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Real Estate

Portugal

Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.

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Law and Practice

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Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL. is a leading full-service law firm in Portugal, with a solid background of more than 80 years of experience. Internationally recognised, its reputation stems from the excellence and high level of the services provided to clients, solid ethical values and a distinctive approach with cutting edge solutions. The specialised legal services in the main areas of law and in different sectors of the economy are also a guide mark of the firm that lead to its involvement in the most important operations in Portugal, as well as in high-value cross-border transactions and disputes. The team's expertise covers, but is not limited to: creating structures for real estate investment operations in the form of companies, real estate investment funds and real estate companies; real estate investment operations, merg-

ers and acquisitions and performance of the respective due diligences; monitoring the installation, the exploitation and the operation of tourism projects; preparing and negotiating real estate agreements, purchase and sale agreements, sale and lease-back agreements, call options, swaps and surface rights; preparing and negotiating public works contracts agreements, designs and necessary supervision; preparing and negotiating real estate use and management agreements, such as hotel management agreements, lease agreements, use assignment and beneficial rights; real estate financing operations and the preparation of respective guarantees. The firm has assisted clients in operations involving office buildings, shopping centres, retail parks, logistic parks, hotels and other tourism projects.

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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. A member of the Portuguese Bar Association, she regularly participates as a speaker in real estate conferences and has published several articles in the real estate area. Filipa has represented national and international clients in transactions involving, inter alia, the acquisition and sale of large portfolios including buildings for different uses, office parks, car parks and student housing.



Bruno Santiago became a partner in 2015, having rejoined the firm in 2005 after collaborating with it between 2000 and 2002. A member of the tax team, Bruno is a specialist in tax law and practises in domestic and international

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João Torroaes Valente joined the firm in 2018 as a partner. He is co-head of the corporate and real estate practice group. João advises national and foreign investors on corporate real estate transactions, including the development and sale and

purchase of shopping centres, retail parks, offices, and logistic, residential and tourism projects. He is a lecturer in postgraduate courses at the Católica Lisbon School of Law, the University of Lisbon School of Law and the Porto Business School. João, who is a member of the Portuguese Bar Association, regularly participates as a speaker in seminars and conferences on real estate, tourism and investment funds, having authored several articles on his areas of expertise. He is a corporate real estate, tourism and investment vehicles specialist, and co-headed the real estate team at Uria Menéndez Proença de Carvalho before joining Moraes Leitão. In the area of corporate law, João focuses on the structuring of joint ventures to implement and finance international and multi-jurisdictional real estate investment projects.



Andreia Bento Simões is an associate who is a member of the real estate team, having joined the firm in 2016. A member of the Portuguese Bar Association, she has provided legal assistance in large construction projects (industrial plants, hotels, residential and commercial condominiums and malls) and in the financing of real estate transactions.

1. General

1.1 Main Sources of Law

The main source of real estate law is the Portuguese Civil Code, based on Roman law and the French Civil Code, encompassing not only freehold but also other rights of guarantee and acquisition. The definition of property includes full possession and exclusive use and disposition. The law applicable to possession, title to property and other real estate rights is defined by the country in which the property is located, therefore Portuguese law is applicable to the creation, recognition, acquisition or modification of any real estate rights in Portugal.

1.2 Main Market Trends and Deals

Investment in real estate increased almost 74% in 2018, in comparison with 2017, which was already an excellent year. Foreign investment continues to be responsible for 80% of real estate investment, with major deals in the sale of large portfolios, office buildings and shopping centres. Due to an increase in tourism, investments in hotels, hostels and short rentals have also increased.

Fidelidade, the largest Portuguese insurance company and a client of this firm, sold a portfolio of more than 2,000 properties (Project Golden), mainly residential, to Apollo, a New York investment fund, after a full due diligence process and a very competitive tender for a global price of EUR425 million. Closing was in December 2018.

Several entities indirectly owned by funds managed by Anchorage Capital Group, LLC, a New York-based investment firm (another client), entered into a sale and purchase agreement with the Novo Banco group for the acquisition of a portfolio of 8,726 properties comprising a mix of residential units, associated parking spaces, storages, retail units and land plots. From this portfolio (with a total gross book value of EUR716.7 million), the client acquired approximately 3,500 assets in 2018.

Seguradoras Unidas, also an insurance company, sold part, with sales still ongoing, of a portfolio corresponding to approximately 127 properties.

These were the three major deals in 2018 in the Portuguese real estate market.

1.3 Proposals for Reform

The most relevant reforms with an impact on real estate development entered into force in late 2018 and the beginning of 2019:

- the short rental (*alojamento local*) regulation entered into force on 21 October 2018 and introduced quotas for short rental in certain locations as well as prior mandatory authorisation from neighbours in the case of hostels;
- the regulation of the so-called *Sociedades de Investimento e Gestão Imobiliária* (real estate investment and management companies, or SIGIs), which follows closely the regulation for real estate investment funds implemented in various European countries, entered into force on 1 February 2019; and
- several amendments to the real estate lease rules entered into force on 13 February 2019, notably
 - (a) lease agreements for housing purposes now have a minimum duration of one year;
 - (b) unless otherwise agreed, the lease agreements for housing purposes are now automatically renewed for equal periods, but never less than three years, and the lease agreements for non-housing purposes for a period never less than five years; and
 - (c) lessors can only oppose the renewal of lease agreements for housing purposes after three years from the date of execution of the agreement and after five years in the case of lease agreements for non-housing purposes. This means that, in practice, the lessor will be subject to an agreement for a period of at least three or five years, as applicable, except if the lease has a fixed duration not renewable.

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, as follows.

- Surface right (*direito de superfície*) 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.
- Right of use (*usufruto*) is the right to use, temporarily, and obtain the profits of a property where the property title belongs to another entity. Such a right terminates with the death of the beneficiary, within 30 years in the case of a company or any other duration agreed.
- A property can be owned by one or more persons (common property) and it is also possible to divide buildings into segments or independent units, which in Portugal is called horizontal property.

2.2 Laws Applicable to Transfer of Title

The main legislation concerning real estate is in the civil code.

2.3 Effecting Lawful and Proper Transfer of Title

The purchase and sale of a property must be executed in writing, either through a public deed or through a private executed agreement certified by a notary, a lawyer, the commercial and industrial office or registry officers.

The purchase and sale of a property must be registered with the Property Registry to produce effects against third parties. Registration is compulsory regarding the facts that create, recognise, acquire or modify any real estate rights. The Property Registry Code establishes a principle of priority according to which the right that is registered first prevails over any subsequently registration. Property Registry certificates can be physical or electronic.

Title insurance is not available in Portugal. As Property Registry certificates (*certidão do registo predial*) 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:

- the land registry certificate (*certidão do registo predial*);
- the tax registry certificate (*caderneta predial*);
- the licence of use for buildings (*licença de utilização*);
- the energy efficiency certificate (*certificado de eficiência energética*), if applicable;
- the building specifications certificate (*ficha técnica de habitação*), 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 environmental documentation in the case of land for construction.

2.5 Typical Representations and Warranties

The typical representations and warranties are related to the capacity of a seller and buyer; ownership of the property; boundaries, charges and encumbrances; third-party rights; planning and zoning (in the case of land for construction); authorisations and licences; 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 important for investors to consider when purchasing real estate.

2.7 Soil Pollution or Environmental Contamination

The Environmental Liability Law identifies land contamination as an environmental damage. 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 has certain types of economic activities defined in the law, the competent authority may order the clean-up of the property, regardless of whether 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 decontamination of the property.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

The permitted uses of a property are 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 infrastructures 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 sell 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 sell is made.

In this respect, for instance, the Law on the General Foundations of Public Policy of Soils, Territorial and Urban Management establishes that expropriation on public interest grounds (*expropriações por utilidade pública*) may take place to achieve the purposes of public policy concerning the soil. Alternatively, and in certain cases (ie, failure to comply with an operation of rehabilitation or regeneration), the owners may be subject to a compulsory sale (*venda forçada*).

The Legal Regime of the Territorial Management Instruments also establishes that expropriation or compulsory sale may take place to perform the territorial plans and programmes.

The procedure for the expropriation is set forth under the Expropriations Code. According to such legal regime, the expropriation may be agreed and if an agreement is not reached, a litigation procedure will follow. The latter 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 payment of a fair compensation (*justa indemnização*) by the expropriating entity to the expropriated party.

The procedure for a compulsory sale states that the competent authority may sell the property through 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 asset purchase and sale of real estate is subject to property tax (*Imposto Municipal sobre a Transmissão Onerosa de Imóveis*, or IMT) and stamp duty (*Imposto do Selo*), payable by the purchaser. IMT is levied as a progressive tax between 0% and 6% (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, on the contract price or the patrimonial value of the property (*valor patrimonial tributário*), whichever is higher. Stamp duty is levied at a rate of 0.8% on the same amount.

As a general rule, and as the purchase and sale of real estate is subject to IMT, such a transaction is exempt from value added tax (VAT) unless the vendor waives the aforementioned exemption, opting to tax the transaction under VAT. The VAT exemption may be waived if real estate (comprised of urban property, autonomous units thereof, or building plots) is sold to a buyer that will use them, fully or predominantly, in activities subject to VAT. As such, the above-mentioned real estate acquisitions are subject to VAT at a rate of 23% (a 22% rate in Madeira and an 18% rate in the Azores).

In the case of a share deal, if an entity owns at least 75% of the share capital of a limited liability company (*sociedade por quotas*), IMT will be levied in the same terms as mentioned above. Furthermore, the acquisition of participation units in privately placed, closed-end real estate investment funds – regardless of the location of the management company, the redemption of participation units, an 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, holds at least 75% of the participation units representative of the investment fund's patrimony – is also subject to IMT.

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 by a foreign investor. The treatment given 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

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, specific assets (ie, assets in the public domain or linked to public services) that cannot be pledged.

Security usually associated with real estate financing includes the following.

- *Mortgage of property* – mortgages over real estate must be executed with a public notary (or equivalent official) and registered with the Land Registry Office. Registration is a condition for the validity of the mortgage. If agreed between the parties, the mortgagee can become the 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 and must be registered in the Land Registry Office, and cannot exceed 15 years.
- *Pledge of shares/quotas* – the pledge of nominative shares has to be recorded in the company's books as well as in the certificates or in the relevant security account if the shares are book-entry. The pledge of the quotas must be registered at the Commercial Registry Office. In any case, the company's by-laws may require a shareholders' consent to the granting of a pledge. Without prejudice to the above, all pledges shall take effect against a company once it is informed in writing or it gives its express or tacit recognition thereof.
- *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 a debtor. An

assignment by way of security can be granted over future receivables, as long as these are determinable. Please note that Portuguese law admits assignments by way of security of rents arising from real estate leases.

- *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.
- *IP* – IP rights can be pledged and the pledge must be registered with the IP Institute (Instituto Nacional da Propriedade Industrial).
- *Personal guarantee (fiança)* – the *fiança* is a personal guarantee, under which the guarantor, with his own assets, personally undertakes before the creditor the payment of the credit held by the creditor over the debtor.

Mortgages or assignment of revenues over Portuguese assets must be subject to Portuguese law (*lex rei sitae*).

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

On the granting of security over real estate, notarial fees and registration fees are due.

Pursuant to Portuguese law, interest payments are calculated daily using an interest rate for the relevant interest period, with the end result rounded up or down to the nearest one thousandth of a percentage point. Over sums outstanding at any time under the financing, interest is calculated with reference to a year of 360 days.

Late payment interest is limited to a maximum of 3%, to be accrued to the interest rate.

As a general principle, interest payments paid to non-resident companies or credit institutions are subject to a withholding tax of 25%.

Under the tax treaties currently in force, reduced rates may be applicable when domestic rates are higher than the treaty rate. The reduced rates range between 5% and 20% according to the applicable double tax treaty.

No withholding tax is due on payments of interest to Portuguese resident credit institutions or Portuguese branches of non-resident credit institutions and specific exemptions also apply under parent/subsidiary rules.

Stamp duties are levied in accordance with the Stamp Duty Code (CIS) and the General Stamp Duty Table (TGIS) at percentage or lump-sum rates, on all acts, deeds, documents, securities, books, papers and other events listed in the TGIS that occur in Portugal and are not subject to VAT.

Notwithstanding, the CIS foresees rules that extend its application to a series of events executed or performed outside Portugal. Notably, stamp duty is charged on loans granted, guarantees made, interest charged and commissions – levied by non-resident credit institutions, financial institutions or other companies to any Portuguese resident entities – irrespective of their nature.

Stamp duty applies to loans, guarantees, interest and commissions at the rates described below.

Loans granted to a Portuguese borrower incur stamp duty at a rate of:

- 0.04% per month if the term for repayment is less than one year;
- a payment of 0.5% on each disbursement if the term for repayment is equal to or greater than one but less than five years; or
- a payment of 0.6% on each disbursement if the term for repayment is equal to or greater than five years.

All cases are calculated on the amount of the loan.

Stamp duty is also charged on the granting of security unless ancillary to a contract already subject to stamp duty; ie, so long as security is granted at the same time as a Portuguese loan (ie, subject to stamp duty) is executed and that such a guarantee secures that loan. This means that if security is granted at the same time as a Portuguese loan to a Portuguese borrower, stamp duty would only have to be paid once.

When applicable to security, stamp duty rates are the same as set out above for loans and are calculated based on the amount secured. It should be noted that when the security is intended to cover all loans, the issue of security by a Portuguese guarantor will entail the payment of stamp duty over the full amount secured. It is possible contractually to fix the amounts secured by the security (thereby limiting the applicable stamp duty payable).

If no loan is granted to a Portuguese entity, the agreement is signed outside Portugal and the Portuguese entity acts as guarantor, no stamp tax is due on this security at signing. However, stamp tax (at the above rates) would have to be paid if the agreement were subsequently presented in Portugal before any official entity (as would be the case, typically, in an enforcement scenario).

Finally, interest and banking commissions, and fees for financial services paid by a Portuguese borrower, will also be subject to stamp duty at a rate of 4%.

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 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 when the guarantee is given 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 corporate interest is a factual matter). In order to substantiate verification of corporate interest, a limit on the amount secured by the obligor by reference to the actual net value of its assets is usually recommended.

3.6 Formalities When a Borrower is in Default

To set 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. Local responsibility for executing mortgage foreclosure proceedings lies with the courts where a property is located. In the case of enforcement of a portfolio, the competent court shall be the court where the property with the highest tax value is located.

Only due and payable credits may be claimed under a mortgage enforcement. The mortgage cannot be enforced for more than the amount of the secured claim and in any case the mortgagee may not receive more than the amount due to him under the secured claim.

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 with the proceeds of such sale.

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

In relation to mortgages, the normal procedure is the enforcement of the security by means of seizure; ie, the judicial apprehension of an asset given as guarantee of an obligation.

The seizure confers to a creditor the right to be paid with the proceeds of the sale of such assets, with preference over

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

Under the Portuguese Civil Code, real estate privileges are always special.

Regarding real estate properties, the rules of credit graduation, considering creditor privileges, are, roughly speaking, the following:

- credits of the employees working in a mortgaged property;
- credit for any judicial expenses incurred directly on the common interest of the creditors, for the preservation, execution or liquidation of real estate properties;
- credits of the state due for the tax over property transfer and over heritage and donations;
- credits of the local public authority (autarquia local) for the municipal tax over real properties (Imposto Municipal sobre Imóveis, or IMI);
- credits of social security;
- any credit secured by retention right (direito de retenção); and
- credit secured by mortgage, in compliance with the priority arising from the respective registry.

The enforcement procedure involves the following steps:

- the filing of a petition in a competent court;
- the seizure by a secured creditor of the assets of a debtor, which is made by electronic communication to a competent Land Registry Office (this procedure being equivalent to a formal presentation to register), and the delivery to a custodian, normally an enforcement agent;
- the service of proceedings on the debtor;
- the service of proceedings on creditors of the debtor who have a priority claim in respect of its assets;
- the decision of the courts ordering the debtor to make payment and setting the order of priority in which the creditors are to be paid, assuming there are several creditors;
- the sale, by way of court order, of the secured assets; and
- the distribution of the proceeds of the sale, in accordance with the order of priority determined by the courts.

The timing of the process of enforcing security in Portugal varies. On the basis of historic evidence, however, it is estimated that enforcement proceedings in relation to mortgages take on average between one and three years without appeal.

3.7 Subordinating Existing Debt to Newly Created Debt

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

3.8 Lenders' Liability Under Environmental Laws See 2.7 Soil Pollution or Environmental Contamination.

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:

- 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 a period of six months preceding the commencement of insolvency proceedings;
- personal guarantees granted by the insolvent, within 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 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 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 one year immediately preceding the commencement of insolvency proceedings.

Other than in the case of unconditional termination, an insolvency administrator may also, at the request of creditors and for the purpose of protecting the insolvency estate, challenge certain acts or contracts executed in the two years prior to the commencement of an insolvency proceeding, provided that the two following cumulative hurdles are demonstrated or presumed: (i) the relevant acts or contracts must be prejudicial to the insolvency estate and to the satisfaction of its creditors, and (ii) the transaction must have been entered into between the company and a third party acting under a malicious motive (*mala fide*).

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 if the agreement already includes fall-back provisions in that regard 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 Governmental Controls Applicable to Strategic Planning and Zoning

See 2.9 Condemnation, Expropriation or Compulsory Purchase and 4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction.

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

The Legal Regime for Construction and Land Development is the basic legislation for 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. The prior information can also be used by an investor that is not the proprietor of the asset to ascertain what can be done in terms of construction works.

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. In certain cases that are defined in law, the prior information allows for the submission of a prior communication to the municipality, which is a far more expedient procedure than the usual construction licence.

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

The prior communication is a declaration presented to the municipality by the promoter of the construction works that is applicable to situations in which the urban parameters for construction are already set out, whether in a detailed plan or in an allotment licence. In these cases, the prior communication is presented with all the necessary documents and the municipality only has to evaluate if the documents are all presented. If so, in approximately eight days, the investor may begin construction, after paying the municipal taxes.

The authorisation of use (*licença de utilização*) is a permit for the use of buildings or its parts and for changes to that use. After the construction works, the authorisation of use is the permit that attests that the construction was made according to the licensed project or according to the project contained in the prior communication.

The territorial instruments referred to in 2.9 Condemnation, Expropriation or Compulsory Purchase also represent limitations to design, appearance and method of

construction, since there are areas in which construction is prohibited or limited. For instance, pursuant to Decree-Law No 166/2008, of 22 August 2008 (as amended), and Decree-Law No 73/2009, of 31 March 2009 (as amended), several actions in the area of the National Ecological Reserve and the National Agricultural Reserve are severely limited or prohibited.

Refurbishment of an existing building must be conducted pursuant to the Legal Regime for Urban Rehabilitation. The operations of refurbishment may be approved by a specific instrument or through a detailed plan.

4.3 Regulatory Authorities

The regulation for the development and use of plots of land is carried out by the municipalities in urban and planning control proceedings (prior information, licence, prior communication and authorisation). Municipalities, therefore, are the competent authorities to conduct the procedure and issue the relevant titles.

During proceedings, municipalities may consult other entities that have legal competence according to the matter or location involved. In some cases, depending on the location of the operation, consultation with certain entities such as the CCDR (Commission for Co-ordination and Regional Development) may be mandatory.

Applicable legislation includes the territorial management instruments referred to in **2.9 Condemnation, Expropriation or Compulsory Purchase** and the Legal Regime for Construction and Land Development.

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 a 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 final decision.

Third parties have the right to participate.

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.

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 proceed as follows:

- *non-judicial remedy* – pursuant to the Procedure Administrative Code, the 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; or
- *judicial remedy* – in this case, the applicant may file a lawsuit in accordance with the procedure established under the Procedural Code of the Administrative Courts in which the applicant 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 to seek a preliminary remedy.

4.6 Agreements with Local or Governmental 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, 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

The Legal Regime for Construction and Land Development provides for several mechanisms of enforcement of the restrictions on development and 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 (ie, in breach of the applicable legal proceeding or in breach of any administrative act or applicable regulation), 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 to 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 are commercial companies (private limited companies, or LDA) or public limited companies (SA), and Collective Investment Real Estate Undertakings (OIC) (investment funds or investment companies). The most common are public limited companies and real estate funds (REFs). Additionally, on 1 February 2019 the regulation of SIGIs entered into force, following closely the regulation of REITs implemented in various European countries.

5.2 Main Features of the Constitution of Each Type of Entity

Commercial Companies

SA companies

A joint stock company, 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.

An SA must be incorporated with a minimum share capital of EUR50,000. At least 30% of the SA's capital stock must be paid up at the time of incorporation and the remaining capital stock must be paid up by the shareholders within five years from the company's incorporation.

The share capital may result from contributions in cash or in kind (labour and 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 can be nominative or bearer shares and each type may be converted to the other type of share. However, shares must always be nominative when they have not been fully paid up, when there is restriction on transferability and when shareholders are required by the by-laws to make ancillary capital contributions.

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

share certificates, possession of which confers all shareholders' rights on the holder. The articles of association may not prohibit the transfer of shares otherwise permitted by law and transferability may only be restricted within the terms of the relevant legal provisions.

As a general rule, an SA must be incorporated by a minimum of five shareholders. 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 the paying up of the company's entire quota capital. Quota holders may freely stipulate the amount of an LDA share capital, the minimum nominal value of each quota being equal to EUR1. The share capital may result from contributions in cash or in kind (labour and provision of services are not allowed). Quota titles are not freely negotiable under written document. 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. This regime provided by law can be rendered stricter or more flexible by the articles of association. An LDA may be incorporated by a minimum of two equity holders or by a single equity holder (either an individual or a company). In the case of a single equity holder, the LDA must add the word *unipessoal* to its corporate name and there are certain special legal requirements regarding the relationship between the LDA and the single equity holder.

Collective Investment Real Estate Undertakings

Real estate investment funds

REIFs are ruled by the applicable OIC Regime and can be open, closed or special. Open-end funds are incorporated by public subscription and closed-end funds 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 managing companies requires the authorisation of the Bank of Portugal and the Securities Commission. The participation units must be deposited with a financial institution with its head office or a branch in Portugal. The assets of the fund can be real estate, cash and participation in real estate companies. The assets of the REIF must be regularly evaluated by at least two evaluators.

Real estate companies

Real estate companies (SII) need to be joint stock companies and can have a fixed share capital (SICAFI), which regime is similar to closed-end funds, or variable share capital

(SICAVI), which regime is similar to open-end funds. Real estate companies are ruled by the OIC Regime and the Portuguese Companies Code. The real estate companies can be self-managed or managed by a management company or any other financial institution. Incorporation of a real estate company is subject to the authorisation of the Securities Commission.

Real estate investment and management companies

SIGIs are also incorporated as a joint stock company (*sociedade anónima*), with or without public subscription, have a minimum paid-up share capital of EUR5 million and adopt the supervisory model corresponding to a supervisory board (*conselho fiscal*) and a statutory auditor (*revisor oficial de contas*) (or an audit firm that is not part of the supervisory board).

In addition, SIGIs must have the following corporate purpose:

- acquisition of property ownership rights, surface rights or other equivalent rights concerning properties for leasing purposes or other forms of commercial operation;
- acquisition of equity shareholding interest in other SIGIs or in companies with a registered office in other member states of the EU or of the European Economic Area that are bound by administrative co-operation in the field of taxation equivalent to the one established in the EU and that fulfil cumulatively certain requirements; and
- acquisition of equity interests corresponding to shares or to investment units of (i) alternative investment funds (AIFs) for real estate investment with an income distribution policy similar to the one required for the SIGI and (ii) AIFs for real estate investments in residential leases governed by Article 102 of Law No 64-A/2008 of 31 December 2008 with an income distribution policy similar to the one required for the SIGI.

5.3 Minimum Capital Requirement

See 5.2 Main Features of the Constitution of Each Type of Entity.

5.4 Applicable Governance Requirements

SA Companies

The most common management and supervisory structure of SA companies includes a board of directors (*Conselho de Administração*) and an internal auditing board (*Conselho Fiscal*) or an internal single auditor (*Fiscal Único*).

Two other structures also are admissible: a supervisory board (*conselho geral e de supervisão*), an executive board of directors (*conselho de administração executivo*) and a certified chartered accountant (*revisor oficial de contas*); or a board of directors comprising an audit commission (*comissão de auditoria*) and a certified chartered accountant. The manage-

ment 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 applicable) 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 may also take place via electronic means or by video conference. Minutes of board meetings must be recorded in a book of minutes and must be 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 by a single manager (*gerente*) or by a managers' board (*gerência*). The managers must be individuals and are not legally required to be quota holders. An LDA must appoint an internal auditor (*fiscal único*) or an internal auditing board (*conselho fiscal*) if it surpasses at least two of 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, REIFs 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). REIFs and companies have fees to be paid 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 the law recognises that allow a person, company or other organisation to occupy and use real estate for a limited period without buying the property. In the case of contracts for use of shops, those are not subject to the legal framework of an urban lease, but only to the general legal framework applicable to contracts.

6.2 Types of Commercial Leases

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

6.3 Regulation of Rents or Lease Terms

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law No 6/2006 of 27 February 2006, amended by Law No 31/2012 of 14 August 2012, Law No 79/2014 of 19 December 2014, Law No 42/2017 of 14 June 2017 and Law No 43/2017 of 14 June 2017, also known as the New Urban Lease Regime. Urban lease agreements are divided into two types: lease agreement for habitation purposes and lease agreements for non-habitation purposes.

Rents and lease terms of commercial leases are freely regulated between parties. In fact, the most relevant aspects of commercial lease agreements such as term, termination and renewal are freely negotiated by parties. Contrary to lease agreements for habitation purposes, the mandatory regime is not applicable to commercial leases and only applies residually in cases where the parties have not defined the respective regime in a lease agreement.

In commercial leases, rent usually has a fixed amount. Regarding contracts for use of shops, generally there is a fixed amount and a variable amount that is related to a tenant's revenue.

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 for a fixed term or non-fixed term. The usual choice is a lease agreement with a fixed term (if it is agreed between the parties that the agreement is without a fixed term, the legal minimum limit is one year and the legal maximum limit is 30 years).

Regarding the maintenance and repair of an 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.

Concerning the frequency of rent payments, except where otherwise agreed between the parties, 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 that is established every year by the government. If the parties do not agree to this, rent may be adjusted by a landlord annually according to scales foreseen in the law.

6.7 Payment of VAT

Generally, lease agreements are exempt from VAT. This VAT exemption may be waived provided that the necessary conditions are met: such as both parties need to be VAT taxable persons in Portugal and a tenant uses the leased property for VAT taxable activities. Waiving VAT may be convenient as by waiving that exemption, the landlord may deduct the VAT borne. In this case, no stamp duty is payable.

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

The maintenance and repair of areas used by several tenants – for example, parking lots or gardens (condominium costs) – are generally agreed upon between the parties. Generally the costs are borne by each tenant proportionally 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 proportionally to the area occupied by each one. These types of matters are stipulated between the parties.

6.11 Insuring the Real Estate that is Subject to the Lease

Notwithstanding the fact that properties subject to a horizontal property regime must be covered by a mandatory insurance policy covering the risk of fire, there is no legally mandatory insurance policy applicable to real estate subject to commercial lease agreements and there is also no legal provision imposing the costs of any contractual insurance obligation on any of the parties. However, usually, in this type of insurance, the insurance premium is paid by a tenant due to a 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 damages caused by terrorism and sabotage. Finally, the tenant usually undertakes the cover of business interruption and other time element coverages of its own interest.

6.12 Restrictions on Use of Real Estate

A landlord may impose some rules and restrict the use of a leased property. In general, the landlord may impose restrictions concerning the alterations made to the property, which may be subject to the consent of the landlord. In these cases, the tenant undertakes all the costs involved with the alteration. The landlord may also restrict the assignment or sublease of the property, this being subject to the prior consent of the landlord except in the case of a transfer of an ongoing business (*trespasse*) where the lease is included. In this case, the landlord has a pre-emption right, except if the parties have agreed otherwise. The landlord may also restrict the 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 which conditions a tenant may alter or improve a real estate; namely, it is established that the tenant shall not carry out any works on the leased property without the prior written consent of the landlord. The 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, planning, procurement and management of the repair work. It is common that all works performed by the tenant become an integral part of the property or, upon a landlord request, 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 No 6/2006 of 27 February 2006 (as amended), also known as the New Urban Lease Regime. Urban lease agreements are divided into two types: lease agreement for habitation purposes and lease agreements for non-habitation purposes. Unlike leases for non-habitation purposes, leases for habitation purposes have a minor degree of contractual freedom. All the most relevant matters are imperatively established in the law.

In regards to retail and use of shop agreements, these are not subject to the general regime; ie, to the New Urban Lease Regime or to any other regulation provided by law. They are instead subject to atypical agreements, which are ruled by agreements between parties according to the Civil Code. Apart from the right to use the areas agreed, tenants may use the common services and amenities provided by the landlord or by the manager of the commercial centre.

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 a 60-day notice is given; this can be less in cases where the agreement foresees a minor duration is applicable. Nevertheless, a landlord cannot request termination of a lease agreement after an insolvency declaration based on the following grounds: 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 the failure by a tenant to meet its obligations by requesting some securities, such as requesting a rent deposit, a bank guarantee for the tenant or a guarantor. These are the most common kinds of securities provided.

6.17 Right to Occupy After Termination or Expiration of a Lease

A tenant is entitled to occupy a property after the expiration or termination of a commercial lease, unless otherwise agreed between the parties. 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 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. As an example, the non-payment of the rent, costs and expenses for more than two months; in the event of late payment of more than eight days, more than four times in a row, or four times in a period of twelve months; and in the case of opposition from the tenant to works (remodelling or restoration) that need to be provided by public authorities, by mutual agreement the landlord can terminate the lease with the tenant.

6.19 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 may 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 that are deemed the responsibility of the tenant. This process has been reported as a quicker process than the judicial process. Nevertheless, according to this firm's experience, several delays have been verified. The estimated duration of the eviction process has been two years.

6.20 Termination by Third Party

In the case of opposition by a tenant to urgent works (namely remodelling or restoration) that are required by any public authority from the landlord, the law foresees the possibility of termination of a lease agreement by the landlord. Within six months, the tenant still has the possibility to cease the mentioned opposition, by accepting the works and therefore 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 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 (*dono da obra*) 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 pre-

paratory and accessory works are deemed included in the scope of work. Since the price is fixed and non-revisable, the same cannot change notably due to the increase of 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 wilful 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. There are, however, limitations to the limit ability, such as when:

- the limitation is contrary to public policy principles;
- the limitation gives rise to a merely symbolic compensation; and
- the limitation applies to defective performance, delay in performance or non-performance by reason of wilful misconduct or serious default.

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. Differently, it is disputable whether the parties may agree to reduce the statutory five-year warranty period based on their contractual freedom. In fact, several Portuguese authors have concluded that the five-year period

is a mandatory minimum warranty period intended to protect the public interest in terms of durability of the immovable property. However, some other Portuguese authors and recent case law have taken the view that the provision establishing the five-year warranty period is not a mandatory provision and as a consequence the parties may contractually agree to reduce the five-year warranty period if the nature of the works or the term foreseen for its use justifies such reduction and the reduction is not material.

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 associated to each construction milestone, meaning that if such a milestone is not achieved within the agreed completion date, 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.

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 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 securities from a contractor, such as contractors' parent companies guarantees and comfort letters, letters of credit and bank guarantees on first demand. Additionally, owners require that contractors 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 the event 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).

It is also worth mentioning that an energy efficiency certificate (*certificado de eficiência energética*) is required for all buildings (with some exceptions set forth by law, such as buildings or autonomous fractions used as warehouses, workshops or parking). The certificate evidences that the

applicable legal requirements concerning energy efficiency and air quality inside the buildings are being complied with and, when this is not the case, requires the identification of the necessary corrective measures.

Furthermore, new properties for housing purposes must have the so-called house specifications certificate (*ficha técnica de habitação*), which is a document mentioning the main characteristics of the property that must be prepared and signed by the real estate promoter, confirmed by the signature of the constructor and deposited at the respective municipality against the payment of the municipal tax.

8. Tax

8.1 VAT

In general, the sale of real estate located in Portugal is subject to property transfer tax (IMT) and exempt from VAT, unless the vendor and the purchaser agree to waive the exemption.

The option to waive the exemption and to charge VAT at the standard rate is available to avoid boundaries to the right to deduct input VAT. This is due to the main VAT rule whereby one can only deduct VAT paid on goods and services that were incurred for making taxable supplies.

To be able to waive the exemption, the vendor and purchaser must be entrepreneurs and it is necessary that the latter, in the course of his business or professional activities, uses the real estate (comprised of urban property or autonomous units thereof, or building plots) thus acquired for taxable transactions.

In such cases, the acquisition of immovable property is subject to the general VAT rate of 23% (a 22% rate in Madeira and an 18% rate in the Azores) and tax is payable by the purchaser.

A reduced rate of 6% is enforceable in the following cases related to real estate.

- Urban rehabilitation contract work, as specified by law, conducted in real estate or public spaces located in urban rehabilitation areas (critical areas of recovery and urbanistic recovery, intervention areas of urban rehabilitation corporations and others) as limited by law, or under the scope of requalification and rehabilitation operations of overriding national public interest.
- Real estate rehabilitation contract work that, regardless of its location, is directly contracted by the Housing and Urban Rehabilitation Institute (Instituto da Habitação e da Reabilitação Urbana), as well as that performed under the scope of special financial or tax support regimes on the rehabilitation of buildings or under programmes financially supported by the HURI.

- Contract work on the improvement, refurbishment, renovation, restoration, reparation or conservation of real estate or autonomous units thereof assigned to housing, with the exception of cleaning work, maintenance work of green spaces and contract work on real estate that covers the total or some of the constituent elements of swimming pools, saunas, tennis, golf or mini golf courses, or similar facilities. The reduced rate does not apply to the incorporated materials, unless their respective amount is equal to or less than 20% of the global amount of services rendered.

IMT is levied at a rate of 5% for rural properties, at a progressive tax between 0% and 6% (depending on the contract price/patrimonial value of the property) for inhabitation urban property and 6.5% for any other property. The tax basis is the contract value or the official evaluation value (VPT), whichever is higher.

Moreover, the acquisition of real estate is subject to stamp duty at a rate of 0.8% on the same taxable amount determined for IMT purposes.

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 due when transferring the shares of the real estate owning company, provided the company has the capital divided in shares (SA).

In any case, the transfer of more than 75% of the equity of a private limited liability company with the capital divided in quotas (Lda) will trigger IMT at the above-mentioned rates.

Likewise, the acquisition of participation units in privately placed, closed-end real estate investment funds – 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 – is subject to IMT.

In fact, collective investment funds are investment vehicles commonly used to purchase immovable property.

The acquisition of real estate by real estate investment funds incorporated and operating in accordance with Portuguese law is subject to IMT and stamp duty in the same terms mentioned above.

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 urban and rural immovable property, payable by the respective owner or person entitled to the use or fruition on December 31st 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 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%.

The rates are not different for business or non-business use.

Use criteria is relevant for property transfer tax purposes when determining the patrimonial value of the asset (ie, the taxable basis) since one of the criteria for this evaluation is its purpose or use (ie, trading, services, inhabitation). However, ratio differences are not substantial.

8.4 Income Tax Withholding for Foreign Investors

Rental Income: Non-residents

Non-resident investors 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. Withholding is a payment in account of final tax due.

In any case, non-resident real estate owners receiving income are obliged to submit an annual tax return in Portugal with the rental income. Thus, maintenance and upkeep expenses incurred by an investor may be deducted within the tax return information.

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. The tax is assessed by the tax authorities on the basis of the submitted tax returns.

As for withholding tax, in the cases when it is due, the lessee is responsible for handing over the tax withheld to the tax authorities.

Rental Income: Residents

Resident investors are also subject to withholding tax at the same rate of 25% if the lessee is a legal entity or an individual that has organised accounting.

Tax withheld is a payment on account of the final tax due, and 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, plus municipal and State surcharges if applicable.

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 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 not 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.

In certain situations, capital gains obtained by non-residents may not be taxed in Portugal under the application of a double taxation treaty.

Capital Gains: Residents

Capital gains obtained by resident individuals on the sale of real estate are only taxed on 50% of the gain and are subject to the progressive rates above-mentioned. 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.

Should the capital gain be 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 asset's 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. These include municipal property tax reductions on real estate assigned to the production of energy derived from renewable sources and to energy-efficient real estate, and municipal property tax exemptions on (i) urban real estate subject to rehabilitation and (ii) urban real estate built, expanded, improved or acquired for consideration for housing purposes.

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