial registry officer.

2.3 Effecting Lawful and Proper Transfer of Title

As mentioned above, the purchase and sale of a property must be executed in writing (either by public deed or by privately executed agreement) by a notary, a lawyer, or the commercial or industrial registry officer.

The purchase and sale of a property must be registered with the Property Registry in order to produce effects against third parties. Registration is compulsory regarding the facts that create, recognise, acquire or modify any real estate rights. The Property Registry Code establishes a principle of priority according to which the right that is registered first prevails over any subsequently registered rights. The Property Registry certificates can be physical or electronic.

Title insurance is not available in Portugal. As the Property Registry certificates (*certidão do registo predial*) are public,

there is a legal presumption that the rights definitively registered in the Property Registry are correct, updated and true.

2.4 Real Estate Due Diligence

It is usual for buyers to prepare, through their legal and technical advisers, complete checklists with the documentation required. From a legal perspective, the main documents requested and reviewed are (i) the land registry certificate (*certidão do registo predial*), (ii) the tax registry certificate (*caderneta predial*), (iii) the licence of use for buildings, (iv) the energy efficiency certificate (*certificado de eficiência energética*), (v) the building specifications certificate (*ficha técnica de habitação*), if applicable, (vi) proof of the payment of all taxes and charges related to the property, (vii) confirmation of non-exercise of pre-emption rights, and (viii) planning, zoning and environment documentation in the case of land for construction.

2.5 Typical Representations and Warranties

The typical representations and warranties are related to capacity of the seller and buyer, ownership of the property, boundaries, charges and encumbrances, third party rights, planning and zoning (in the case of land for construction), authorisations and licences, rental status of the property, claims, litigation, liabilities, defects and equipment, environment and asbestos risk.

In the event of seller misrepresentation, a time to remedy is usually granted and in case no remedy is possible an indemnity is paid by the seller to the buyer. Such indemnity is usually secured by a bank guarantee, a bond or an escrow account for at least four years.

2.6 Important Areas of Law for Investors

The real estate law is contained in the Civil Code and Real Estate Registration Code and tax law. Planning and zoning law is also involved in the case of acquisition of land for construction or buildings for rehabilitation.

2.7 Soil Pollution or Environmental Contamination

The Environmental Liability Law identifies land contamination as an environmental damage. The owner of the polluted property is not liable for such pollution if he/she was not responsible for the contamination. However, if the owner of the property undertakes certain types of economic activities as defined in the law, the competent authority may order the clean-up of the property, regardless of whether or not the owner is responsible for the contamination. In these cases, the owner has the right to claim from the entities that were responsible for the pollution.

If the owner of the land is not ordered to carry out clean-up measures, in some situations, the licensing of future activi-

Contributed by *Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL* **Authors:** Filipa Arantes Pedroso, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

ties in the property may be conditional upon decontamination of the property.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

The permitted uses of real estate are regulated in special land use plans and municipal land use plans.

The special land use plans are subdivided into (i) territorial plans of protected areas (POAP), (ii) territorial plans of reservoirs (POAAP), (iii) territorial plans of the sea coast (POOC), (iv) territorial plans of the river estuaries (POE) and (v) territorial plans of the archaeological parks (POPA). The purpose of these plans is the preservation of natural resources and natural habitats, establishing prohibitions for certain operations and conditions for other operations that may be authorised.

The municipal land use plans contain the main regulations concerning the use of the land. There are three types of municipal plans, which are the municipal director plan (PDM), the urbanisation plans (*planos de urbanização*) and the detailed plans (*planos de pormenor*).

According to a recent reform of planning law, the above-mentioned special plans must be included in the municipal plans, as the municipal plans are bidding.

It is possible to enter into specific agreements with public authorities in order for a project to proceed faster. The size of the project, the timing for approval and the execution of relevant infrastructures may be subject to an agreement with the relevant municipality.

2.9 Condemnation, Expropriation or Compulsory Purchase

Several legal regimes establish the possibility of expropriation/taking of land and compulsory sale with fair compensation. The legal regimes to take into account vary according to the title and basis on which such expropriation/taking of land or compulsory sale is made.

In this respect, for instance, the Law on the General Foundations of Public Policy of Soils, Territorial and Urban Management establishes that expropriation on public interest grounds (*expropriações por utilidade pública*) may take place in order to achieve the purposes of public soil policy. Alternatively, and in certain cases (ie failure to comply with performance of rehabilitation or regeneration), the owners may be subject to compulsory sale (*venda forçada*).

The Legal Regime of the Territorial Management Instruments also establishes that expropriation or compulsory sale may take place in order to perform the territorial plans and programmes.

The procedure for expropriation is set forth under the Expropriations Code. According to such legal regime, the expropriation may be agreed or if agreement is not reached a litigation procedure will follow. The latter will be conducted through arbitration. Once a decision is issued, the process will be referred to the court for a judicial phase.

Expropriation gives rise to payment of a fair compensation (*justa indemnização*) by the expropriating entity to the expropriated parties.

The procedure for compulsory sale states that the competent authority may sell the property in a public tender. For such purpose a resolution on promotion of the sale and other terms to follow is set out in the Expropriations Code.

2.10 Taxes Applicable to a Transaction

The asset purchase and sale of real estate is subject to both property tax (“Imposto Municipal sobre a Transmissão Onerosa de Imóveis”, or IMT) and stamp duty (“Imposto do Selo”), payable by the purchaser. IMT is levied at a rate of 6% for urban property meant for housing purposes, 5% for rural property and 6.5% for other types of property, on the contract price or the patrimonial value of the property (*valor patrimonial tributário*), whichever is higher. Stamp duty is levied at a rate of 0.8% on the same amount.

As a general rule, and since the purchase and sale of real estate is subject to IMT, such a transaction is exempt from VAT, unless the vendor waives such exemption, opting instead to tax the transaction under VAT. The VAT exemption may be waived if real estate (comprising urban property, autonomous units thereof, or building plots) is sold to a buyer that will use them, fully or predominantly, in activities that will entitle him/her to a VAT deduction. As such, the above-mentioned real estate acquisitions are subject to VAT at a rate of 23% (a 22% rate in Madeira and an 18% rate in the Azores).

In the case of a share deal, if an entity owns at least 75% of the share capital of a limited liability company (*sociedade por quotas*), IMT will be levied on the same terms as mentioned above. Furthermore, the acquisition of participation units in privately placed closed-end real estate investment funds, regardless of the location of the management company, the redemption of participation units, or the increase or reduction of the share capital or other, in which one of the holders, or two holders who are married or in a registered partnership, hold at least 75% of the participation units representative of the investment fund’s patrimony, are also subject to IMT.

Under Portuguese law certain IMT exemptions on the purchase and sale of real estate apply, provided certain conditions are met, such as the acquisition of properties (i) by real estate trading companies for the purpose of resale, (ii) for

rehabilitation purposes and (iii) under company restructuring operations.

2.11 Legal Restrictions on Foreign Investors

There are no restrictions on the ownership of real estate by a non-resident or by a foreign investor. The treatment given is the same. Tourism and activities declared to be of relevance to tourism under the applicable legislation may be granted tax incentives.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

A facility agreement secured by a mortgage is the most common financing and security for real estate projects in Portugal.

There are no specific restrictions to the maturity of a financing but the maturity date should be specified.

The loan-to-value, interest coverage and debt service coverage ratios are terms customarily agreed on to set a tighter framework for the credit facility.

3.2 Typical Security Created by Commercial Investors

Under Portuguese law the concept of a floating charge or a general charge over the assets of a company is not recognised. There are, however, certain specific assets (eg assets in the public domain, or linked to public services) which cannot be pledged. This will depend on a specific analysis of the assets.

Security usually associated with a real estate financing includes:

- Mortgage of property: Mortgages over real estate must be executed before a public notary (or equivalent official) and registered with the Land Registry Office, such registration being a condition of validity of the mortgage. If agreed between the parties, the mortgagee can become beneficiary of the proceeds of the insurance entered into to cover the risks of the mortgaged property.
- Assignment of revenues (“*consignação de rendimentos*”): The assignment of revenues secures the fulfilment of an obligation to the creditor who is entitled to be paid from the revenues of a real estate asset. The granting of this security requires a deed and must be registered in the Land Registry Office and cannot exceed 15 years.
- Pledge of shares/quotas: The pledge of nominative shares has to be recorded in the company’s books as well as in the certificates or in the relevant security account if the shares are book-entry. The pledge of the quotas must be regis-

tered at the Commercial Registry Office. In any case, the company’s by-laws may require the shareholders’ consent to the grant of the pledge. Without prejudice to the above, all pledges shall take effect against the company once it is informed in writing or it gives its express or tacit recognition thereof.

- Book debt/receivables/insurances: A pledge or an assignment by way of security can be granted over receivables, which in both cases must be notified to the debtor. An assignment by way of security can be granted over future receivables, as long as these are determinable. Please note that Portuguese law admits assignments by way of security of rents arising from real estate leases.
- Pledge of bank accounts: The preferred method is a financial pledge over the balance of specified bank accounts. The account bank must be notified of the pledge but is not required to give its consent.
- Intellectual property: Intellectual property rights can be pledged and the pledge must be registered with the IP Institute (Instituto Nacional da Propriedade Industrial);
- Personal guarantee (“*fiança*”): The *fiança* is a personal guarantee, under which the guarantor, with his/her own assets, personally undertakes before the creditor the payment of the credit held by the creditor over the debtor.

Mortgages or assignment of revenues over Portuguese assets must be subject to Portuguese law (*lex rei sitae*).

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

As a general rule no governmental or other consents are required for the provision of security. There are no restrictions on granting security over real estate to foreign lenders as well as on repayments being made to a foreign lender.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

On the granting of security over real estate notarial fees and registration fees are due.

Pursuant to Portuguese law, interest payments are calculated daily using an interest rate for the relevant interest period with the end result rounded up or down to the nearest one-thousandth of a percentage point, over sums outstanding at any time under the financing, interest being calculated with reference to a year of 360 days.

Late payment interest is limited to a maximum of 3%, to be accrued to the interest rate.

As a general principle, interest payments paid to non-resident companies or credit institutions are subject to a withholding tax of 25%.

Contributed by *Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL* **Authors:** Filipa Arantes Pedrosa, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

Under the tax treaties currently in force, reduced rates may be applicable when domestic rates are higher than the treaty rate. The reduced rates range between 5% and 20% according to the applicable double tax treaty.

No withholding tax is due on payments of interest to Portuguese resident credit institutions or Portuguese branches of non-resident credit institutions and specific exemptions also apply under parent/subsidiary rules.

Stamp duties are levied in accordance with the Stamp Duty Code (CIS) and the General Stamp Duty Table (TGIS) at percentage or lump-sum rates, on all acts, deeds, documents, securities, books, papers, and other events listed in the TGIS which occur in Portugal and are not subject to VAT.

Notwithstanding, the CIS sets out rules that extend its application to a series of events executed or performed outside Portugal. Notably, stamp duty is charged on loans granted, guarantees made, interest charged and commissions levied by non-resident credit institutions, financial institutions or other companies to any Portuguese resident entities, irrespective of their nature.

Stamp duty applies to loans, guarantees, interest and commissions at the rates described below.

Loans granted to a Portuguese borrower will incur stamp duty at a rate of:

- 0.04% per month if the term for repayment is less than one year;
- a payment of 0.5% on each disbursement if the term for repayment is equal to or greater than one but less than five years; or
- a payment of 0.6% on each disbursement if the term for repayment is equal to or greater than five years,

all cases being calculated on the amount of the loan.

Stamp duty is also charged on the granting of security unless ancillary to a contract already subject to stamp duty, ie so long as security is granted at the same time as a Portuguese loan (ie subject to stamp duty) is executed and that such guarantee secures that loan. This means that if security is granted at the same time as a Portuguese loan to a Portuguese borrower, stamp duty would only have to be paid once.

When applicable to security, stamp duty rates are the same as set out above for loans, and are calculated based on the amount secured. Note that when the security is intended to cover all loans, the issue of security by a Portuguese guarantor will entail payment of stamp duty over the full amount secured. It is possible to fix contractually the amounts se-

cured by the security (thereby limiting the applicable stamp duty payable).

If no loan is granted to a Portuguese entity, the agreement is signed outside Portugal, and the Portuguese entity acts as guarantor, no stamp tax is due on this security at signing, but stamp tax (at the above rates) would have to be paid if the agreement were subsequently presented in Portugal before any official entity (as would be the case, typically, in an enforcement scenario).

Finally, interest and banking commissions and fees for financial services paid by a Portuguese borrower will also be subject to stamp duty at a rate of 4%.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The validity of the guarantees provided to secure third party debt (including any group companies) is subject to an assessment of whether the grantor of such guarantee has a justified corporate interest in doing so. Corporate interest may be assumed from the existence of a group relationship between both companies (so long as both are Portuguese resident companies), but some doctrine argues that such assumption only exists where the guarantee is granted by the holding company to the subsidiary. In the case of upstream guarantees or guarantees to sister companies, the corporate interest should be demonstrated on other grounds (a confirmation of this in the resolution approving the transaction may be considered sufficient, but please note that at the end of the day corporate interest is a factual matter). In order to substantiate verification of corporate interest, we usually recommend a limit on the amount secured by the obligor by reference to the actual net value of its assets.

3.6 Formalities When a Borrower is in Default

To start enforcement proceedings the creditor must hold an enforceable title (*título executivo*) and file an application against the debtor with the appropriate court competent for enforcement. Local responsibility for executing mortgage foreclosure proceedings lies with the court where the property is located. In the case of enforcement of a portfolio, the competent court is the court where the property with the highest tax value is located.

Please note that only due and payable credits may be claimed under a mortgage enforcement. The mortgage cannot be enforced for more than the amount of the secured claim and in any case the mortgagee may not receive more than the amount due to him/her under the secured claim.

A mortgagee does not have the right to take possession of a property in the event of default in payment of the secured obligation, but only the right to a judicial sale of the property and to be paid with the proceeds of such sale.

Contributed by *Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL* **Authors:** Filipa Arantes Pedrosa, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

In a judicial sale, the property will be sold free of any charges and encumbrances.

In relation to mortgages, the normal procedure is the enforcement of the security by means of seizure, ie the judicial apprehension of the asset given as guarantee of the obligation.

The seizure confers to the creditor the right to be paid with the proceeds of the sale of such assets, with preference over other creditors, provided that there is no prior security in rem over the attached assets.

Under the Portuguese Civil Code, real estate privileges are always special.

Regarding real estate properties, the order of priority, considering creditor privileges, is grosso modo the following: (i) credits of the employees working in the mortgaged property; (ii) credit for any judicial expenses incurred directly on the common interest of the creditors, for the preservation, execution or liquidation of the real estate properties; (iii) credits of the state due for the tax on property transfer (IMT) and over heritage and donations; (iv) credits of the local public authority (*autarquia local*) for the municipal tax on real properties (“Imposto Municipal sobre Imóveis”, or IMI); (v) credits of the social security; (vi) any credit secured by retention right (*direito de retenção*); and (vii) credit secured by mortgage, in compliance with the priority arising from the respective registry.

The enforcement procedure involves the following steps:

- the filing of a petition in a competent court;
- the seizure by the secured creditor of the assets of the debtor, which is made by electronic communication to a competent Land Registry Office (this procedure being equivalent to a formal presentation to register), the assets being delivered to a custodian, normally an enforcement agent;
- the service of proceedings on the debtor;
- the service of proceedings on creditors of the debtor who have a priority claim in respect of its assets;
- the decision of the court ordering the debtor to make payment and setting the order of priority in which the creditors are to be paid, assuming there are several creditors;
- the sale, by way of court order, of the secured assets; and
- the distribution of the proceeds of the sale, in accordance with the order of priority determined by the court.

The timing of the process of enforcing security in Portugal varies. On the basis of historic evidence, however, it is estimated that enforcement proceedings in relation to mortgages take on average a period between one and three years without appeal.

3.7 Subordinating Existing Debt to Newly Created Debt

Under Portuguese law it is possible for existing secured debt to become subordinated to newly created debt if a subordination agreement is agreed between the parties.

3.8 Lenders’ Liability Under Environmental Laws

The principle is that the responsibility is the polluter’s. Please see 2.7 **Soil Pollution or Environmental Contamination**.

3.9 Effects of Borrower Becoming Insolvent

Pursuant to the Portuguese Insolvency Code certain common transactions can be terminated by the insolvency administrator without any condition and in relation to which evidence in contrary is not even admitted (“Unconditional Termination”). The most obvious applicable cases are:

- granting of security in rem by the insolvent company (such as the granting of mortgages, the pledge of shares or of bank accounts, etc) to secure pre-existing obligations or other obligations which replace the former, within the period of six months preceding the commencement of the insolvency proceedings;
- personal guarantees granted by the insolvent, within the six months before the commencement of the insolvency proceedings, in respect of business which are not of the interest of the insolvent company;
- granting of security in rem simultaneously with the creation of the secured obligations, within the period of 60 days before the commencement of the insolvency proceedings;
- payments or other acts aiming at discharging debts by the insolvent company whose due date would fall after the date of the commencement of the insolvency proceedings, if the act is performed within six months before the commencement of the insolvency proceedings (or after the commencement of the insolvency proceedings but before the due date); and
- reimbursement of shareholders’ loans within the period of one year immediately preceding the commencement of insolvency proceedings.

Other than in the case of Unconditional Termination, the insolvency administrator may also, at the request of the creditors and for the purpose of protecting the insolvency estate, challenge certain acts or contracts executed in the two years prior to the commencement of the insolvency proceeding, provided that the two following cumulative hurdles are either demonstrated or presumed:

- the relevant acts or contracts must be prejudicial to the insolvency estate and to the satisfaction of its creditors; and
- the transaction must have been entered into between the company and a third party acting under a malicious motive (*mala fide*).

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Please refer to **2.8 Permitted Uses of Real Estate under Zoning or Planning Law** and **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The Legal Regime for Construction and Land Development is the basic legislation for construction of new buildings or other works in existing buildings, such as rehabilitation.

This legal regime provides for several controls: (i) prior information; (ii) licence; (iii) prior communication; and (iv) authorisation.

The prior information corresponds to a preliminary analysis of the feasibility of a given construction work. The prior information can also be used by an investor that is not the proprietor of the asset to ascertain what can be done in terms of construction works.

If the prior information is approved by the municipality, which is the competent authority to allow construction works, then a new procedure for construction must follow. In certain cases which are defined in the law, the prior information allows for the presentation of a prior communication to the municipality, which is a far more expedient procedure than the usual construction licence.

The licence is required as the main type of control for construction of buildings or refurbishment works.

The prior communication is a declaration presented to the municipality by the promoter of the construction works that is applicable to situations in which the urban parameters for construction are already set out whether in a detailed plan or in an allotment licence. In these cases, the prior communication is presented with all the necessary documents and the municipality only has to evaluate whether the documents are all presented. If so, in approximately eight days, the investor may begin construction, after paying the municipal taxes.

The authorisation is a permit for the use of buildings or its parts and for changes to that use. After construction work takes place, the authorisation for use is the permit that attests that the construction was made according to the licensed project or according to the project contained in the prior communication.

The territorial instruments referred to in **2.8 Permitted Uses of Real Estate under Zoning or Planning Law** also represent limitations to design, appearance and method of construction, since there are areas in which construction is prohibited or limited. For instance, pursuant to Decree-Law no. 166/2008, of 22 August, as amended and Decree-Law no. 73/2009, of 31 March, several actions in areas delimited by the National Ecological Reserve and the National Agricultural Reserve are severely limited or prohibited.

Refurbishment of an existing building must be conducted pursuant to the Legal Regime for Urban Rehabilitation. The refurbishment operations may be approved by a specific instrument or through a detailed plan.

4.3 Regulatory Authorities

The regulation for the development and use of plots of land is carried out by the municipalities in the urban and planning control proceedings (prior information; licence; prior communication; and authorisation). Municipalities, therefore, are the competent authorities to conduct the procedure and issue the relevant titles.

During the proceedings, the municipalities may consult other entities that have legal competence according to the matter or location involved. In some cases, depending on the location of the operation, consultation with certain entities such as the CCDR (Regional Co-ordination and Development Commission) may be mandatory.

Applicable legislation includes the territorial management instruments referred to in **2.8 Permitted Uses of Real Estate under Zoning or Planning Law** and the Legal Regime for Construction and Land Development.

4.4 Obtaining Entitlements to Develop a New Project

The process for obtaining entitlements (licences or prior communications) or completing a refurbishment of a building depends on the specific location of the property.

The process of obtaining an entitlement generally involves a preliminary appraisal of the project, which may be followed by a public consultation when a project is regarded as having relevant impact, and a final decision.

Third parties have the right to participate, as follows:

For the prior information procedure, consultations may be carried out and opinions may be requested from external entities, such as the CCDR.

For the licensing procedure, the municipalities may open a public consultation in which third parties may participate.

For the prior communication procedure, the investor must submit a prior communication with the opinion issued by the competent external entities.

Private third parties may also intervene in the procedure since it is considered public information.

4.5 Right of Appeal Against an Authority's Decision

If the application is rejected, the applicant may proceed as follows:

- Non-judicial remedy: Pursuant to the Procedure Administrative Code, the applicant may (i) submit an administrative complaint, asking the author of the decision to review it; or (ii) submit a hierarchical appeal, asking the supervisor to review the decision.
- Judicial remedy: In this case the applicant may file a lawsuit in accordance with the procedure established under the Procedural Code of the Administrative Courts in which the applicant may challenge the legality of the decision and ask the court to compel the Administration to adopt a lawful administrative decision. It is also possible to file an injunction in order to seek a preliminary remedy.

4.6 Agreements With Local or Governmental Authorities

The Legal Regime for Construction and Land Development provides for several types of contracts within the development of a certain project. Typical agreements include concession agreements, urban development agreements and planning agreements.

Major refurbishment operations carried out by municipalities may also be conducted through partnerships with private entities. In this case, rehabilitation concession agreements and urban refurbishment agreements may be executed.

4.7 Enforcement of Restrictions on Development and Designated Use

The Legal Regime for Construction and Land Development provides for several mechanisms of enforcement of the restrictions on development and use, as follows:

It is possible for the municipality to carry out coercive works in a property, if the owner fails to comply with the municipality's instructions and deadlines for such works.

The municipality may also carry out inspections and supervision actions in relation to the works performed.

Also, if urban planning operations are carried out irregularly (ie in breach of the applicable legal proceeding or in breach of any administrative act or applicable regulation), the municipality may implement the following measures:

- embargo of works or refurbishment of land;
- administrative suspension of the licence or authorisation;
- order to perform corrections or changes to the works or legalisation of urban operations;
- order of demolition of works;
- re-establishment of the land in the condition prior to the works; or
- order to terminate the use of the building in question.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

The main vehicles used are: commercial companies (private limited companies (LDA) or public limited companies (SA)) and collective investment real estate undertakings (OIC) (investment funds or investment companies). The more common are public limited companies and real estate funds.

5.2 Main Features of the Constitution of Each Type of Entity

Commercial companies

SA companies

The SA is a company limited by shares, meaning that its capital is divided into shares and that the shareholders' liability for the company's debts is limited to the amount of their investment.

An SA must be incorporated with a minimum share capital of EUR50,000. At least 30% of the SA's capital stock must be paid up at the time of incorporation and the remaining capital stock must be paid up by the shareholders within a period of five years from the company's incorporation.

The share capital may result from contributions in cash or in kind (labour and provision of services are not allowed). Shares may be represented by share certificates or kept in book-entry form, having a minimum nominal value of one euro cent.

Shares can be nominative or bearer shares, and each type of share may be converted to the other type. However, shares must always be nominative when they have not been fully paid up, when there is restriction on transferability, and when shareholders are required by the by-laws to make ancillary capital contributions.

Shares in an SA are freely transferable, except when the company's articles of association provide for restrictions on their transferability. These restrictions may consist of a pre-emption right in favour of the remaining shareholders. Nominative shares may be transferred by the owner's written declaration addressed to the keeper of the SA's share registry. Bearer shares may be transferred by simple delivery of the

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL **Authors:** Filipa Arantes Pedroso, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

share certificates, possession of which confers all shareholders' rights on the holder. The articles of association may not prohibit the transfer of shares otherwise permitted by law, and transferability may only be restricted within the terms of the relevant legal provisions.

As a general rule, an SA must be incorporated by a minimum of five shareholders. It is possible to incorporate an SA with a single shareholder when such single shareholder is a company.

LDA companies

The LDA is a company limited by quotas, meaning that its share capital is divided into equity participations (quotas) that cannot be represented by transferable certificates nor kept in book-entry form. Quota holders are jointly and severally liable for the paying up of the company's entire quota capital. Quota holders may freely stipulate the amount of an LDA share capital, the minimum nominal value of each quota being equal to EUR1. The share capital may result from contributions in cash or in kind (labour and provision of services are not allowed). Quota titles are not freely negotiable under written document. The transfer of quotas is subject to the LDA's express consent, unless the prospective transferee is another quota holder or the transferor's spouse or next-of-kin. This regime provided by law can be rendered either stricter or more flexible by the articles of association. An LDA may be incorporated either by a minimum of two equity holders or by a single equity holder (either an individual or a company). In the case of a single equity holder, the LDA must add the word *unipessoal* to its corporate name and is subject to certain special legal requirements regarding the relationship between the LDA and the single equity holder.

Collective investment real estate undertakings

Real estate funds

Real estate funds (REF) are ruled by the OIC Regime applicable to real estate funds and can be open, closed or special. Open-end funds are incorporated by public subscription and closed-end funds by private subscription. The funds are represented by participation units with the same nominal value and held by the participants. The incorporation of the funds requires the consent of Securities Commission. The funds have no legal capacity and need to be represented by a managing company. The incorporation of the managing companies requires the authorisation of the Bank of Portugal and the Securities Commission. The participation units must be deposited with a financial institution with its head office or a branch in Portugal. The assets of the fund can be real estate, cash and participation in real estate companies. The real estate must regularly be evaluated by at least two evaluators.

Real estate companies

Real estate companies need to be public limited companies (SA), and can have a fixed share capital (SICAF), where

the regime is similar to closed-end funds, or variable share capital (SICAVI), where the regime is similar to open-end funds. Real estate companies have legal capacity. Real estate companies are ruled by the OIC Regime and the Portuguese Companies Code. They can be self-managed or managed by a management company or any other financial institution. Incorporation of a real estate company is subject to the authorisation of the Securities Commission.

5.3 Annual Entity Maintenance and Accounting Compliance

There are no significant annual maintenance and accounting compliance costs for commercial companies, other than the fees due to the company's accountant and auditor (as agreed between the parties) and the fees charged for the submission of the annual approval of accounts (roughly EUR85). Real estate funds and companies have to pay fees to (i) the Securities Commission for incorporation, (ii) the management company (except self-managed investment companies), (iii) the depositary bank and (iv) advisers.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Lease agreements, contracts for use of shops in commercial centres, retail parks or outlets, and commodatum agreements (ie lease agreements free of charge), are agreements that the law recognises which allow a person, company or other organisation to occupy and use real estate for a limited period of time without buying the property. In the case of contracts for use of shops, those are not subject to the legal framework of the urban lease, but only to the general legal framework applicable to contracts.

6.2 Types of Commercial Leases

Commercial lease agreements can be for commercial purposes, for industrial or professional purposes (namely, for offices) or for logistics.

6.3 Regulation of Rents or Lease Terms

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law no. 6/2006 of 27 February 2006, amended by Law no. 31/2012 of 14 August 2012, also known as the "New Urban Lease Regime". The urban lease agreements are divided into two types: lease agreements for residential purposes and lease agreements for non-residential purposes.

Rents and lease terms of commercial leases are freely regulated between the parties. In fact, the most relevant aspects of commercial lease agreements such as term, termination and renewal are freely negotiated by the parties. Contrary to lease agreements for residential purposes, the mandatory

regime is not applicable to commercial leases and will only apply residually in cases where the parties have not defined the respective regime in the lease agreement.

In commercial leases rent usually has a fixed amount. Regarding contracts for use of shops, generally there is a fixed amount and a variable amount which is related to the tenant's revenues.

6.4 Typical Terms of a Lease

The typical terms of commercial leases are generally stipulated between the parties.

The length of the lease term can be with fixed term or without fixed term. The usual choice is the lease agreement with fixed term (if it is agreed between the parties that the agreement is without fixed term, the legal maximum limit is 30 years).

Regarding the maintenance and repair of the real estate occupied, the tenant is obliged to keep the leased area in good condition and make any ordinary repair. Structural works should be borne by the landlord.

Concerning the frequency of rent payments, except as otherwise agreed between the parties, rent is usually paid monthly and is due on the first working day of the preceding month.

6.5 Rent Variation

The parties can freely agree how the rent will be increased as long as the lease agreement lasts.

6.6 Determination of New Rent

Generally rent is subject to annual increases by application of a coefficient which is established every year by the government. In case the parties do not agree this, the rent may be adjusted by the landlord annually, according to scales set out in the law.

6.7 Payment of VAT

Generally lease agreements are exempt from VAT. The VAT exemption may be waived provided that the necessary conditions are met: both parties need to be VAT taxable persons in Portugal, and the tenant must use the leased property for VAT taxable activities, among other conditions. Waiving VAT may be convenient as the landlord by waiving that exemption may deduct the VAT borne. In this case no stamp duty is payable.

6.8 Costs Payable by Tenant at Start of Lease

At the beginning of a lease agreement, one monthly rent is required and the parties may agree on payment of up to three monthly rents in advance, as a deposit security.

6.9 Payment of Maintenance and Repair

The maintenance and repair of areas used by several tenants, for example parking lots or gardens (condominium costs), are generally agreed between the parties. Generally the costs are borne by each tenant proportionally to the area occupied by each of them. Service charges are generally based on the area of the property leased to each tenant in proportion to the area of the whole building. If no provision is made by the parties, the landlord is obliged to bear these costs.

6.10 Payment of Utilities and Telecommunications

Generally the utility and telecommunications bills are borne by each tenant proportionally to the area occupied by each one. These types of matters are stipulated between the parties.

6.11 Insuring the Real Estate That is Subject to the Lease

Notwithstanding the fact that properties subject to a horizontal property regime must be covered by a mandatory insurance policy covering the risk of fire, there is no legally mandatory insurance policy applicable to real estate that is subject to commercial lease agreements and there are also no legal provisions imposing the costs of any contractual insurance obligation on any of the parties. However, usually, in this type of insurance, the insurance premium is paid by the tenant due to contractual undertaking. Landlords usually impose in the commercial lease agreement that the insurance policy to be undertaken by the tenant must cover damages caused by natural and human causes. Whenever the value of the real estate so justifies, the landlord may request further insurance coverage, such as damages caused by terrorism and sabotage. Finally, the tenant usually undertakes the coverage of business interruption and other time-specific coverage in its own interest.

6.12 Restrictions on Use of Real Estate

The landlord may impose some rules and restrict the use of the property leased. In general, the landlord may impose restrictions concerning alterations made to the property, which may be subject to the consent of the landlord. In these cases the tenant undertakes to pay all the costs involved with the alteration. The landlord may also restrict the assignment or sublease of the property, this being subject to prior consent of the landlord, except in the case of a transfer of an ongoing business (*traspasse*) where the lease is included. In this case the landlord has a pre-emption right, except if the parties have agreed otherwise. The landlord may also restrict the use of the leased property. The law specifies that the tenant must use the property respecting its licence of use.

6.13 Tenant's Ability to Alter and Improve Real Estate

Generally the parties agree on the conditions on which the tenant may alter or improve the real estate, namely it is es-

tablished that the tenant shall not carry out any works on the property leased without prior written consent of the landlord. Repair works means all ordinary repairs, maintenance and works. In general, this means any reconditioning or replacement necessary to repair and maintain the property in good conservation status. The tenant is responsible for their execution directly or through third parties, including the planning, procurement and management of the repair work. It is a common requirement that all works performed by the tenant become an integral part of the property or, upon a landlord request, be removed and the property returned in the same condition as it was on the delivery date, save for deterioration caused by normal wear and tear.

6.14 Specific Regulations

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law no. 6/2006 of 27 February 2006, amended by Law no. 31/2012 of 14 August of 2012, also known as the “New Urban Lease Regime”. The urban lease agreements are divided into two types: lease agreement for residential purposes and lease agreements for non-residential purposes. Unlike leases for non-residential purposes, leases for residential purposes have a minor degree of contractual freedom. All the most relevant matters are imperatively established in the law.

In regard to retail use of shops, these are not subject to the general regime, to the New Urban Lease Regime or to any other regulation provided by law. Those are non-standard agreements, which are ruled by agreement between parties according to the Civil Code. Apart from the right to use the areas agreed, the tenants may use the common services and amenities provided by the landlord or by the manager of the commercial centre.

6.15 Effect of Tenant’s Insolvency

Lease agreements (in which the insolvent party is the tenant) are not suspended with the insolvency declaration. The insolvency administrator may terminate the lease agreements at any time provided that a 60-day notice is given, or less, in case the agreement specifies a shorter duration. Nevertheless, the landlord cannot request termination of the lease agreement after the insolvency declaration based on the following grounds: delay in the payment of the rent related to the period before the insolvency declaration or for the economic deterioration of the tenant.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The landlord can protect himself/herself against a failure by the tenant to meet its obligations by requesting some securities, as follows: a deposit, a bank guarantee to the tenant or a guarantor. These are the most common kinds of security provided.

6.17 Right to Occupy after Termination or Expiration of a Lease

The tenant is entitled to deliver the property after the expiration or termination of a commercial lease, unless otherwise has been agreed between the parties. In order to prevent default, the landlord may stipulate a contractual clause in which, in the event of delay, a fine is applicable to each day of delay until the delivery of the property. If the tenant continues to occupy the property, the landlord may proceed with an eviction procedure.

6.18 Right to Terminate Lease

The events that typically give the landlord and the tenant a right to terminate the lease agreement are related to the default of the other party, for example, non-payment of the rent, costs and expenses for more than two months; or in the event of late payment of more than eight days, more than four times in a row, or four times in a period of 12 months. In case of opposition from the tenant to works (remodelling or restoration) that need to be provided by public authorities, by mutual agreement the landlord can terminate the lease with the tenant.

6.19 Forced Eviction

In the event of default prior to the date originally agreed, a tenant can be forced to leave (eg be evicted). There is a special eviction proceeding with the aim of expediting the eviction of a tenant of the leased property; this may be used in case the lease agreement may be terminated by judicial means and as long as the stamp duty has been paid. This procedure takes place on the Balcão Nacional do Arrendamento. Through this proceeding, in addition to requiring the vacation of the leased property, the landlord may also request the payment of cumulative rents, costs and expenses which are deemed the responsibility of the tenant. This process has been reported as a quicker process than the judicial process. Nevertheless, according to our experience, several delays have been verified. The estimated duration of the process has been two years.

6.20 Termination by Third Party

In case of opposition by the tenant to urgent works (namely remodelling or restoration) which any public authority has required of the landlord, the law provides the possibility of termination of the lease agreement by the landlord. Within six months, the tenant still has the possibility to cease the mentioned opposition, by accepting the works and therefore the lease agreement is no longer valid.

Upon notice given to the tenant, the landlord has the obligation to pay the tenant compensation in the amount corresponding to one year’s rent or, alternatively, may provide a house for the tenant in the same municipality or in a surrounding municipality, in similar conditions of location, rent and expenses.

This process may take approximately six months to one year.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common structure used to price construction projects is the fixed price, according to which the owner-developer (*dono da obra*) agrees with the contractor a total and fixed price for the entire project. A detailed description of the works is set forth in the agreement and any required preparatory and accessory works are deemed included in the scope of work. Since the price is fixed and non-revisable, the same cannot change notably due to any increase in the costs of the workforce, materials or equipment or inflation in general. Any additional works and their respective costs must be expressly approved by the developer.

7.2 Assigning Responsibility for the Design and Construction of a Project

Typically, the building contractor is liable towards the developer for any defects in the construction. In fact, it is common to include a guarantee of 'fitness for purpose' in the construction agreement, meaning that the contractor will be strictly liable towards the developer for any defect. However, the responsibility of the contractor will be excluded if it is able to prove that the defects are due to an error of design. In this case, the contractor may then request to be reimbursed by the designer for the costs it bore correcting such defects. Pursuant to Portuguese law, the request for licensing of construction works shall include a declaration from designers stating that they complied with all technical and construction rules in force.

7.3 Management of Construction Risk

Construction risk on a project may be managed through clauses on limitation of liability. However, it should be noted that liability cannot be completely excluded by the parties. In fact, pursuant to Portuguese law, clauses whereby the creditor waives in advance its rights to compensation by reason of default or late performance by the debtor are deemed null and void. Also, in general, contractual clauses directly or indirectly excluding liability in cases of serious default or wilful misconduct are seen as abusive. Private parties are allowed under their contractual autonomy to negotiate remedies for breach of contractual obligation, notably through limitation of liability clauses or liquidated damages clauses. There are, however, limitations to this limitability when (i) the limitation is contrary to public policy principles, (ii) the limitation gives rise to a merely symbolic compensation and (iii) the limitation applies to defective performance, delay in performance or non-performance by reason of wilful misconduct or serious default.

As regards warranty for defects, under the Portuguese Civil Code construction works pertaining to immovable property intended for long-term use are covered by a statutory five-year warranty period. Nevertheless, it is undisputed that the Civil Code allows the parties to agree to extend the five-year warranty period based on the principle of freedom of contract, pursuant to which entities are free to agree on the terms of the contracts they enter into. In contrast, it is disputable whether the parties may agree to reduce the statutory five-year warranty period based on their contractual freedom. In fact, several Portuguese authors have concluded that the five-year period is a mandatory minimum warranty period intended to protect the public interest in terms of durability of the immovable property. However, some other Portuguese authors and recent case law have taken the view that the provision establishing the five-year warranty period is not a mandatory provision and as a consequence the parties may contractually agree to reduce the five-year warranty period if the nature of the works or the term specified for its use justify such reduction and the reduction is not material.

7.4 Management of Schedule-Related Risk

Usually, parties agree on a time schedule for completing the works, which includes both a final date for completion of the entire project as well as monthly milestones for completion of each construction stage. The payment of an instalment of the price is associated with each construction milestone, meaning that if such milestone is not achieved within the agreed completion date, the developer may withhold the respective payment (or part of it proportionally to the portion of the works not completed) and/or be entitled to a monetary compensation for each day/week of delay.

For such purpose, the contractor should prepare monthly progress reports and submit them to the developer. The developer should then inspect the works and, if they are acceptable, proceed with the corresponding payment to the contractor.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

It is common for developers to seek several forms of security from a contractor, such as contractors' parent company guarantees and comfort letters, letters of credit, and bank guarantees on first demand. Additionally, developers may require that contractors have works insurance and insurance against injury to persons and damage to property.

7.6 Liens or Encumbrances in the Event of Non-Payment

Contractors and/or designers are not permitted to lien or otherwise encumber a property in the event of non-payment. In case of non-payment they may execute the guarantees put in place (eg bank guarantees) or resort to court asking for compensation for their damages.

7.7 Requirements Before Use or Inhabitation

In general, buildings are subject to a municipal licence known as 'licence of use' (*licença de utilização*). Without this licence, no property may be sold (except in specific cases provided for by law under which such properties are exempted from the requirement for a licence of use).

It is also worth mentioning that an energy efficiency certificate (*certificado de eficiência energética*) is required for all buildings (with some exceptions set forth by law, such as buildings or autonomous units thereof used as warehouses, workshops or parking). The certificate evidences that the applicable legal requirements concerning energy efficiency and air quality inside the buildings are being complied with and, when this is not the case, requires the identification of the necessary corrective measures.

Furthermore, new properties for housing purposes must have the so-called house specifications certificate (*ficha técnica de habitação*), which is a document stating the main characteristics of the property that must be prepared and signed by the real estate promoter, confirmed by the signature of the constructor and deposited at the respective municipality against the payment of the municipal tax.

8. Tax

8.1 VAT

In general, the sale of real estate located in Portugal is subject to property transfer tax (IMT) and exempt from VAT, unless the vendor waives the exemption.

IMT is levied at the rate of 5% for rural property, at 6% for residential urban property and 6.5% for any other property. The tax basis is either the contract value or the official evaluation value (VPT), whichever is higher.

Moreover, the acquisition of real estate is subject to stamp duty at a rate of 0.8% on the same taxable amount determined for IMT purposes.

Since there is liability to IMT, the VAT Code exempts such operations from VAT, unless the vendor is entitled to waive the applicable VAT exemption, ie to opt to tax the real estate transfer. The option to waive the exemption and to charge VAT at the standard rate is available to avoid boundaries to the right to deduct input VAT. This is due to the main VAT rule whereby one can only reclaim VAT paid on goods and services that were incurred for making taxable supplies.

To be able to waive the exemption, both the vendor and purchaser must be entrepreneurs and it is necessary that the latter, in the course of his/her business or professional activities, uses the real estate (comprising urban property or

autonomous units thereof, or building plots), thus acquired, for taxable transactions.

In such cases, the acquisition of immovable property is subject to the general VAT rate of 23% (a 22% rate in Madeira and an 18% rate in the Azores) and tax is payable by the purchaser.

A reduced rate of 6% is enforceable in the following cases related to real estate: (i) urban rehabilitation contract work, as specified by law, conducted in real estate or public spaces located in urban rehabilitation areas (critical areas of recovery and urban recovery, intervention areas of urban rehabilitation corporations and others) as limited by law, or under the scope of requalification and rehabilitation operations of overriding national public interest; (ii) real estate rehabilitation contract works which, regardless of their location, are directly contracted by the Housing and Urban Rehabilitation Institute ("Instituto da Habitação e da Reabilitação Urbana", or IHRU), as well as those performed under the scope of special financial or tax support regimes on the rehabilitation of buildings or under programmes financially supported by the IHRU; and (iii) contract works on the improvement, refurbishment, renovation, restoration, reparation or conservation of real estate or autonomous units thereof assigned to housing, with the exception of cleaning work, maintenance work of green spaces and contract work on real estate which cover the total or some of the constituent elements of swimming pools, saunas, tennis, golf or minigolf courses or similar facilities. The reduced rate does not apply to the incorporated materials, unless their respective amount is equal to or less than 20% of the global amount of the services rendered.

8.2 Mitigation of Tax Liability

Normally, large estate portfolios maybe structured as share deals to mitigate the property transfer tax effect since this tax is not normally due when transferring the shares of the real estate owning company.

In any case, the transfer of more than 75% of the equity of a private limited liability company will trigger IMT at a rate of 5% for rural property and 6.5% for urban property and building plots.

Likewise, the acquisition of participation units in privately placed closed-end real estate investment funds, regardless of the location of the management company, and the redemption of participation units, or the increase or reduction of the share capital or other, in which one of the holders, or two holders who are married or in a registered partnership, hold at least 75% of the participation units representative of the investment fund's patrimony, are subject to IMT.

In fact, collective investment funds are investment vehicles commonly used to purchase immovable property.

The acquisition of real estate by real estate investment funds incorporated and operating in accordance with Portuguese law is subject to IMT and stamp duty on the same terms mentioned above.

Generally, collective investment undertakings are subject to corporate income tax but they benefit from an advantageous regime. Investment income, capital gains and rental income are not included in their taxable income, except when such income is derived from offshore entities. Additionally, these are exempt from state and municipal surcharge (*derrama estadual* and *derrama municipal*).

Furthermore, collective investment undertakings are subject to stamp duty at a 0.0125% rate on their net asset value, payable quarterly.

8.3 Municipal Taxes

Municipal property tax is levied annually on the patrimonial value of both urban and rural immovable property, payable by their respective owner or person entitled to the use or fruition on 31 December of any given year. Municipal property tax is usually payable in three instalments in April, July and November.

The general tax rates vary between 0.3% and 0.45% of the patrimonial value for urban immovable property and a rate of 0.8% rate for rural immovable property. If the investor is a legal entity resident in an offshore jurisdiction, the applicable rate will be 7.5%.

The rates are not different in case of a business or non-business use.

The use criterion is, however, relevant for property transfer tax purposes when determining the patrimonial value of the asset, ie the taxable basis, since one of the criteria for this evaluation is its purpose or use (eg trading, services, residential). However, the ratio differences are not substantial.

8.4 Income Tax Withholding for Foreign Investors

Rental income: non-residents

Non-resident investors are subject to withholding tax on rental income at a rate of 25% if the lessee is a legal entity or an individual that has organised accounting obligations. Withholding is a payment in account of final tax due. The withholding rates may be reduced under the application of a double taxation treaty.

In any case, non-resident real estate owners receiving income are obliged to submit an annual tax return in Portugal with the rental income. Thus maintenance and upkeep expenses incurred by the investor may be deducted within the tax return information.

Final taxation of non-resident investors will occur at the rate of 25% of corporate income tax for legal entities and at an autonomous rate of 28% for individuals. The tax is assessed by the tax authorities on the basis of the submitted tax returns.

As for withholding tax, in the cases when it is due, the lessee is responsible for handing over the tax withheld to the tax authorities.

Rental income: residents

Resident investors are also subject to withholding tax at the same rate of 25% if the lessee is a legal entity or an individual that has organised accounting obligations.

Tax withheld is a payment on account of the final tax due, and has a rate of 28% for individuals – when they do not opt to tax the income according to the rules applicable to individuals' business income, in which case they will be taxed according to different rules – and a rate of 21% for legal entities.

Resident individuals may choose to include the aforementioned rental income to their taxable income, subject to tax at progressive rates of up to 48%, to which a surtax of up to 3.5% may be added. Moreover, a temporary additional income tax rate applies at 2.5% on the part of the taxable income exceeding EUR80,000 and 5% on the part of the taxable income exceeding EUR250,000.

As for legal entities, in the case of corporate tax, a municipal surcharge of up to 1.5% may be added. A state surcharge may also apply at a rate of 3% on taxable profits in excess of EUR1,500,000 and up to EUR7,500,000, at a rate of 5% on taxable profits in excess of EUR7,500,000 up to EUR35 million, and at a rate of 7% on taxable profits in excess of EUR35 million. Therefore, the 25% upfront withholding taxation on the rental income may result not to be above the final tax due.

Capital gains: non-residents

Capital gains obtained by non-resident legal entities on the sale of real estate are subject to corporate income tax at a rate of 25% and non-resident individuals are subject to tax at a rate of 28%. Tax is assessed upon the submission of the annual tax return.

In certain situations, capital gains obtained by non-residents may not be taxed in Portugal under the application of a double taxation treaty.

Capital gains: residents

Capital gains obtained by resident individuals on the sale of real estate are only taxed on 50% of the gain, and subject to the progressive rates mentioned above. Exemptions are available in the case of proceeds derived from the sale of the

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL** *Authors:* Filipa Arantes Pedroso, Maria Quintela, Rita Ferreira Vicente, Rui Ribeiro Lima

family housing when reinvested for the same family housing purposes.

Capital gains obtained on the sale of real estate by resident legal entities in Portugal are taxed under corporate income tax at a general tax rate of 21%, to which a municipal surcharge of up to 1.5% may be added. As mentioned above, a state surcharge may also apply at a rate of 3% on taxable profits in excess of EUR1,500,000 and up to EUR7,500,000, at a rate of 5% on taxable profits in excess of EUR7,500,000 up to EUR35 million, and at a rate of 7% on taxable profits in excess of EUR35 million.

Should the capital gain be reinvested in tangible fixed assets, intangible assets or non-consumable biological assets, only 50% of its value is taxed if the reinvestment is made by the end of the second year after the sale.

8.5 Tax Benefits

The ownership of real estate by legal entities allows the recognition of tax-deductible depreciations according to the asset's expected useful life. The applicable depreciation rates are laid down in the law, and deductions made above those rates are not deductible for corporate income tax purposes.

Several tax benefits are available under IMT and IMI, provided that certain conditions are met. These include municipal property tax reductions on real estate assigned to the production of energy derived from renewable sources and to energy-efficient real estate, property tax exemptions on (i) urban real estate subject to rehabilitation, (ii) urban real estate built, expanded, improved or acquired for consideration for housing purposes, (iii) real estate integrated into a tourist resort to which touristic utility has been granted, and (iv) underground parking lots.

**Morais Leitão, Galvão Teles, Soares da
Silva & Associados, RL**

Rua Castilho,
1651070-050 Lisboa
Portugal

Tel: +351 213 817 400
Fax: +351 213 817 499
Email: mlgtslisboa@mlgts.pt
Web: www.mlgts.pt

MORAIS LEITÃO
GALVÃO TELES
SOARES DA SILVA