
THE REAL ESTATE LAW REVIEW

SECOND EDITION

EDITOR
DAVID WATERFIELD

LAW BUSINESS RESEARCH

THE REAL ESTATE LAW REVIEW

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THE REAL ESTATE LAW REVIEW

Second Edition

Editor
DAVID WATERFIELD

LAW BUSINESS RESEARCH LTD

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EDITOR'S PREFACE

Following the success of the first edition of *The Real Estate Law Review*, the second edition now extends to some 33 jurisdictions and we are fortunate, once again, to have the benefit of incisive news and commentary from distinguished legal practitioners in each jurisdiction. Each chapter has been updated to focus on key developments in the relevant jurisdiction and their potential impact on the global real estate market. This edition continues to provide an up-to-date picture of real estate activity in each jurisdiction and, therefore, the global real estate market.

International economic and political instability, in particular the eurozone crisis and US fiscal cliff, continues to have a significant impact on the international real estate investment market as investors seek value and a safe haven for their cash. The ongoing scarcity of debt finance also continues to constrain the wider investment market. Although new sources of funding have started to appear, the transition from a dependence on bank lending has been gradual. The challenging economic climate seems likely to continue and practitioners and their clients will need to adapt to the challenges it brings and the investment trends and opportunities that emerge.

The globalisation of the real estate market is a continuing theme that is likely to become more significant to real estate practitioners and their clients with each passing year. The second edition of *The Real Estate Law Review* seeks to build on the achievement of the first by developing an understanding of the law and practice in key jurisdictions while helping to cultivate an overview of the global real estate market.

Once again, I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this edition. 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
March 2013

Chapter 21

PORTUGAL

*Filipa Arantes Pedroso*¹

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,² 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.³ 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.⁴

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

ii Registration system

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

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.

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 any subsequently registered rights.

iii Choice of law

The law applicable to the possession, title to property and other real estate rights is defined by the state in which the property is located;⁷ 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 and recovery by the end of 2013 is expected, provided that exports remain a key contributor to GDP growth.

The real estate investment market was one of the sectors significantly affected by the financial crisis.

Because of the uncertainty in the Portuguese and European economies, together with the public debt and companies' lack of liquidity, investors are still waiting for better circumstances before proceeding with real estate investments. Although real estate financing is now available, costs are higher (higher spreads) and the amounts and rules are more restrictive. Although investors are holding out for better opportunities, it will be necessary for buyers and sellers to reach a compromise on prices; there may well be, however, more transactions in 2013 than in 2012.

⁷ Article 46(1) of the Civil Code.

Tourism continues to be one of the Portuguese government's main priorities. Domestic and Spanish demand have both decreased but the outlook overall is positive as tourism from other European countries (notably Germany, France and the Netherlands), Brazil and the United States have increased. The tourist real estate sector is still in great difficulties and it is not clear if it will pick up in 2013, although companies are being supported by European and recovery funds. The ambitious and important health tourism project 'Healthy'n Portugal' is being implemented by the Portuguese Investors' Association ('AEP') and Health Cluster Portugal, with the support of the Secretary of State for Tourism. Medical tourism is one of the fastest-growing businesses in many countries and the Portuguese health sector has a good international reputation (ranked No. 12 worldwide).⁸ Portugal's general tourism offering is very diversified and its climate and hospitality are well valued by tourists. Medical tourism in combination with these will help consolidate Portugal as the Florida of Europe. The cross-border health care directive,⁹ which seeks to facilitate access to safe and high-quality health care across EU Member States and promotes cooperation between member states, was an important step forward. The directive, which is to be implemented by 21 October 2013, helps patients to obtain the care they need and Member States to ensure the accessibility, quality and financial sustainability of their health systems and the well-being of their citizens. The directive laying down the measures to facilitate recognition of medical prescriptions issued in another Member State complements the cross-border health care directive and both are key for the development of the health-and-well-being tourism project in Portugal.

III 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 relevance to tourism according to the applicable legislation may be granted tax incentives. Companies established in Portugal may be entitled to a special investment support regime, notably exemption from property transfer tax ('IMT') and stamp duty on the acquisition of land and property if considered a relevant investment.

IV STRUCTURING THE INVESTMENT

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

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

8 World Health Report published by the World Health Organization in 2000.

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

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

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

In the case of commercial companies, if the real estate is already owned by the company, the aforementioned transfer taxes (IMT and stamp duty) do not apply; if, however, the company is a 'quota' company (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'). This tax, of 25 per cent in 2013, is accrued on a percentage of the taxable profit at the following rates:

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

The owners of real estate are subject to municipal tax ('IMI') up to 0.8 per cent of the value of the property (a special rate of 7.5 per cent is applicable for properties owned by companies located in tax havens) and is paid every year in April, July and November if the tax due is higher than €500. Stamp duty of 1 per cent is due if the value of the housing property is above €1 million.

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

FII's can be open or closed-end funds depending on whether they are incorporated by public or private subscription. FII's 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 Securities Market Commission ('CMVM') and is then subject to its supervision. SIIMOs have legal capacity and can have variable capital ('SICAVI'), with a similar regime to the open-end FII, or fixed capital ('SICAFI'), which has the same regime as a closed-end FII.

In the acquisition of real estate, the open-end FII and SICAVI are exempt from IMT and stamp duty. Closed-end FII and SICAFI whose units are held by qualified investors or by financing institutions pay only 50 per cent of IMT and stamp duty. Regarding the property income of the FII and SIIMO, tax of 20 per cent applies to the net income, which does not include conservation and maintenance, and IMI. The FII and SIIMO may not deduct the interest of the financing obtained for the acquisition or construction of real estate. The capital gains tax rate is 25 per cent over half of the positive difference between gains and losses made. The management company must pay this and income tax in April of the following year.

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

V REAL ESTATE OWNERSHIP

i Planning

The Portuguese planning and licensing legislation is for the most part contained¹⁰ 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 carried out in accordance with previous options contained in plans. Therefore, in the development of a real estate project it is important to analyse the applicable rules of territorial management, notably the special plans and the municipality plans.

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

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

ii Environment

The Environmental Liability Law,¹¹ based on the 'polluter-pays' principle, establishes that, if any damage to the environment occurs or there is a threat of damage due to a private or public economic activity, the entity responsible must take the necessary measures to repair the damage or prevent other damages (administrative liability) and

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

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

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

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

Properties are also subject to IMI, paid every year in three instalments in April, July and November,¹² 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 housing stock has been evaluated during 2012 and the taxable value is now close to market values. Valuation is updated regularly (yearly for commercial real estate and once every three years for residential real estate, as foreseen in the applicable law).

iv Finance and security

A loan agreement secured by a mortgage is the most common financing and security for real estate projects in Portugal. A mortgage grants the creditor the right to be paid a certain amount with priority over other creditors without any special privilege. The mortgage is created by an authenticated private document or by a deed executed by a notary public. The mortgage 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; the pledge of quotas needs to be registered at the Companies Registry. The requirements for a pledge of shares depend on the type of shares: bearer, nominative or book entry shares. A pledge of credit rights such as leases, bank accounts, insurance policies or construction contracts is also quite common. The creditor will usually require 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.

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

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

VI LEASES OF BUSINESS PREMISES

Six years after the enactment of the New Urban Lease Regime ('NRAU'),¹³ a reform¹⁴ entered into force on 12 November 2012. Lease agreements must be in writing. If a property is sold, the leases do not terminate and are automatically assigned to the new owner of the property. There are two types of leases: housing and commercial. Housing leases no longer have a minimum term and when parties are silent the lease shall be considered as having been entered for a fixed term of two years. The main terms of commercial leases continue to be freely agreed between the parties, notably regarding the duration, termination and opposition to the extension. The maximum duration of a commercial lease is 30 years and if the parties do not establish a duration, the law provides a default a five-year period; the tenant can terminate the lease with one year's notice.

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

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

Any party may terminate the lease in 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 two months, or in the event of a late payment of more than eight days for more than four times in a row or four times in a period of twelve months. In the first two situations above, termination is effective upon communication to the tenant except if, in the following month the tenant pays the amounts due with a penalty (50 per cent of the amounts due) or allows the works requested. This means that at the very least the tenant remains in the leased premises for three months: two months for the landlord to terminate and another month prior to paying, not paying or agreeing to the

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

14 Law No. 31/2012, 14 August.

works (a three-month delay counted from the landlord's notification). Law 31/2012 has also introduced a special procedure to expedite the eviction of a lessee and return of the property to the rental market. This reform maintains the existing eviction procedure for the termination of a lease whenever the law imposes the use of the judicial route for that end. Additionally, the law has introduced the aforementioned special eviction procedure as a means to terminate effectively the rental agreement, regardless of the rental's purpose, whenever the tenant does not vacate the leased property on the date set by law or determined by the parties for that effect.

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

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

VII DEVELOPMENTS IN PRACTICE

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

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

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).

VIII OUTLOOK AND CONCLUSIONS

Implementation of the new lease law was an important step concerning the rental market, which is expanding considerably because of the difficulties in obtaining financing to buy houses. However, rents are still going down and there will only be an upturn in the housing lease market if the legal framework concerning eviction proves effective. Rents in the commercial market are being renegotiated and are now lower than two years ago, but because of the low rents paid by tenants the need for renovation is becoming a considerable problem in Portuguese cities; the implementation of the new legal framework seeks to resolve this matter. The biggest challenge, however, is for the courts to act faster, and this is also addressed by the new framework and the creation of the BNA.

It is difficult to say if there will be growth in 2013 as it depends not only on Portugal but also 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, 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 and medical 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, will continue to be a priority.

Appendix 1

ABOUT THE AUTHORS

FILIPA ARANTES PEDROSO

Moraís Leitão, Galvão Teles, Soares da Silva & Associados

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

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

In the area of real estate, 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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