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Real Estate

Portugal

Law and Practice

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PORTUGAL

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1. General

1.1 Main Sources of Law

The main source of real estate law is the Portuguese Civil Code.

1.2 Main Market Trends and Deals

Residential, student residences and tourism (hotels and resorts) were the main areas of growth in the Portuguese real estate market over the past 12 months. Furthermore, insurance companies and banks sold large portfolios of properties, notably of repossessed real estate assets (REOs).

In 2019, Portugal broke records once again in the non-residential real estate market, which reached an investment amount of circa EUR5.75 billion. The housing market noted a price increase of approximately 9%. In 2019, foreign investment was responsible for approximately 87% of real estate investment in Portugal.

1.3 Impact of Disruptive Technologies

The Portuguese real estate market is constantly evolving, notably due to the emergence of new technology tools, with blockchain and artificial intelligence being two of the main technologies that will have a significant influence on the real estate market in the next 12 months and coming years.

In Portugal, proptech has already changed the way transactions are conducted. For instance, Portugal's land registry website allows market players to promote land registry acts online, to make electronic deposits of documents, to make payments, to make requests and to consult the land registry certificates, or even to notify public entities of the exercise of legal pre-emption rights in the sale of properties.

Machine learning projects capable of automatically reading and analysing data and conducting due diligence exercises have been implemented in Portugal, and artificial intelligence capable of identifying suitable investment targets using algorithms and software to manage conditions precedent in large real estate and financing transactions in real time have also been used.

Smart contracting, through blockchain, is also becoming a reality. Real estate leases executed through a website or financing agreements that can automatically release liens when fully repaid are two of the many examples of the potential of this technology.

1.4 Proposals for Reform

The most relevant reforms with impact in the real estate development have already entered into force in 2019 and at the beginning of 2020.

2. Sale and Purchase

2.1 Categories of Property Rights

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

- surface right (*direito de superfície*), which is the right to construct or maintain (permanently or temporarily) a building on land owned by another person or entity, or to plant and maintain crops on such land. When surface rights terminate, the owner of the land becomes the owner of the building incorporated in the land; or
- right of use (*usufruto*), which is the right to use (temporarily) the profits and the right to use and manage a property for which the title belongs to another entity.

2.2 Laws Applicable to Transfer of Title

The main legislation concerning real estate is the Civil Code, which is applicable to the transfer of any type of real estate (residential, industrial, offices, retail or hotels).

2.3 Effecting Lawful and Proper Transfer of Title

The purchase and sale of a property must be executed in writing, through either a public deed or a certified private agreement, and registered with the Property Registry in order to produce effects against third parties.

Title insurance is not available in Portugal. As Property Registry certificates are public, there is a legal presumption that the rights definitively registered in the Property Registry are correct, updated and true.

2.4 Real Estate Due Diligence

It is usual for buyers to prepare, through their legal and technical advisers, complete checklists with the required documentation. From a legal perspective, the main documents requested and reviewed are as follows:

- the land registry certificate;
- the tax registry certificate;
- the licence of use for buildings;
- the energy efficiency certificate, if applicable;
- the building specifications certificate, if applicable;
- proof of the payment of all taxes and charges related to the property;
- confirmation of non-exercise of pre-emption rights; and
- planning, zoning and environment documentation in case of land for construction.

2.5 Typical Representations and Warranties

The typical representations and warranties are related to the following:

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- the capacity of the seller and buyer;
- ownership of the property;
- boundaries, charges and encumbrances;
- third party rights;
- planning and zoning;
- authorisations and licences;
- the rental status of the property;
- claims;
- litigation;
- liabilities;
- defects and equipment;
- environment; and
- asbestos risk.

A time to remedy is usually granted and, if 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 for at least four years.

2.6 Important Areas of Law for Investors

Real estate, urban and planning and tax law are the most important areas for an investor to consider when purchasing real estate.

2.7 Soil Pollution or Environmental Contamination

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

If the owner of the land is not ordered to carry out clean-up measures, in some situations the licensing of future activities at the property may be conditional upon the decontamination of the property.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

The permitted uses of a parcel of real estate shall be assessed through the municipal land use plans, which contain the main regulations concerning the use of the land. There are three types of municipal plans: the municipal director plan (PDM); the urbanisation plan (*planos de urbanização*); and the detailed plan (*planos de pormenor*).

The size of a project, the timing for approval and the execution of relevant infrastructure may be subject to an agreement with the relevant municipality.

2.9 Condemnation, Expropriation or Compulsory Purchase

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

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

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

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

2.10 Taxes Applicable to a Transaction

The purchase and sale of real estate is subject to both property tax (IMT) and stamp duty (*Imposto do Selo*), payable by the purchaser. IMT is levied at the following progressive percentage rates of the contract price or the patrimonial value of the property, whichever is higher:

- between 0% and 8% (depending on the contract price/patrimonial value of the property) for urban property meant for housing purposes;
- 5% for rural property; and
- 6.5% for other types of property.

Stamp duty is levied at a rate of 0.8% on the same amount.

In a share deal, if an entity owns at least 75% of the share capital of a limited liability company, IMT will be levied on the same terms as mentioned above.

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

2.11 Legal Restrictions on Foreign Investors

There are no restrictions on the ownership of real estate by a non-resident or foreign investor; the treatment is the same.

Tourism and activities declared to be of relevance to tourism under the applicable legislation may be granted tax incentives.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

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

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

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

3.2 Typical Security Created by Commercial Investors

Security usually associated with real estate financing includes:

- mortgage of property;
- assignment of revenues (*consignação de rendimentos*);
- pledge of shares/quotas;
- book debt/receivables/insurances: a pledge or an assignment by way of security can be granted over receivables;
- pledge of bank accounts;
- pledge of intellectual property; and
- personal guarantee (*fiança*).

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

As a general rule, no governmental or other consents are required for the provision of security. There are no restrictions on granting security over real estate to foreign lenders, nor are there any on repayments being made to a foreign lender.

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

Notarial fees and registration fees are due on the granting of security over real estate.

Loans granted to a Portuguese borrower incur stamp duty at the following rates:

- 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 one or more years but fewer than five years; or

- a payment of 0.6% on each disbursement if the term for repayment is five years or more.

All cases are calculated on the amount of the loan.

Stamp duty is also charged on the granting of security, unless it is ancillary to a contract already subject to stamp duty – ie, so long as security is granted at the same time as a Portuguese loan (ie, subject to stamp duty) is executed, and such guarantee secures that loan.

When applicable to security, stamp duty rates are the same as set out above for loans, and are calculated based on the amount secured.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The validity of the guarantees provided to secure third party debt (including any group companies) is subject to an assessment of whether or not the grantor of such a guarantee has a justified corporate interest in doing so. Corporate interest may be assumed from the existence of a group relationship between both companies (so long as both are Portuguese resident companies), but some doctrines argue that such an assumption only exists where the guarantee is granted by the holding company to the subsidiary. In the case of upstream guarantees or guarantees to sister companies, the corporate interest should be demonstrated on other grounds (a confirmation of this in the resolution approving the transaction may be considered sufficient, but please note that at the end of the day corporate interest is a factual matter).

3.6 Formalities When a Borrower Is in Default

To initiate enforcement proceedings, a creditor must hold an enforceable title (*título executivo*) and file an application against a debtor with the appropriate court competent for enforcement.

A mortgagee does not have the right to take possession of a property in the event of default of payment of the secured obligation, but only the right to a judicial sale of the property and to be paid from 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 – ie, the judicial apprehension of an asset given as guarantee of an obligation.

The seizure gives a creditor the right to be paid with the proceeds of the sale of such assets, with preference over other credi-

tors, provided that there is no prior security in rem over the attached assets.

3.7 Subordinating Existing Debt to Newly Created Debt

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

3.8 Lenders' Liability Under Environmental Laws

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

3.9 Effects of Borrower Becoming Insolvent

Pursuant to the Portuguese Insolvency Code, certain common transactions can be terminated by an insolvency administrator without any condition and in relation to which evidence in contrary is not even admitted (unconditional termination). The most obvious applicable cases are as follows:

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

3.10 Consequences of LIBOR Index Expiry

The key consequence to borrowers is the uncertainty regarding the applicable index after 2021. In any case, it will mostly depend on whether the agreement already includes fall-back provisions in that regards, or if the new benchmark rate that is being developed will be applicable to the agreement. The main mechanism that is being adopted to manage that risk is the inclusion of fall-back provisions in the agreement being entered into force.

4. Planning and Zoning

4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning

The permitted uses of a parcel of real estate shall be assessed through the municipal land use plans, which contain the main regulations concerning the use of the land. There are three types of municipal plans: the municipal director plan (PDM); the urbanisation plan (*planos de urbanização*); and the detailed plan (*planos de pormenor*).

The size of a project, the timing for approval and the execution of relevant infrastructure may be subject to an agreement with the relevant municipality.

The Legal Regime for Construction and Land Development is the basic legislation for the construction of new buildings or other works in existing buildings. This legal regime provides for several controls: prior information; licence; prior communication; and authorisation.

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

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

This legal regime provides for several controls: prior information; licence; prior communication; and authorisation.

The prior information corresponds to a preliminary analysis of the feasibility of a given construction work. If the prior information is approved by the municipality, which is the competent authority to allow construction works, then a new procedure for construction must follow.

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

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The prior communication is a declaration presented to the municipality by the promoter of the construction works, and is applicable to situations in which the urban parameters for construction are already set out.

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

4.3 Regulatory Authorities

Regulation of the development and use of plots of land is carried out by the municipalities in the urban and planning control proceedings. Therefore, municipalities are the competent authorities to conduct the procedure and issue the relevant titles.

During proceedings, municipalities may consult other entities that have legal competence over the matter or location involved.

Applicable legislation includes the Legal Regime for Construction and Land Development and the territorial management instruments – ie, the municipal director plan (PDM); the urbanisation plan (*planos de urbanização*); and the detailed plan (*planos de pormenor*).

4.4 Obtaining Entitlements to Develop a New Project

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

The process to obtain an entitlement generally involves, at first, appreciation of the project, which may be followed by public consultation if a project is regarded as having a relevant impact, and then final decision.

Third parties have the right to participate, as follows:

- for the prior information procedure, consultations may be carried out and opinions may be requested from external entities, such as the CCDR;
- for the licensing procedure, municipalities may open public consultations in which third parties may participate; and
- for the prior communication procedure, an investor must submit a prior communication with the opinion issued by the competent external entity.

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

4.5 Right of Appeal Against an Authority's Decision

If an application for permission to develop or carry on designated use is rejected, an applicant may submit an administrative complaint, asking the author of the decision to review it, or submit a hierarchical appeal, asking the supervisor to review the decision; alternatively, they can file a lawsuit in which they may challenge the legality of the decision and ask the courts to condemn the administration to adopt a lawful administrative decision. It is also possible to file an injunction in order to seek a preliminary remedy.

4.6 Agreements with Local or Government Authorities

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

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

4.7 Enforcement of Restrictions on Development and Designated Use

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

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

Also, if urban planning operations are carried out irregularly, the municipality may implement the following measures:

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

5. Investment Vehicles

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

The main vehicles used to invest in real estate assets are private limited companies (LDA), public limited companies (SA), and

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Collective Investment Real Estate Undertakings (OIC) (investment funds or investment companies).

5.2 Main Features of the Constitution of Each Type of Entity

Commercial Companies

SA companies

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

The share capital may result from contributions in cash or in kind (labour and the provision of services are not allowed). Shares may be represented by share certificates or kept in book-entry form, having a minimum nominal value of EUR1.

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

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

LDA companies

The LDA is a company limited by quotas, meaning that its share capital is divided into equity participations (*quotas*) that cannot be represented by transferable certificates nor kept in book-entry form. Quota holders are jointly and severally liable for paying up the company's entire quota capital. The share capital may result from contributions in cash or in kind (labour and the provision of services are not allowed). The transfer of quotas is subject to the LDA's express consent, unless the prospective transferee is another quota holder, or the transferor's spouse or next of kin. An LDA may be incorporated either by a minimum of two equity holders or by a single equity holder (either an individual or a company).

Collective Investment Real Estate Undertakings

Real Estate Funds (REFs)

REFs can be open, closed or special. Open-end funds are incorporated by public subscription, while close-end funds are incorporated by private subscription. The funds are represented by participation units with the same nominal value and held by the participants. The incorporation of the funds requires the consent of the Securities Commission. The funds have no legal capacity and need to be represented by a managing company. The incorporation of the managing companies requires the

authorisation of the Bank of Portugal and the Securities Commission. The participation unities must be deposited with a financial institution with a head office or branch in Portugal.

Real Estate Companies

Real estate companies need to be public limited companies (SA), and can have a fixed share capital (SICAFI) or variable share capital (SICAVI). Real estate companies can be self-managed or managed by a management company or any other financial institution. The incorporation of a real estate company is subject to the authorisation of the Securities Commission.

Real estate investment and management companies ("SIGIs")

SIGIs shall be incorporated as a public limited company, with or without public subscription, and adopt the supervisory model corresponding to a supervisory board and a statutory auditor.

5.3 Minimum Capital Requirement

An SA must be incorporated with a minimum share capital of EUR50,000.

LDA companies do not have a minimum amount of capital (the quota holders may freely stipulate the amount of an LDA share capital, with the minimum nominal value of each quota being equal to EUR1).

SIGIs shall have a minimum paid-up share capital of EUR5,000,000.

5.4 Applicable Governance Requirements

SA Companies

The most common management and supervisory structure of SA companies includes a board of directors and an internal auditing board or an internal single auditor.

Two other structures are also admissible:

- a supervisory board and an executive board of directors (and a certified chartered accountant); or
- a board of directors comprising an audit commission and a certified chartered accountant.

The management of an SA may be delegated to a single manager if the company's capital stock is equal to or less than EUR200,000.

Directors are not legally required to be shareholders. Corporate shareholders can be appointed directors, but must appoint an individual to perform such duties. At least one of the members of the internal auditing board or the internal auditor (as appli-

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cable) must be a certified chartered accountant. A secretary and a deputy secretary may be appointed in SAs.

The board of directors of an SA is legally required to meet at least once a month, unless the company's by-laws establish a different period for their meetings. Meetings may take place anywhere that the directors find most convenient. Alternatively, meetings can take place via electronic means or by video conference. Minutes of board meetings must be recorded in a book of minutes and signed by all those present.

The annual accounts must be approved by the shareholders at the annual general meeting, and an electronic declaration for tax purposes must be submitted.

LDA Companies

An LDA may be managed either by a single manager or by a managers' board. The managers must be individuals and are not legally required to be quota holders. An LDA must appoint either an internal auditor or an internal auditing board if it surpasses at least two of the following three thresholds during two consecutive fiscal years:

- the total amount of the LDA's assets exceeds EUR1.5 million;
- the total amount of the LDA's net sales exceeds EUR3 million; and/or
- the average number of the LDA's employees exceeds 50.

At least one of the members of the internal auditing board or the internal auditor (as applicable) must be a certified chartered accountant.

The annual accounts must be approved by the quota holders at the annual general meeting. Furthermore, submission of an electronic declaration for tax purposes is also required.

Real Estate Funds and Real Estate Companies

Except for self-managed companies, REFs and real estate companies do not have legal capacity and are managed by management companies.

5.5 Annual Entity Maintenance and Accounting Compliance

There are no significant annual maintenance and accounting compliance costs for commercial companies, other than the fees due to a company's accountant and auditor (as agreed between the parties) and the fees charged for the submission of the annual approval of accounts (roughly EUR85). REFs and companies pay fees to:

- the Securities Commission for incorporation;

- the management company (except self-managed investment companies);
- the depositary bank; and
- advisers.

6. Commercial Leases

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

Lease agreements, contracts for use of shops in commercial centres, retail parks or outlets and commodatum agreements (ie, a lease agreement free of charge) are agreements that allow a person, company or other organisation to occupy and use real estate for a limited period of time without buying the property.

6.2 Types of Commercial Leases

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

6.3 Regulation of Rents or Lease Terms

Rents and some of the lease terms of commercial leases are freely regulated between parties. Conversely, there is a mandatory regime for lease agreements for habitation purposes.

6.4 Typical Terms of a Lease

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

The length of a lease term can be a fixed term or a non-fixed term. The usual choice is a lease agreement with a fixed term between one and five years (the legal minimum limit is one year and the legal maximum limit is 30 years).

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

Rent is usually paid monthly and is due on the first working day of the preceding month.

6.5 Rent Variation

Parties to a lease agreement can freely agree on how rent will be increased for as long as a lease agreement lasts.

6.6 Determination of New Rent

Generally, rent is subject to annual increases by the application of a coefficient established every year by the government.

6.7 Payment of VAT

Generally, lease agreements are exempt from VAT, but this VAT exemption may be waived if the necessary conditions are met.

6.8 Costs Payable by Tenant at Start of Lease

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

6.9 Payment of Maintenance and Repair of Communal Areas

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

6.10 Payment of Utilities and Telecommunications

Generally, utility bills and telecommunications are borne by each tenant in proportion to the area they occupy. These types of matters are stipulated between the parties.

6.11 Insuring the Real Estate that is Subject to the Lease

Only properties subject to the horizontal property regime must be covered by a mandatory insurance policy covering the risk of fire. There is no legal provision imposing the costs of any insurance obligation on any of the parties. However, in this type of insurance, the insurance premium is usually paid by a tenant due to contractual undertaking. In a commercial lease agreement, landlords usually impose that the insurance policy to be undertaken by the tenant must cover damages caused by natural and human causes. Whenever the value of the real estate so justifies, the landlord may request further insurance coverages, such as for damage caused by terrorism or sabotage.

6.12 Restrictions on Use of Real Estate

A landlord may impose some rules and restrictions on the use of a leased property, such as restrictions concerning the alterations made to the property, assignment or sublease of the property, and the type of use of the leased property. The law foresees that the tenant must use the property by respecting its licence of use.

6.13 Tenant's Ability to Alter and Improve Real Estate

Generally, the parties agree on the conditions under which the tenant may alter or improve real estate – primarily, it is established that the tenant shall not carry out any works on the leased

property without the prior written consent of the landlord. Repair works mean all ordinary repairs, maintenance and works and, in general, any reconditioning or replacements necessary to repair and maintain the property in good conservation status. The tenant is responsible for the execution, directly or through third parties, and for the planning, procurement and management of the repair work. It is common for all works performed by the tenant to become an integral part of the property or, upon a landlord request, to be removed and the property returned in the same condition as it was on the delivery date, save for deterioration caused by normal wear and tear.

6.14 Specific Regulations

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law number 6/2006 of 27 February 2006 (as amended), and applies to both lease agreements for habitation purposes and lease agreements for non-habitation purposes.

6.15 Effect of Tenant's Insolvency

Lease agreements (in which the insolvent party is the tenant) are not suspended upon an insolvency declaration. The insolvency administrator may terminate a lease agreement at any time, provided that 60 days' notice is given. Nevertheless, a landlord cannot request termination of a lease agreement after an insolvency declaration based on a delay in the payment of rent related to the period before the insolvency declaration, or for the economic deterioration of the tenant.

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

A landlord can protect himself against a tenant's failure to meet its obligations by requesting some securities, such as rent deposit, bank guarantee or a guarantor (*fiador*).

6.17 Right to Occupy After Termination or Expiry of a Lease

A tenant is not entitled to occupy a property after the expiration or termination of a commercial lease. In order to prevent default, the landlord may foresee a contractual clause in which a fine is applicable for each day of delay until the delivery of the property. If the tenant continues to occupy the property, the landlord can proceed with an eviction procedure.

6.18 Right to Assign Leasehold Interest

Both the assignment of the leasehold interest and the sublease of all or a portion of the leased premises by the tenant are subject to the authorisation of the landlord.

6.19 Right to Terminate Lease

The events that typically give a landlord and tenant the right to terminate a lease agreement are related to the default of

the other party, such as the non-payment of rent or costs and expenses for more than three months, or late payment of more than eight days, more than four times in a row, or four times in a period of 12 months.

6.20 Registration Requirements

In general, lease agreements do not need to follow any particular execution formalities and do not have to be recorded in the Land Record.

Only lease agreements entered into for a period longer than six years must be recorded in the Land Record, in which case a fee of approximately EUR250 is due from the tenant.

6.21 Forced Eviction

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

6.22 Termination by Third Party

If a tenant is opposed to urgent works (namely remodelling or restoration) required by any public authority from the landlord, the law foresees the possibility of the landlord terminating the lease agreement. Within six months, the tenant still has the possibility to cease any opposition by accepting the works, in which case the termination of the lease agreement is no longer valid.

Upon notice being given to the tenant, the landlord is obliged to pay the tenant compensation in the amount corresponding to one year's rent or, alternatively, to ensure a house is available to the tenant in the same municipality or in a surrounding municipality, in similar conditions of location, rent and expenses.

This process may take approximately six months to one year.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common structure used to price construction projects is fixed price, according to which an owner/employer agrees

with a contractor on a total and fixed price for the entire project. A detailed description of the works is set forth in the agreement, and any required preparatory and accessory works are deemed to be included in the scope of work. Since the price is fixed and non-revisable, it cannot change due to increases in costs of workforce, materials, equipment or inflation in general. Any additional works and respective costs must be expressly approved by the owner/employer.

7.2 Assigning Responsibility for the Design and Construction of a Project

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

7.3 Management of Construction Risk

Construction risks on a project may be managed through clauses on limitation of liability. However, it should be noted that liability cannot be completely excluded by parties. In fact, pursuant to Portuguese law, clauses whereby a creditor waives in advance its rights to compensation by reason of default or late performance by a debtor are deemed null and void. Also, in general, contractual clauses directly or indirectly excluding liability in cases of serious default or willful misconduct are seen as abusive. Private parties are allowed, under their contractual autonomy, to negotiate remedies for breach of contractual obligation, notably through limitation of liability clauses or liquidated damages clauses.

As regards warranty for defects, under the Portuguese Civil Code construction works pertaining to immovable property intended for long-term use are covered by a statutory five-year warranty period. Nevertheless, the Civil Code allows the parties to agree to extend the five-year warranty period based on the principle of freedom of contract, pursuant to which entities are free to agree on the terms of the contracts they enter into. Conversely, it is disputable whether the parties may agree to reduce the statutory five-year warranty period based on their contractual freedom.

7.4 Management of Schedule-Related Risk

Usually, parties agree on a time schedule for completing construction works, which includes a final date for completion of

the entire project as well as monthly milestones for completion of each construction stage. The payment of an instalment of the price is linked to each construction milestone, meaning that the employer may withhold the respective payment (or part of it, proportionally to the portion of the works not completed) and/or be entitled to monetary compensation for each day/week of delay if such a milestone is not achieved within the agreed completion date.

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

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

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

7.6 Liens or Encumbrances in the Event of Non-payment

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

7.7 Requirements Before Use or Inhabitation

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

8. Tax

8.1 VAT

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

8.2 Mitigation of Tax Liability

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

In any case, the transfer of more than 75% of the equity of a private limited liability company will trigger IMT.

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

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

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

8.3 Municipal Taxes

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

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

Moreover, individuals, companies and structures or collective bodies without autonomous legal personality and undivided inheritances, that are owners, usufructuaries or have the surface right over urban properties located in Portugal may be liable for an Additional to Municipal Property Tax (AIMI).

For this purpose, the taxable base corresponds to the sum of the VPT of all the urban properties held by each taxpayer, with reference to 1 January of each year.

The applicable AIMI rates are as follows:

- individuals and undivided inheritances: 0.7%;
- companies: 0.4%; and
- legal entities resident in an offshore jurisdiction: 7.5%.

In case of individuals, a tax rate of 1% should apply to the taxable amount exceeding EUR1,000,000 and up to EUR2,000,000; taxable amounts that exceeds EUR2,000,000 incur a tax rate of 1.5%.

Moreover, as a general rule individuals and undivided inheritances benefit from a deduction of EUR600,000 of their taxable base. Taxpayers who are married or living in non-marital partnership, and who opt to submit a joint tax return, have the right to a joint deduction of EUR1,200,000 from the sum of the VPT of all their urban properties. Additionally, in this scenario, the brackets to which the increased marginal rates of 1% and 1.5% are applied are doubled.

Urban properties classified as “trade, industry, or services” and “others” are excluded from AIMI.

8.4 Income Tax Withholding for Foreign Investors

Rental Income: Non-Residents

Foreign investors, either resident or non-resident, are subject to withholding tax on rental income at a rate of 25% if the lessee is a legal entity or an individual that has organised accounting obligations.

Final taxation of non-resident investors will occur at a rate of 25% of corporate income tax for legal entities, and at an autonomous rate of 28% for individuals.

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

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

As for legal entities, in the case of corporate tax, a municipal surcharge of up to 1.5% may be added. A state surcharge may also apply, at a rate of 3% on taxable profits in excess of EUR1.5 million and up to EUR7.5 million, at a rate of 5% on taxable profits in excess of EUR7.5 million up to EUR35 million, and at a rate of 9% on taxable profits in excess of EUR35 million. Therefore, the 25% upfront withholding taxation on rental income may result not to be above the final tax due.

Capital Gains: Non-Residents

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

Capital Gains: Residents

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

Capital gains obtained on the sale of real estate by resident legal entities in Portugal are taxed under corporate income tax at a general tax rate of 21%, to which a municipal surcharge of up to 1.5% may be added. As mentioned above, a state surcharge may also apply at a rate of 3% on taxable profits in excess of EUR1.5 million and up to EUR7.5 million, at a rate of 5% on taxable profits in excess of EUR7.5 million up to EUR35 million, and at a rate of 9% on taxable profits in excess of EUR35 million.

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

8.5 Tax Benefits

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

Several tax benefits are available under IMT and IMI, provided certain conditions are met.

PORTUGAL LAW AND PRACTICE

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is one of Portugal's leading full-service law firms, with more than 80 years of experience. The firm is internationally recognised for its high levels of service and cutting-edge solutions. Specialised legal services in the main areas of law and in different sectors of the economy are a benchmark of the firm, leading to its involvement in the most important operations in Portugal, as well as in high-value cross-border transactions and disputes.

Morais Leitão has a team of more than 200 lawyers across its head office in Lisbon and offices in Porto and Funchal (Madeira Island). To support clients' international strategies, Morais Leitão has developed a network of associations with local firms in Angola, Mozambique, Macau and Hong Kong, called Morais Leitão Legal Circle, which offers integrated multi-jurisdictional teams.

Authors



João Torroaes Valente joined the firm in 2018 as a partner and co-ordinates the corporate real estate & tourism department. He advises national and foreign investors on corporate real estate transactions, including the development and sale and purchase of shopping centres,

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Filipa Arantes Pedroso joined the firm as an associate in 1982 and became a partner in 1987. She is a member of the corporate real estate & tourism department. Filipa advises on real estate investment (asset deal or share deal); M&A and due diligence; the creation of real estate

investment structures, real estate investment funds and real estate companies; touristic investment operations; the execution and negotiation of real estate agreements, notably purchase and sale, sale and leaseback, and options; the execution and negotiation of construction agreements, projects and supervision; real estate agreements such as the operation of hotels and leases; and real estate financing and respective security. She is a member of the Portuguese Bar Association and regularly participates as a speaker in real estate conferences, and has published several articles in the real estate area.



Andreia Bento Simões is an associate and a member of the corporate real estate & tourism department, having joined the firm in 2016. She is a member of the Portuguese Bar Association, and has provided legal assistance in large construction projects (industrial plants,

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Bruno Santiago joined the firm in 2005 and became a partner in 2015; he is one of those responsible for the internal management of the tax department. Bruno specialises in tax law, exercising his practice in domestic and international taxation, both in consulting and in

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