



Commercial Real Estate

2017

Third Edition

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Portugal

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Leasing

Practical points

(a) *Securing the premises*

Pursuant to a lease agreement or a pre-let lease agreement, the parties may agree on the payment of a reservation fee in advance in order to secure the premises, while they are being constructed or in advance of an existing occupier vacating.

(b) *Taxes and fees payable*

The execution of a lease agreement is subject to stamp duty payable by the landlord at the rate of 10% of the amount of one month's rent. Stamp duty on lease agreements must be paid on or before the 20th of the month following the execution date of the lease agreement. In general, the lease of real estate is exempt from VAT.

Landlords (natural persons) of leased premises are subject to personal income tax (IRS). Rents received are taxable at the rate of 28%. If the rental income arises from property refurbished and located in an urban rehabilitated area, the landlords resident in Portuguese territory are taxed at a rate of 5%, provided that all requirements are duly met. In the case of corporate entities, rents are subject to corporate income tax (IRC) and taxable at the rate of 25%. Withholding tax applies when such income is paid by entities, which must have an organised accounts system.

(c) *Fitting-out works*

It is customary to include clauses establishing that the occupier shall not carry out any works on the premises without the prior written approval of the landlord. In specific cases, it is possible to obtain approval before the occupier takes possession of the premises, but this should be agreed pursuant to the lease agreement.

(d) *Codes of practice*

Leases are governed by the Civil Code. Lease agreements must be executed in writing. In a real estate transaction, it is common that lawyers undertake a due diligence. It is very important to draft or review and negotiate the contract and other relevant documents regarding a real estate lease.

Lease agreements with a duration for more than six years, as well as their respective assignment or subletting, must be registered at the Property Registry Office, in order to be enforceable against third parties.

Another important issue is when a landlord intends to sell a property which has been rented out to third parties: the occupier of the property for more than three years has

the right of pre-emption in respect of the sale.

This pre-emption right is mandatory and cannot be eliminated by the parties nor be waived in advance by the occupier of the establishment, where the right to lease exists.

Any communications, authorisations and approvals provided for in a lease agreement, unless otherwise specifically provided for, shall always be made in writing and sent to the addresses agreed upon in the signed lease agreement.

On the first business day following termination of a lease agreement, the occupier shall deliver the leased premises to the lessor free and clean and in good repair, except for normal wear and tear. A lease agreement is governed by Portuguese law, and in case of dispute, the parties shall submit to the jurisdiction of the courts where the leased premises are located.

Key commercial terms

(a) *Rent*

Except when the parties agree otherwise, rent is usually paid monthly and is due on the first working day of the precedent month.

The amount of rent can usually be freely agreed upon between the parties, with the exception of low-cost housing (conditioned rents) – this regime sets a maximum amount of rent for lease agreements. The parties may agree on the payment of up to three months' rent in advance, as a deposit security.

(b) *Rent adjustments*

Monthly rent is normally subject to annual increases by application of a co-efficient published every year by the Government. Nevertheless, extraordinary increases may be foreseen. In case no specific agreement exists, the rent may be adjusted by the landlord annually, according to scales periodically established by law. This is often the case in commercial leases.

(c) *Other occupational costs*

Unless agreed otherwise, generally, the occupier is obligated to pay costs and expenses related to the property, namely utility bills. Regarding drainage and sewage charges (*taxas de saneamento de esgotos*), condominium fees, any required licences, and insurance of the leased premises – all these types of costs can be requested by the landlord to be paid by the occupier.

(d) *Period of occupation*

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 into for a fixed term of two years. The main terms of commercial leases continue to be freely agreed between the parties, notably regarding the duration, renewal, termination and opposition to the extension. The maximum duration of a commercial lease is 30 years and if the parties do not establish duration, the law provides a default five-year period; the occupier can terminate the lease with one year's notice.

(e) *Remaining in occupation*

Either party may terminate a lease in case of default of the other party. Termination by a landlord must be declared by a court decision except:

- i) in the case of opposition of the occupier to works ordered by public authorities;
- ii) non-payment of rent, costs and expenses for two months; or

iii) in the event of a late payment of more than eight days more than four times in a row, or four times in a period of 12 months.

In the first two situations above, termination is effective upon communication to the occupier except if, in the following month, the occupier pays the amounts due with a penalty (50% of the amounts due) or allows the works requested. This means that at the very least, the occupier remains in the leased premises for three months: two months for the landlord to terminate and another month prior to paying, not paying or agreeing to the works (a three-month delay counted from the landlord's notifications).

It is possible to agree contractually that an occupier will have the right to request an extension, as long as the conditions of the new lease are agreed upon by the parties.

(f) *Disposing of the premises*

In general, the assignment or sublease of a lease agreement is subject to prior consent of the landlord, except in the case of a transfer of an ongoing business ("*trespasse*"), where the lease is included. In this case, the landlord has a right of pre-emption, except if the parties have agreed otherwise.

(g) *Alterations*

Generally any alterations made to the premises foreseen in a lease agreement are subject to the consent of the landlord. The occupier undertakes to bear all the costs involved with the premises required for the alteration.

(h) *Repair of the premises*

Usually occupiers undertake to maintain the premises in good condition and to bear the costs of any required repair works. This kind of repair work shall mean all ordinary repairs, maintenance and works; in general, any reconditioning or replacement necessary to repair and maintain the leased premises in good conservation status. The occupiers are responsible for the execution, directly or through third parties, planning, procurement and management of the repair work. It is common that all works performed by the occupier become an integral part of the premises (without the occupier having the right to any retention or claim for compensation) or, upon a landlord's request, to be removed and the premises returned in the same condition as they were on the delivery date, save for deterioration caused by normal wear and tear.

Nevertheless, in absence of stipulation, maintenance work is generally the landlord's responsibility.

Investment

Practical points

(a) *Exclusivity*

Once the investor has agreed to purchase a property, a promissory purchase and sale agreement should be signed by the parties and the signatures of the purchaser and the seller should be certified by a notary or a lawyer in order that such agreement can be directly executed in court. Also an obligation of specific execution (*execução específica*) should be included in the promissory purchase and sale agreement, as it will allow the purchaser to request that the court execute the contract instead of a penalty. Furthermore, it is usual to provide an advance payment which will be lost to the seller if the purchaser does not comply with the terms and conditions set out in the promissory purchase and sale agreement, or paid in double to the purchaser in case of default by the seller.

(b) *Restrictions on disposing of property*

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.

(c) *Impacts on timing*

When buying a property, an investor should be sure that such property has no charges or encumbrances and agree on the timing to release such charges, notably the mortgage of the property. Other charges such as rights of way may be accepted but should be carefully analysed by the purchaser. Other important matters are the pre-emption rights granted to the relevant municipality or the *Direcção-Geral do Património Cultural* or the Country (IGESPAR). In the case of agricultural land, neighbours may also have pre-emption rights.

(d) *Key milestones in the acquisition process*

The first step is a legal due diligence on the documentation concerning the property or land. A technical due diligence in case of a building should also take place to confirm the status of the building and the existence of any relevant defects. As soon as it is clear that the property meets or can meet the requirements of the purchaser, a promissory purchase and sale agreement in the terms set out above ('Exclusivity') should be executed between the seller and the purchaser. This agreement should include all the conditions that are required to be fulfilled before the purchase and sale. The sale and purchase, which can be executed through a private agreement (certified by a notary or a lawyer) or notarial deed, should take place within the period of time agreed between the parties that allows the fulfilment of the conditions precedent required by the purchaser and included in the promissory agreement.

(e) *Requirement for transfer of monies*

As mentioned above, it is usual that the promissory purchase and sale agreement establishes a down payment between 10% and 20% of the purchase price. This amount may be put in escrow until certain conditions precedent which are not controlled by the seller such as pre-emption rights are fulfilled. If the relevant municipality exercises its pre-emption right, the amount in escrow is transferred to the purchaser; if the pre-emption right is not exercised, such amount is transferred to the seller. On the other hand, if the sale is not completed due to default of the seller, the penalty is usually the payment in double to the purchaser of the amount of the down payment. In case of purchaser's default, the seller is entitled to keep the down payment. The only formalities to be complied with concerning the transfer of monies are anti-laundry legislation.

(f) *Execution procedure*

In Portugal, there is a requirement to sign hard copies for a purchase and sale to be valid. Furthermore, as mentioned above, for protection of the purchaser the signatures of the parties should be certified by a notary or a lawyer, notably when there is a down payment. When dealing with overseas companies, a power of attorney, with certification by a notary and legalised in a Portuguese Consulate or with the Apostille of the Hague Convention confirming that the persons signing on behalf of such company have powers to bind a company, is enough to certify the signatures. If the persons are signing directly in the presence of a notary or a lawyer, a certificate of the company's registry, issued in the country where the company is established and legalised by the Portuguese Consulate or with the Apostille of the Hague Convention, evidencing that the persons signing have the power to bind the company, is required.

(g) *Other procedural requirements*

The acquisition of properties in Portugal must be registered with the Property Registry (*Registo Predial*) and tax authorities. The registration with the Property Registry is proof of ownership of the relevant property.

(h) *Taxes and fees payable*

The investor pays on acquisition of a property transfer tax (IMT) in the amount of 6.5% or 5%, depending on whether the property is urban or agricultural, of the purchase price or the property value registered with the tax authorities, whichever is higher. Additionally, 0.8% stamp duty is also due under the same conditions as the IMT; that is, on the purchase price or the property value registered with the tax authorities, whichever is higher.

Properties are also subject to a municipality tax (IMI), paid every year in one, two or three instalments,¹ at the rate of between 0.3% and 0.45%. These rates are increased to triple in case of vacant building or ruins. Rural properties are subject to a rate of 0.8%. Properties owned by certain offshore entities listed in the applicable law pay 7.5%. Municipalities may totally or partially exempt certain properties from payment of IMI and/or IMT as an incentive to the investment made in the area of such municipality.

Tourism and activities declared to be of relevance for tourism purposes 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 it is considered a relevant investment.

Key commercial terms

(a) *Deposit*

A deposit or down payment is usually paid with the execution of a promissory purchase and sale agreement (see ‘Requirement for transfer of monies’, above).

(b) *Timing*

If all the documentation is in order, the minimum delay can be 15 days due to pre-emption rights; however, the parties usually provide for longer delays.

(c) *Employees*

A property has no employees attached. This may apply when acquiring a company that has employees.

(d) *Warranties for construction of building*

According to Portuguese civil law, a contractor is responsible for non-visible defects in a building during a period of five years from the delivery of the building to the new owner, or more if a longer guarantee period is contractually agreed by the parties. This applies to any person that acquires a building during such period.

(e) *Transfer of other tax or financial benefits*

Tax or financial benefits are not transferred in the acquisition of a property, except if the company owner of the property is acquired instead of the property.

Development

Practical points

(a) *Land ownership and assembly*

All properties are registered in the Land Registry and in the Tax Department, however if the registry is not updated, notably in the case of persons that have died without a successor, it may be a difficult task. Owners are free to sell or not, however in certain cases of public interest, expropriation by the State may apply.

(b) *Land transfer*

A developer must agree with an owner on terms and conditions, including price and timing, for the acquisition of the land. The parties are free to agree on the sale and purchase of land. Promissory sale and purchase agreements and call options can be put in place.

(c) *Taxes and fees payable*

Other than the taxes referred to above in ‘Taxes and fees payable’, a developer must pay licence fees to the relevant municipality, which can be extremely high in the case of agricultural land becoming land for construction (*loteamento*). Furthermore, environmental assessment and licences are required, and depend on the number of square metres of construction.

Key commercial terms

(a) *Price*

Price is freely agreed on by the parties. The price depends on the location of the land to be developed and the number of square metres of construction allowed.

(b) *Payment structure*

Payment structure is freely agreed on by the parties, seller and purchaser. The transfer of title is usually made with the last payment; however, payments can be made after the acquisition if guarantees are provided by the purchaser which are accepted by the seller. The most common guarantees given after a purchase and sale are first demand bank guarantees or retention of title (*reserva de propriedade*).

(c) *Deal structures*

Forward funding or forward purchase structures are not very common in Portugal.

Real estate can be acquired directly, in an asset deal, or indirectly, in a share deal. 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 real estate investment funds (FII) and real estate investment companies (SIIMO).

(d) *Taxes and fees payable*

Taxes paid in the acquisition of land are property transfer tax (IMT) and stamp duty tax, as mentioned in ‘Investment, Taxes and fees payable’, above. Properties are also subject to an annual municipality tax (IMI). Other fees are paid to the relevant municipality, notably to obtain the licences to develop the land, as referred to in ‘Development, Taxes and fees payable’, above.

Financing

Practical points

(a) *Level of loan*

A facility agreement secured by a mortgage is the most common financing and security for real estate projects in Portugal. The loan-to-value ranges between 65% and 80% of the value of the commercial property granted as security.

(b) *Security*

As a general rule, no governmental or other consents are required for the provision of security. 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 (e.g., assets in the public domain, or linked to public services) which cannot be pledged. This will depend on a specific analysis of the assets.

- (i) Mortgage of property. Mortgages over real estate must be executed before a public notary (or equivalent official) and registered with the Real Property Registry Office, such register consisting in 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.
- (ii) 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.
- (iii) Pledge of shares/quotas. The pledge of nominative shares has to be recorded in a 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 registered 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.
- (iv) 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.
- (v) 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.
- (vi) Intellectual property. Intellectual property rights can be pledged and the pledge must be registered with the IP Institute (*Instituto Nacional da Propriedade Industrial*).

(c) *Lender due diligence*

Before entering into any financing, it is common practice to carry out a lender’s due diligence (legal, financial, tax, environmental and technical).

(d) *Enforcement*

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.

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, i.e., 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 Article 735, number 3, of the Portuguese Civil Code, real estate privileges are always special.

Regarding real estate properties, the rules of credit graduation, considering creditor privileges, are *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 over property transfer (“*IMT – Imposto Municipal sobre Transmissões de Imóveis*”) and over heritage and donations; (iv) credits of the local public authority (“*autarquia local*”) for the municipal tax over real properties (“*IMI – Imposto Municipal sobre Imóveis*”); (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 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 of between one and three years without appeal.

Key commercial terms

(a) *Length of loan*

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

(b) *Interest rate and payment dates*

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%.

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% to 20% according to the applicable double tax treaty.

No WHT 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.

(c) *Repayment*

Loan-to-value, interest-cover and debt-service cover ratio are terms customarily agreed on to set a tighter framework for the credit facility.

(d) *Stamp duty issues*

(i) Territorial application

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 foresees 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.

(ii) Rates

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 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 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, i.e., so long as security is granted at the same time as a Portuguese loan (i.e., 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 secured 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%.

* * *

Endnote

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

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