

# Commercial real estate in Portugal: overview

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## THE CORPORATE REAL ESTATE MARKET

1. **What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?**

2016 was an excellent year with some major international players continuing to invest in real estate in Portugal. The main areas of investment were in commercial real estate, notably office buildings and retail (such as shopping centres, retail parks and stand-alone units). In general, the demand has been primarily for rental assets with long-term and reliable tenants. A combination of the considerable liquidity in other countries and the fact that attractive yields can still be achieved in Portugal make it an attractive country in which to invest.

## REAL ESTATE INVESTMENT

2. **What structures do investors typically use for real estate investment in your jurisdiction and what are the main advantages and disadvantages of each (for example, flexibility and tax transparency)?**

Investors mainly use commercial companies (special purposes vehicles) for real estate investment, notably:

- Joint stock public companies (*sociedade anónima*) for larger companies.
- Private limited liability companies (*sociedades por quotas*) for smaller companies which want a more flexible structure and fewer corporate government requirements.

Other vehicles such as real estate funds and real estate companies have been used less lately. Portugal has not yet implemented legislation governing real estate investment trusts (REITs).

However changes to the tax regime of real estate funds (namely, the fact that taxes are paid with the sale of the participation funds), which puts them on the same footing as those in other European countries may increase investment in real estate funds.

3. **What are the main sources of finance and types of investors for real estate investment in your jurisdiction? Does your government encourage overseas investment into real estate in your jurisdiction, for example through real estate investment legislation?**

Private investors (funds and family offices) are the main type of investors. Around 85% of the investments in real estate come from foreign investors. There is no special treatment or benefits for foreign investments except in very specific cases.

## Restrictions on foreign ownership or occupation

4. **Are there restrictions on foreign ownership or occupation of real estate (including foreign ownership of shares in companies holding real estate)? Are there restrictions on foreign guarantees or security for ownership or occupation and on lending for the purchase of real estate?**

There are no restrictions on foreign investment or foreign shareholders in Portugal.

## TITLE TO REAL ESTATE

5. **What constitutes real estate in your jurisdiction? Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?**

Any type of real property, rural, agriculture or urban land constitutes real estate. Land and buildings owned by the same entity are registered in the same title.

6. **How is title to real estate evidenced? What is the name of the public register of title and the authorities responsible for managing it? Is electronic access and electronic conveyancing available?**

Title to real estate is evidenced by a property registry certificate (*certidão predial*) issued by the Property Registry (*Conservatória do Registo Predial*). Additionally, under Portuguese law, all real estate must have a property tax registry certificate (*caderneta*) issued by the tax authorities (*Autoridade Tributária*).

The Property Registry's website ([www.predialonline.pt/PredialOnline/](http://www.predialonline.pt/PredialOnline/)) offers access to the property registry certificates and application process for registering title.

7. **What are the main information and documents registered in the public register of title? Can confidential information or documents be protected from disclosure in the public register of title?**

Both the property registry certificate and property tax certificate are accessible by the public. The property registry certificate contains:

- A specific description of the plot or building including area measurements, and type of property (that is, urban or rural).
- Registered rights or restrictions on the property, including any acquisitions, liens, mortgages or encumbrances.

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The tax registry certificate certifies the registration of the property with the tax authorities.

Access to these public records when acquiring real estate is essential, not only for confirmation purposes, but also to assess whether there are any matters that may affect the transaction, such as registered rights, restrictions, or charges, including mortgages, easements, or encumbrances on the property.

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**8. Is there a state guarantee of title? Is the authority that manages the public register liable to pay compensation for any errors it makes in relation to title registration? Is title insurance available and is it commonly used?**

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The Property Registry is state owned. There is no compensation but errors are corrected at no cost. There is no insurance for title available in the Portuguese market.

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**9. How can real estate be held (that is, what types of tenure and other main ownership rights exist over land)?**

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

- Surface right (*direito de superfície*). This 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 the land. On termination of the surface right, the owner of the land becomes the owner of the building incorporated in the land title].
- Right of use (*usufruto*). This is the right to temporarily use, manage and take the profits of a property the title of which belongs to another entity. Such a right terminates with the death of the beneficiary, or within 30 years when the beneficiary is a company.
- A property can be owned by one or more persons (common property) and it is also possible to divide buildings into fractions or independent units, which is known as "horizontal property".

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**SALE OF REAL ESTATE**  
**Preliminary agreements**

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**10. What types of preliminary agreements are typically used in the sale of real estate? Are they legally binding?**

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The first document is typically an offer made through a letter of intent, which is a non-binding document and is usually followed by legal due diligence concerning the property or land documentation (see Question 12).

Technical due diligence in case of a building also takes place to confirm the status of the building and the existence of any relevant defects (see Question 12).

As soon as it is clear that the property meets or is capable of meeting the requirements of the buyer, a promissory purchase and sale agreement is executed between the seller and the buyer. This agreement is binding and must include all the conditions precedent that need to be fulfilled before the purchase and sale.

The sale and purchase agreement (see Question 11), which can be executed through a private agreement (certified by a notary or a lawyer) or a notarial deed, is concluded at the end of an agreed period of time which allows the fulfilment of the conditions precedent included in the promissory agreement.

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**Sale contract**

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**11. Briefly outline the typical main provisions of a corporate real estate sale contract and main real estate provisions of a typical share purchase agreement.**

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The promissory purchase and sale agreement (see Question 10) must be signed by the parties, and the signatures of the buyer and the seller must be certified by a notary or lawyer for the agreement to be directly enforceable in court.

An obligation of specific execution (*execução específica*) should also be included in the promissory purchase and sale agreement, allowing either party to request that the court enforce the contract instead of paying a penalty or compensation.

It is usual to provide an advance payment (deposit), which will be retained by the seller if the buyer does not comply with the terms and conditions in the promissory sale agreement, or paid in double to the buyer in case of default by the seller.

Mortgages are registered in the Property Registry (see Question 6). Buyers are advised to make a thorough investigation (see Question 12) to ensure that no charges or encumbrances such as rights of way exist, even where none are shown on the register.

Other important matters to check are the pre-emption rights granted to the relevant municipality or the *Direcção-Geral do Património Cultural* or to the state (IGESPAR).

With agricultural land, neighbours may also have pre-emption rights. The promissory sale agreement already contains representations and warranties of the parties, and these are usually repeated in the notarial deed.

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**Due diligence**

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**12. What real estate due diligence is typically carried out before an acquisition and what key areas does it cover? Which documents are typically reviewed? Which specialist advisers are usually involved and which reports do they typically produce?**

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Legal due diligence usually covers:

- Title and registration.
- Leases and pre-emption rights.
- Planning and licences.
- Environmental and taxes related to the property.
- Corporate matters, litigation, agreements and corporate taxes in the case of a share deal.

Technical advisers are typically engaged for construction matters. In specific cases with high environmental risks, environmental specialists are also required.

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**Sellers' warranties**

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**13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover? What are the main limitations on warranties, for example are they typically qualified by disclosure?**

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The typical representations and warranties given by a seller of corporate real estate include:

- Capacity of the seller.
- Ownership of the property.

- Boundaries.
- Charges and encumbrances.
- Third party rights.
- Planning and zoning (in case of land for construction).
- Authorisations and licences.
- Rental status.
- Claims, litigation, and liabilities.
- Defects and equipment.
- Environment and asbestos risk.

A "time to remedy" is usually granted and where no remedy is possible an indemnity is paid by the seller to the buyer. Such an indemnity is usually secured by a bank guarantee, a bond or an escrow account of at least five years' duration.

Where the defects are disclosed to and accepted by the buyer before the sale is concluded, the seller's liability can be limited to the extent of the defects disclosed.

### Liability

#### 14. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?

The seller is liable for non-disclosure of information about material defects in the property.

#### 15. Briefly outline the environmental legislation and potential liability for a buyer in a purchase of real estate. Is it common to carry out environmental surveys and searches and to obtain environmental insurance? How is environmental liability typically dealt with in the sale contract?

Land contamination is classed as environmental damage under Environmental Liability Law, which was approved by Decree-Law no. 147/2008.

The owner of the polluted property is not liable if it is not responsible for the contamination. However, if the owner engages in certain types of economic activities defined by law such as waste management operations that are subject to specific licensing or the manufacture and/or use of hazardous substances, the competent authority can order the owner to clean up the property, even if the owner is not responsible for the contamination. In these cases, the owner has the right to claim the costs that derive from the clean-up measures and from any remediation from the entities that are responsible for the pollution.

If the owner of the land is not ordered to carry out remediation measures, the licensing of future activities in the property can in some circumstances be made conditional on decontamination of the property.

The matter is usually dealt with through the representations and warranties (see Question 13).

#### 16. Can an owner or occupier inherit liability for other matters relating to the real estate even if they occurred before it bought or occupied it? Can a seller or occupier retain any other liability relating to the real estate after it has disposed of it?

The owner or occupier of real estate does not inherit statutory liability for matters other than environmental liability which occur before the change of ownership, but the parties are free to agree otherwise.

### Completion arrangements

#### 17. What are the typical arrangements and main documents required for completion of the sale? When does title transfer and what are the formal legal requirements to execute the sale documents, transfer the real estate and register the change of title? Is notarisation required?

The property is transferred by notarial deed or by a private agreement certified by a lawyer. The main documents required for the completion of the sale are:

- Property registry certificate (*certidão predial*).
- Tax certificate (*caderneta predial*).
- Use permit (*licença de utilização*).
- Energy certificate (*certificado energético*)
- Evidence that public entities have not decided to exercise their pre-emption right to acquire the property (if applicable, see Question 11).

The acquisition of properties must be registered with the Property Registry and tax authorities. Registration is evidence of ownership of the relevant property. The promissory agreement (see Question 10) applies from the time it is signed until the time it becomes a notarial deed.

### REAL ESTATE TAX

#### 18. Is stamp duty/transfer tax (or equivalent) payable on the purchase of real estate? Who pays, what are the rates and are there any exemptions? Does it apply to the transfer of shares in a company holding real estate and at what rate?

The purchase of real estate is subject to stamp duty (*Imposto do Selo*) at 0.8%, which is payable by the buyer. The transaction is also subject to property transfer tax (*Imposto Municipal sobre as Transmissões Onerosas de Imóveis* (IMT)) at the following rates:

- 0% to 6% progressive rates on the acquisition of property intended for housing purposes (Rates vary depending on whether the property is used for personal and permanent habitation or for non-permanent habitation purposes).
- 5% on the acquisition of rural property.
- 6.5% on the acquisition of other property.

The applicable stamp duty and transfer tax rate is due either on the purchase price of the transaction or on the official patrimonial value (*Valor patrimonial tributário* normally referred to as *VPT*), that is the value for which the property is registered within the tax authorities registers upon its official evaluation, whichever is higher.

The acquisition of property for redevelopment by real estate enterprises for the purpose of reselling can be exempt from property transfer tax, provided the property is effectively sold

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within three years of acquisition and other requirements are fulfilled such as the need that the company has submitted a return to tax authorities stating its condition as a property resale company.

The transfer of shares in a joint stock public company (*sociedade anónima*) which owns property is not subject to transfer tax, while the transfer of a shareholding in a limited liability company (*sociedade por quotas*) owning property, which result in the holding by the shareholder, after the transfer, of at least 75% or more of the share capital, is subject to property transfer tax at the rates referred above.

In general, EUR250 is payable for each property transfer registration in the Property Registry.

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### 19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios? What is the general approach of the tax authorities in your jurisdiction to such schemes?

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Normally the transfer of significant real estate portfolios is carried out as a share deal to avoid triggering stamp duty and property transfer tax. Tax authorities, in general, do not challenge this route.

Real estate companies that purchase property for the purposes of resale are exempt from property transfer tax, provided that the property is effectively sold within three years of acquisition and other requirements are fulfilled such as the need for the company to submit a return to tax authorities stating its condition as a property resale company.

Other tax exemption regimes are available for the acquisition of:

- Property intended for urbanistic rehabilitation purposes;
- Property by real estate investment funds for residential leasing;
- Property classified of touristic importance purposes duly certified as such by the tourism institute;
- Buildings classified as of national, public or municipal interest.
- Real estate within restructuring operations (such as mergers and demergers) upon specific authorisations by tax authorities.
- Real estate by companies under specific EU incentives when the assets are considered eligible investment (*RFAI Regime fiscal de Apoio ao Investimento*).

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### 20. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?

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As a general rule, the purchase of real estate is exempt from VAT. However, the seller can waive the applicable VAT exemption in order to deduct input VAT it may have paid in the course of its business activity. In this case, the applicable rate on the sale of the real estate is:

- 23% of its value on the Portuguese mainland.
- 22% in Madeira.
- 18% in the Azores.

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### 21. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

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Municipal Property Tax (IMI) is levied annually on the tax value of property, including on property occupied for business purposes, at

a rate which generally varies between 0.3% and 0.45% for urban property. Tax is due by the owners, usufructuaries or holders of the surface rights.

Property owned in Portugal by legal persons resident in a foreign tax jurisdiction classed as a "tax haven" is subject to an increased 7.5% tax rate.

An additional property tax (*Adicional ao Imposto Municipal sobre as Transmissões Onerosas de Imóveis (AIMI)*) was introduced by the State Budget Law for 2017, but this will not be levied on property occupied for business purposes, that is, urban property classified for commercial, industrial or services purposes are out of the scope of the new tax. The main features of the new property tax are the following:

- It is levied on property allocated for housing purposes and is due by its owners, usufructuaries or the holders of the surface rights that are either individuals, undivided inheritances, legal persons, structures or collective bodies without an autonomous legal personality.
- For the purposes of computation of the taxable base, individuals, or undivided inheritances, can deduct EUR600,000. Spouses can deduct EUR600,000 for each one in a maximum of EUR1,200,000 for both.
- The tax rate is 0.7% for property from EUR 600,000 up till EUR1 million and 1% over EUR1 million;
- For legal persons, structures or collective bodies without an autonomous legal nature, the additional tax rate is, in general, 0.4% without a deduction on the tax base.
- If the property is allocated to the personal use of shareholders, members of its corporate bodies, their spouses, ascendants or descendants the tax rate is 0.7% up till a taxable value of EUR 1 million and at a rate of 1% over that amount.
- Property owned by legal persons resident in a foreign tax jurisdiction classed as a "tax haven" is subject to a 7.5% tax rate of this additional tax.

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## CLIMATE CHANGE ISSUES

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### 22. Are there targets or incentives to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria?

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There are no official targets or incentives to reduce greenhouse gas emissions from buildings, although all buildings must have an energy certificate (*certificado de energético*). Some exceptions to this are buildings or autonomous units of buildings used as warehouses, workshops or parking areas. The certificate is evidence of compliance with legal requirements concerning energy efficiency and air quality inside the buildings. A penalty of between EUR250 and EUR3,740 (for individuals) and between EUR2,500 and EUR44,890 (for companies) can apply, notably if the owner sells the property without delivering the energy certificate to the buyer

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### 23. Are provisions relating to the energy efficiency of buildings commonly included in contracts for the sale of real estate or in leases (for example, green leases)?

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Provisions relating to the energy efficiency of buildings are not typically included in contracts for the sale of real estate or in leases. However, the energy certificate must be delivered to the buyer on the execution of the transfer deed and its existence must be expressly mentioned in lease agreements.



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## REAL ESTATE FINANCE

### Secured lending involving real estate

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#### 24. Briefly outline the typical security package required by lenders in relation to real estate lending. How are the most common forms of security interest relating to real estate created and perfected (that is, made valid and enforceable)?

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A facility agreement secured by a mortgage is the most common form of financing and security for real estate projects. The loan-to-value rate ranges between 65% and 80% of the value of the commercial property granted as 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 (such as assets in the public domain or linked to public services) which cannot be pledged. This depends on a specific analysis of the assets.

Common forms of security interest relating to real estate include:

- **Mortgage of property.** Mortgages over real estate must be executed before a public notary (or equivalent official) and registered with the Property Registry to be valid. If agreed by 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, must be registered in the Property Registry and cannot exceed 15 years.
- **Pledge of shares (*quotas*).** For joint stock public companies (*sociedade anónima*), 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. In private limited liability companies (*sociedades por quotas*), the pledge of the shares (equity participations that cannot be represented by transferable certificates nor kept in book-entry form) must be registered at the Commercial Registry. In any case, the company's bye-laws can require the shareholders' consent to the grant of the pledge. Without prejudice to the above, all pledges take effect once the company is informed in writing or expressly or tacitly acknowledges them.
- **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 they can be determined. Portuguese law allows 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*).

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

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

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

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

The rules of priority ranking of creditors are generally the following:

- Remuneration of employees working in the mortgaged property.
- Judicial expenses incurred directly for the common interest of the creditors, for the preservation, execution or liquidation of the real estate properties.
- Amounts due to the state for property transfer tax (*Imposto Municipal sobre Transmissões de Imóveis (IMT)*) and for heritage and donations.
- Amounts due to local authorities (*autarquia local*) for municipal taxes on real properties (*Imposto Municipal sobre Imóveis (IMI)*).
- Social security payments.
- Any credit secured by retention right (*direito de retenção*).
- Mortgage payments, in compliance with the priority arising from the respective registry.

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#### 25. What other real estate related measures do lenders typically take to protect themselves against default by the borrower?

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See Question 24.

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#### 26. Can lenders incur environmental liability? What measures do lenders typically take to manage potential environmental liability?

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Lenders do not generally incur environmental liability (see Question 15).

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#### 27. Briefly outline the main remedies for lenders in relation to the secured real estate if the borrower defaults on the loan. What is the effect of the borrower's insolvency on the lender's remedies?

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The enforcement procedure involves the following steps:

- Filing a petition in a competent court.
- Seizing the assets of the debtor by electronic communication (by the secured creditor) to a competent Registry Office (this qualifies as equivalent to a formal presentation to register). The assets are delivered to a custodian, normally an enforcement agent.
- Serving proceedings on the debtor.
- Serving proceedings on creditors of the debtor who have a priority claim in respect of its assets.
- Court ordering the debtor to make payment and setting the order of priority in which the creditors are to be paid, assuming there are more than one.

- Selling the secured assets by way of court order.
- Distributing the proceeds of the sale in accordance with the order of priority determined by the court.

The timing of the process of enforcing security varies. Enforcement proceedings in relation to mortgages take on average a period of between one and three years where there is no appeal.

The enforcement of the security is the main remedy. Where there are mortgages and other real security, the lenders have preference over other creditors, provided that there is no prior security in rem over the secured assets.

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## 28. Briefly outline key additional issues for lenders in relation to construction and development projects.

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In general, defaults, termination and step-in rights are agreed in the construction contract, and there are usually cross defaults in the loan agreement to protect the lenders.

### *Other real estate financing techniques*

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## 29. Are other real estate finance techniques commonly used in your jurisdiction? For example, real estate securitisation and sale and leasebacks.

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Securitisation is not very common in real estate finance but sale and leaseback is very common.

## REAL ESTATE LEASES

### *Negotiation and execution of leases*

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## 30. Are contractual lease provisions regulated or freely negotiable? Which legislation applies?

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Leases are governed by the Civil Code. Some of the provisions are mandatory while others, such as term, termination and renewal, are freely negotiable by the parties.

An important issue to consider when drafting commercial leases is that when a landlord intends to sell a property which has been rented out to third parties, any occupier of the property for more than three years has a right of pre-emption in respect of the sale.

This pre-emption right is mandatory, and cannot be excluded by the parties nor waived in advance by the occupier where the right to lease subsists.

Any communications, authorisations and approvals provided for in a lease, unless otherwise specifically provided for, must always be in writing and sent to the addresses agreed in the lease.

On the first business day following termination of a lease, the occupier must deliver the leased premises to the landlord vacant, clean and in good repair, except for normal wear and tear.

A lease is governed by the Civil Code (*Articles 1064 to 1113*) and where a dispute arises, the parties must submit to the jurisdiction of the courts where the leased premises are located.

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## 31. What are the formal legal requirements to execute a lease? Does the lease have to be executed by certain parties or as a deed? How do the formalities differ for a company, partnership and for individuals?

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Leases must be executed in writing.

Leases with a duration of more than six years must be registered at the Property Registry, with their respective assignments or subletting agreements, to be enforceable against third parties.

When leases are executed by companies, it is advisable to verify that the individual who is signing has the legal authority to validly bind the company, notably by reviewing the commercial registry certificate of the company and the power of attorney documents (if applicable).

Although it is not mandatory, parties can have their signature certified by a notary or a lawyer, so that the document is directly enforceable.

Certain information regarding the leased property, the landlord and the tenant is required by law to be included in the lease, such as:

- Identification of the parties (for example, names and taxpayer numbers).
- Address or registered office of the landlord.
- Address of the leased property.
- Number, date and issuing entity of the use permit (*licença de utilização*) if the property is for commercial or residential purposes.
- Amount of rent.
- Date of execution of the lease.
- Number of the energy certificate.

### *Rent payments*

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## 32. How are rent levels usually reviewed and are there restrictions on this? Is stamp duty and VAT (or equivalent) payable on rent? Is a rent security deposit required and does it have to be managed in a certain way?

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

The amount of rent can usually be freely agreed between the parties, with the exception of low-cost housing (conditioned rents) where the maximum amount of rent is set by law.

The parties can agree on the payment of up to three months' rent in advance as a security deposit.

Monthly rent is normally subject to annual increases by the application of a rent valuation index published every year by the government. Rents can, however, also be adjusted by the landlord annually, according to scales periodically established by law or agreed by the parties. This is often the case in commercial leases.

Rents are not subject to stamp duty or VAT but to individual or corporate tax depending on whether the landlord is an individual or a company. Stamp duty is due when the contract is executed and is equal to 10% of the monthly rent.

### *Length of term and security of occupation*

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## 33. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?

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The maximum lease term allowed by law is 30 years, but up to this period the parties are free to agree the length of the term.

The renewal and termination of the lease depend on what is agreed between the parties. It is possible for them to agree that a tenant

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has the right to request an extension, as long as the conditions of the new lease are agreed on by the parties

### Disposal

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#### 34. What restrictions typically apply to the disposal of the lease by the tenant? Can the tenant assign or sublet the lease with the landlord's consent? Can tenants share their premises with companies in the same group? What is the effect of a legal reorganisation or transfer/sale of the tenant on the lease and on a guarantee of the lease?

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The parties are free to agree disposal, assignment, sublease and share of leased premises with another company in the group. If nothing is said in the lease agreement it will be subject to the landlord's consent.

In the merger or transfer of an ongoing business (*trespasse*), the lease and guarantees are transferred without the need for the landlord's consent, and only a notification to the landlord is required.

The transfer of an ongoing business by the tenant is subject to pre-emption right of the landlord. In a sale of the premises by the landlord, the lease is maintained on the same terms and conditions.

#### 35. Does a landlord or tenant retain any liability under the lease after the lease is assigned?

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Landlord or tenants do not generally retain any liability under the lease after the lease is assigned unless they have agreed to do so.

### Repair and insurance

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#### 36. Who is usually responsible for keeping the leased premises in good repair and for insuring the leased premises? Are there provisions for the ownership of lease improvements?

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The tenant is usually responsible for maintaining the leased premises in good repair.

The tenant is allowed to introduce changes to the leased premises required for its comfort. If these improvements were not approved by the landlord the latter may request they are removed at the end of the lease agreement.

Other construction works require the landlord's consent. A provision for ownership of improvements (*benfeitorias*) is usually provided for in the lease.

Insurance of the building or units is the landlord's responsibility.

### Landlord's remedies and termination

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#### 37. What remedies are available to a landlord for a breach of the lease by the tenant? On what grounds can the landlord usually terminate the lease and what restrictions and procedures apply? What is the effect of the tenant's insolvency under general contract terms and insolvency legislation?

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Either party can terminate a lease for default by the other party. Termination by a landlord must be declared by a court decision, except for:

- Opposition of the occupier to works ordered by public authorities.

- Non-payment of rent, costs and expenses by the tenant for two months or more
- Late payment of the rent of more than eight days, more than four times in a row, or four times in a period of 12 months.

In case of the last two situations, termination is effective by notifying the occupier, unless the occupier pays the amounts due in the following month with a penalty (50% of the amounts due) or allows the proposed works.

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 before paying, not paying or agreeing to the proposed works (a three-month delay, counted from the landlord's notification).

Where the tenant is the insolvent party, the lease is not automatically suspended on the insolvency declaration. The insolvency administrator can terminate the lease at any time, provided that a 60-day notice period is given, or less where the lease specifies a shorter period.

The landlord can request termination of the lease after the insolvency declaration based on the following grounds:

- Delay in payment of the rent related to the period before the insolvency declaration.
- Financial deterioration of the tenant.

#### 38. Can the tenant withhold rent payments in certain circumstances, for example for serious damage to the leased premises? Can the tenant terminate the lease in certain circumstances?

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If the landlord has not carried out repairs to the leased property required by law and such repairs are urgent, the tenant is entitled to undertake the repairs and set off the amount spent against the amount of the rent(s).

Tenants can terminate the lease on the landlord's default, in particular if it is prevented from using the leased premises (even temporarily), or if the leased premises has a defect that endangers life or health.

### PLANNING AND DEVELOPMENT CONTROLS

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#### 39. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

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State authorities or municipalities have powers to expropriate buildings or business premises. However, recourse to this legal process is only possible for reasons of public interest and on payment of an indemnity to the owner or occupier that must correspond to the market value of the premises.

Municipalities can also expropriate buildings when the owner of those buildings does not carry out conservation works or restoration works deemed necessary for safety of people and goods or for restoration purposes in general. In such cases, compensation must be paid to the owners at market value.

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#### 40. What authorities regulate planning control and which legislation applies? Is there specific protection for special categories of buildings such as historic buildings?

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The authorities that regulate planning are the municipalities which determine the use and occupation of their land by approving land use plans.

The legislation that sets out the legal framework for municipal land use is:

- Law 31/2014 (30 May).
- Decree-Law 80/2015 (14 May).

Municipalities are therefore the competent bodies to issue construction licences and building use permits.

Certain buildings may be subject to special protection due to their characteristics or historic importance, through classification by the government as a landmark of national, public or municipal importance. This protection entails restrictions on the private ownership of such buildings, and introduces limitations on the sale or assignments of properties to third parties, such as pre-emption rights awarded to the state.

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#### 41. What planning consents are required for building works and the use of a building?

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Building works generally require a construction licence issued by the competent municipality in which the property is located.

Certain building works, for example, works located in a previously allotted area or covered by a Detailed Land Use Plan (a type of municipal land use plan) only require a Prior Communication. This is a statement presented to the municipality with all the necessary documents and opinions from public entities outside the municipality. After presenting the Prior Communication, the municipality needs only to assess if all the legal documents were presented and if so, there is no need to issue a licence. The applicant can start construction works after paying the municipal fees.

Once built, use of the asset is subject to a use permit, which is issued on request from the owner of the building with submission of all the necessary documents. This permit is evidence of the construction's compliance with the project approved by the construction licence, or the project defined in the Prior Communication

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#### 42. What are the main authorisation and consultation procedures in relation to planning consents?

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##### Initial consents

The relevant local municipality council is competent to approve planning consents. This competence can be delegated to the mayor and the municipal council officers.

In some situations, such as buildings of national, public or municipal importance, other state bodies must be heard, and must issue opinions during the licensing procedure for the plans to be approved.

The Legal Regime for Construction and Land involves the following stages (*Development (Decree-Law 555/99, 16 December)*):

- Use permits are issued by the mayor or by the municipal council.
- Third party rights and appeals.
- Third parties can challenge planning decisions on the basis of illegality or on the merits. These third parties can present an appeal to the author of the decision issuing the planning consent, on the grounds that it is illegal or that for public interest reasons, the consent must be revoked.
- Together or not with the appeal to the author of the planning consent, third parties can also present an administrative appeal to the hierarchy of the author of the planning consent, on the same grounds as those mentioned above.
- Third parties can also choose to file a challenge in court against the planning consent.
- The municipality can revise the planning consent but cannot affect or in any way limit the concession of building rights unless the original consent was illegal, or if the beneficiary consents to it, or if a legal circumstance arises that renders the planning consent invalid.

##### REFORM

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#### 43. Are there proposals to reform real estate law and are they likely to come into force and, if so, when?

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Legislation relating to real estate investment trusts (REITs) is under discussion but has not yet been implemented. Discussions on tourism law are taking place and may lead to changes. Short rentals (*alojamento local*) are also being discussed and changes may be introduced.

A longer period for increase in residential rents for tenants of 65 or over is also being considered.



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## Practical Law Contributor profiles

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