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# THE REAL ESTATE LAW REVIEW

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EDITOR  
DAVID WATERFIELD

LAW BUSINESS RESEARCH

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# THE REAL ESTATE LAW REVIEW

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## EDITOR'S PREFACE

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In an age that has seen ownership of real estate become increasingly international, it is more necessary than ever to appreciate the basic framework of real estate law in different jurisdictions. This book aims to give readers a general feel and overview of some of the key substantive and practical considerations in the major markets around the world.

Each contributor to *The Real Estate Law Review* is a distinguished legal practitioner in his or her own jurisdiction, and this review represents an immediate and accessible summary of the most important and relevant issues across the many countries covered.

*The Real Estate Law Review* seeks to identify distinctions in practice between the different jurisdictions by focusing on key developments that highlight particular local issues – we believe that this will help practitioners to develop their understanding of practice beyond their own borders. As both domestic and international clients become ever more sophisticated in this regard, real estate practitioners need to be familiar with the issues in the markets that are most relevant to the interests of their clients. Overseas investors have for some time been key influences in most jurisdictions and it is therefore vital that practitioners are able to advise on a particular transaction in the light of an understanding of the investor's own home forum.

In addition to bringing together topical cross-border real estate issues and practical information on real estate practice around the world, *The Real Estate Law Review* also seeks to offer an overview of activity levels in each jurisdiction and, therefore, the global real estate investment market. The impact of events such as the collapse of the US sub-prime residential mortgage market and the Eurozone crisis has demonstrated how complex and inter-related investment markets have become. It is no longer possible to ignore globalisation and view real estate markets in isolation. The financial and economic turmoil of the past few years will continue to affect the international real estate investment market; the scarcity of debt finance seems likely to continue for the foreseeable future and investors with funds will increasingly look to a global real estate market for value and safety.

I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this first edition of *The Real Estate Law Review*. I would also like to thank Gideon Robertson and his publishing team for their tireless work in coordinating the contributions from the various countries around the world.

**David Waterfield**

Slaughter and May

London

February 2012

## Chapter 25

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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 its 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 or agricultural land and urban land or buildings) must be executed by a notary or a lawyer, or the commercial and industrial

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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 Articles 1439 et seq. of the Civil Code.

4 Articles 1524 et seq. of the Civil Code.

5 Articles 1403 et seq. of the Civil Code.

6 Articles 1414 et seq. of the Civil Code.

office or the registry officers. There are certain documents required for the purchase and sale of a property, notably a licence for use if a building, or a construction licence in case of urban land. Both these 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 other any subsequent rights registered.

### **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 purchase 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 ('MoU') entered into between those entities and the Portuguese government are being adopted, but the more optimistic forecasts still indicate no growth in 2012.

The real estate investment market was one of the sectors significantly affected by the financial crisis. The main investors in Portuguese real estate between 1996 and 2010 were EU countries, with Germany, the UK and the Netherlands occupying the leading positions, followed by France and Spain (outside the EU, the United States occupies the leading position).

Tourism is certainly one of the main areas of activity in the Portuguese economy, and is considered a strategic and priority sector. Due to the uncertainty of the Portuguese and European economies, together with the public debt and the lack of liquidity of companies (associated with difficulty in obtaining bank financing), investors appear to

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<sup>7</sup> Article 46(1) of the Civil Code.

be waiting for better circumstances before proceeding with the real estate investments. Banks have been working with their debtors to find solutions avoiding sales at actual market prices and the immediate accounting of imparities, so opportunities will no doubt arise in the near future and investors are waiting for such opportunities. It will be necessary to find a compromise between the prices at which sellers are willing to sell and buyers willing to buy, but there may well be more transactions in 2012 than in 2011. The main areas that have been identified as priority areas for the economic growth of real estate market and the country are tourism (residential – senior tourism, health and well-being – and business tourism) and building renovation.

### III DEVELOPMENTS IN REAL ESTATE PRACTICE

The MoU that followed the request for financial assistance by Portugal provides for the implementation of specific legislation concerning services and changes in the housing market.

The Services Directive easing the requirements related to the establishment of individuals and companies and reducing the number of requirements to which cross-border providers are subject was implemented by Decree-Law No. 69/2011 of 15 June. This law sets out sector-specific amendments in the access to construction and real estate activities, simplifying the requirements applying to cross-border providers – for both types of activity – and reviews of the obstacles to the establishment of service providers such as restrictions on sub-contracting (for construction) and on excessive liquidity obligations and physical establishment (for real estate).

Following the request of the MoU in what concerns the housing market, and in order to improve access to housing, foster labour mobility, improve the quality of housing and make better use of the housing stock, and reduce the incentives for households to build up debt, the government has proposed a New Urban Lease Act Law, which amends the Civil Code, the Civil Procedure Code and Law No. 6/2006 of 27 February. The purpose of the amendments are to ensure balanced rights and obligations of landlords and tenants. Such amendments will:

- a* broaden the conditions under which renegotiation of open-ended residential leases can take place;
- b* introduce a framework to improve access to housing by phasing out rent-control mechanisms;
- c* reduce the prior notice for termination of leases for landlords; and
- d* provide for an extrajudicial eviction procedure for breach of contract, aiming at shortening the eviction time to three months.

Finally, in the area of renovation works, a proposal by the government to amend Decree-Law No. 307/2009 of 23 October aims to simplify 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 renovation.

These two new amendments, concerning leases and renovation works, are yet to be discussed in parliament and therefore some changes may be agreed prior to their respective implementation.

#### **IV REAL ESTATE AND FOREIGN INVESTMENT**

There are no restrictions concerning the ownership of real estate by non-resident or foreign investors, which means they are treated the same as Portuguese nationals or residents. Tourism and activities declared to be of interest 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.

#### **V STRUCTURING THE REAL ESTATE 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 the rate of 0.8 per cent on the price or patrimonial value, again, whichever is higher.

The rule is that value added tax ('VAT') is not applicable; however, if certain conditions are met, the owner may renounce this exemption of VAT. This option may be interesting to explore as it allows the seller to deduct the VAT paid during construction or any other VAT applied during its course of the business.

In relation to share deals, the most popular investment vehicles are commercial companies: public limited liability companies or private limited liability companies ('Lda'). Other common investment vehicles are real estate investment funds ('FIIs') and real estate investment companies ('SIIMOs').

In the case of commercial companies, if the real estate is already owned by the company, the aforementioned transfer taxes – IMT and stamp duty – do not apply; if, however, the company is a 'quota' company – an Lda – the 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'), which in 2012 is 25 per cent accrued on 3 per cent of the taxable profit between €1.5 million and €10 million, and 5 per cent on the taxable profit above €10 million. IRC is also accrued on municipal tax ('IMI'), which cannot be higher than 1.5 per cent. In principle, all the costs connected with the real estate may be deducted.

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 a tax of 25 per cent; non-residents from the EU are exempt from paying taxes

in Portugal if their shareholding is of at least 10 per cent. 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, and the incorporation of an FII needs authorisation from the Stock 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 FII and SICAFI whose units are held by qualified investors or by financing institutions pay only 50 per cent of IMT and stamp duty. In what concerns the property income of the FII and SIIMO, the tax is of 20 per cent and 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.

## **VI REAL ESTATE OWNERSHIP**

### **i Planning**

The Portuguese planning and licensing legislation is for the most part contained<sup>8</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 have an important role in the planning and licensing of real estate projects. Planning in Portugal is made 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 aims, in general terms, to confirm whether the project complies with the applicable law. The municipalities are the entities responsible for the licensing of projects, however, there are other entities that need to be consulted and in certain cases their opinions are binding (for example, Tourism of Portugal in tourism projects). When construction is complete, a licence must be obtained that confirms that the construction was concluded in accordance with the approved designs and the conditions of the construction licence. This user licence certifies the relevant building or fraction can go into use. Tourism

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8 Notwithstanding the Constitution, which has principles concerning planning and development.



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 square metres, 30,000 square metres or 8,000 square metres – also require special licences; these are generally called commercial licences.

## **ii Environment**

The Environmental Liability Law,<sup>9</sup> based on the ‘polluter-pays’ principle, establishes that, if any damage of the environment occurs or a threat of damage exists 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 will 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**

As previously mentioned, the acquisition of real estate is subject to IMT at the 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 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 the rate of 0.8 per cent on the price or patrimonial value, whichever is higher.

Properties are also subject to a IMI paid every year in two instalments, one in April and another in September, at the 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.

The MoU provides also that the government will review the framework for the valuation of housing stock and land for tax purposes, and will present measures to ensure that by the end of 2012 the taxable value of all property is close to market values, and valuation is updated regularly (every year 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 in 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

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9 Decree-Law No. 147/2008 of 29 July.

created by an authenticated private document or by a deed executed by a notary public. The mortgage needs to be registered at the Property Registry to be effective.

Other security, such as the 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 the pledge of shares or quotas, and such pledge of quotas needs to be registered at the Companies Registry. The requirements for a pledge of shares depends 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 the pledge over the credit rights that the debtor is entitled to and which 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 over 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 the stamp duty only applies to the amount of the financing. The rates of the stamp duty 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.

## **VII LEASES OF BUSINESS PREMISES**

Since 2006 lease contracts have fallen under the Civil Code. Lease agreements for longer terms than six months 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 non-housing, or commercial. The main terms and conditions of the commercial leases are freely agreed between the parties, notably in what concerns 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 provides a default a 10-year period, and 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 this matter the landlord will be responsible for such 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, except if the parties have agreed otherwise. The tenant, however, has a right of pre-emption 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 case of default of the other party. Termination by the landlord must be declared by a court decision except in the case of opposition of the tenant to works ordered by public authorities, or non-payment of the rent, costs and

expenses for three months. In this case termination is effective with the communication to the tenant except if, in the following three months 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 six months: three months for the landlord to terminate and another three months prior to paying, not paying or agreeing to the works (this amounts to a six-month delay counted from the notification of the landlord). As previously mentioned (Section III, *supra*) amendments to the law envisage this delay being reduced to three months.

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 leases agreement and, therefore, the aforementioned legislation does not apply: these are called 'non-typified contracts'. The users of these spaces are not considered simple tenants as their establishments benefit from common services provided by the management company, notable 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.

## VIII OUTLOOK AND CONCLUSIONS

Implementation of the amendments to the lease law is an important step concerning the housing market, which is expanding considerably with the difficulties in obtaining financing to buy houses; demand is now bigger than supply. The necessity for renovation is becoming a considerable problem in Portuguese cities due to the low rents paid by the tenants, and this is another important issue to resolve. The biggest challenge, however, is for the courts to act faster, and this is also addressed by the new law; in certain cases a court decision is not required and appeals do not suspend the decision of the lower court.

It is difficult to say whether 2012 will be better than 2011, as much depends on the EU and the problems within the Eurozone. The restructuring of the banks, which have a lot of real estate to inject into the market, is another problem that will take some time to resolve. Prices need to adjust and foreign investors need to believe that real estate investment in Portugal is worthwhile. Tourism, especially senior tourism, is a key factor for the Portuguese economy but is also dependent on the confidence of investors. According to the National Strategic Plan for Tourism, enhancing and developing residential tourism infrastructures, focusing on the elderly and health care, is a priority.

## Appendix 1

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### ABOUT THE AUTHORS

#### **FILIPA ARANTES PEDROSO**

*Moraes Leitão, Galvão Teles, Soares da Silva & Associados*

Filipa Arantes Pedroso joined the firm in 1979 and became a partner in 1987. She is the sub-coordinator of the corporate department and head of the real estate team.

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, Filipa 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.

She is the author of several articles in national and international specialist magazines.

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