

The International Comparative Legal Guide to: **Real Estate 2007**

A practical insight to cross-border Real Estate work



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1 Real Estate Law

- 1.1 Please briefly describe the main laws that govern real estate in your country. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1**

The right of property ownership is granted to every person by the Portuguese Republic's Constitution. Apart from that, real estate is mainly governed by the following statutes:

- Portuguese Civil Code (mainly in its III Book, which regulates all rights *in rem*, and in the IV Chapter of the II Title of its II Book, where the lease contract is regulated).
- Real Estate Registry Law (Código do Registo Predial).
- Municipal Real Estate's Tax Code (Código do Imposto Municipal sobre Imóveis).
- Municipality's Tax on Real Estate Transfers Code (Código do Imposto Municipal sobre as Transmissões Onerosas de Imóveis).
- Land Planning Outline Law (Lei de Bases do Ordenamento do Território).

- 1.2 What is the impact (if any) on real estate of local common law in your country?**

Common law has no impact on real estate in Portugal. However, if it is understood as being the provisions set by the local authorities in opposition to the ones set by the Central Administration, "local common law" has great impact on matters such as land planning and zoning (see chapter 11).

- 1.3 Are international laws relevant to real estate in your country? Please ignore EU legislation enacted locally in EU countries.**

International laws generally are not relevant to premises located in Portugal.

However, certain international laws might be applicable if any international convention to which Portugal is a party so stipulates.

2 Ownership

- 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The Portuguese law does not restrict the ownership of real estate by any particular class of persons.

3 Real Estate Rights

- 3.1 What are the types of rights over land recognised in your country. Are any of them purely contractual between the parties?**

The main types of rights over land are:

- Ownership:** grants the owner the right to fully use, enjoy, encumber and dispose of the real estate, subject to the limits imposed by law or any other rights of third parties.
- Co-ownership:** any property held in the name of two or more parties. Each co-owner can freely dispose of his share (but not of a specific part) of the real estate. If one party wishes to sell his share, the others have a legal pre-emptive right to buy it.
- "Horizontal Property":** exists when, for example, a building is divided into "fractions" (e.g. apartments). Each person holds the rights as the absolute owner over his fraction, and the rights of a joint owner over the common areas of the building, such as the stairs, lifts, lobbies and hallways. Both aspects are indivisible though, as they are part of the same right.
- Surface Right:** allows its beneficiary to build or keep a construction or plantation on land belonging to a third party.
- Usufruct Right:** a legal right to use, enjoy and manage - but not dispose of - the real estate owned by someone else (the "bare owner").
- Easement:** a right to use the land of another for a specific purpose. It can be created either by contract or by law.

4 System of Registration

- 4.1 Is all land in your country required to be registered? What land (or rights) are unregistered?**

The Portuguese registry system means to publicise the buildings'

situation as for the rights or encumbrances that might affect them in order to protect real estate transfers.

Even so, registration is not compulsory in most cases (see answer to question 4.3).

4.2 Is there a state guarantee of title? What does it guarantee?

No. However, there is a legal presumption that the rights definitively registered in the Land Registry exist and belong to the person stated therein and public notaries must ensure that the deeds are valid and binding.

4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

As stated above, registration is not compulsory in most cases. One of the few exceptions is the creation of a mortgage, to which the registry is constitutive, i.e. the mortgage will only exist after being registered.

However, it is in the parties' best interest to register their rights, since:

- non-registered rights in land may not be enforceable towards third parties; and
- an unbroken "chain of title" is required to register a transfer of rights or to create any charges on real estate (i.e. easements, mortgages, etc.).

4.4 What rights in land are not required to be registered?

See answer to question 4.3.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

The registered deeds rank according to their date of registration at the Land Registry.

However, if there is any unregistered land, first registration must take place through a process of "justification". This means that the person who intends to register such land must prove how the land was acquired, and why it has not been previously registered.

In this case, an edict will be posted at the competent Land Registry Office in order to provide the opportunity to the Public Prosecution Office or any other interested party to oppose to the registration in the courts of law.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Ownership is transferred when the contract of purchase and sale is signed by a public deed before a notary.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

"Earlier" rights usually prevail over "later" ones. As stated above, the registered deeds rank according to their date of registration at

the Land Registry.

5 The Registry / Registries

5.1 How many real estate registries operate in your country? If more than one please specify their differing rules and requirements.

Several Land Registry Offices exist for each area in which the Portuguese territory is divided into. Their rules and requirements are identical. Rights over real estate must be registered in the Land Registry Office where the property is located as well as in the tax authorities office of the same place.

5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?

Real estate certificates may be requested online.

5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Yes, compensation can be claimed from the State, since Land Registry Offices provide a public service and are subordinate to the Ministry of Justice.

5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

No. The buyer can obtain all the information on the real estate he might reasonably need.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your country? Please briefly describe their roles and/or duties.

- Selling and purchasing agents (or realtors)

Their main role is to put a potential seller in touch with a potential purchaser. They often take care of the initial stage of the negotiations.

- Lawyers

They advise each relevant party and prepare the formal agreement entered into by them. They also assist their clients throughout the negotiations until the public deed of purchase and sale is registered.

- Notaries

For transactions to be registered at the Land Registry Office it is mandatory to grant the public deed before a Notary, who must certify the parties' signatures and the existence of all necessary permits.

- Others

Many other technical advisors may be involved in a real estate transaction, such as engineers, architects, or any other technical surveyor, depending on the nature and situation of the property.

6.2 How and on what basis are these persons remunerated?

Realtors are remunerated according to the agreement made with their clients. They are often paid a percentage of the value of the transaction, however.

Lawyers are remunerated according to the bar association's rules, and their fees must be previously agreed with the clients. Many law firms charge by the hour though, complying with pre-set values.

Notaries are remunerated in accordance with the type of act to be performed since their fees are established by law.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

The minimum formality is the execution of a purchase and sale agreement by public deed, however for it to become enforceable towards third parties the deed must be registered at the appropriate Land Registry Office.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

The seller is under a general duty of disclosure, according to the "principle of good faith", to which both parties must comply during all stages of the negotiations.

7.3 Can the seller be liable to the buyer for misrepresentation?

Yes, the seller will be liable for damages in case of misrepresentation. Besides compensation for damages, the consequences of misrepresentation on the validity of the agreement will vary.

The agreement can only be annulled if the misrepresentation refers to a specific quality or characteristic of the real estate that had the buyer known of, he would not have purchased the real estate.

In any other situation the buyer is limited to a claim for a price reduction, or demand the seller repair the defect.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

The amount and extent of the warranties provided by the seller depend on the agreement between both parties. Besides ownership, title, and quiet enjoyment of the property, sellers usually warrant the lack of encumbrances and defects of the asset, and that the property is in compliance with the applicable laws, in particular environmental and planning regulations.

In the specific matters covered by the agreed warranties, buyers are released from having to carry out their own diligence.

7.5 Does the seller warrant its ownership in any way? Please give details.

Yes, the seller must show a certificate passed by the Land Registry Office that lists him as the lawful owner of the property. The

Notary must verify the validity of such certificate in order to perform the public deed of purchase and sale of the real estate.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In addition to the buyer's obligation to pay the sale price, the buyer must act in good faith during all stages of the negotiations and is liable to the seller for failure to do so.

The buyer is also obligated to uphold any pre-existing right over the property (e.g. lease or usufruct) that has been disclosed to him, and was previously registered.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

There are no substantial differences between the rules applicable to residents and non-residents concerning the lending of money to finance real estate.

The acquisition of real estate by individuals is usually financed by a residential loan from a credit institution, which must comply with several specific provisions. The main difference from the financing system of corporate entities is in the nature of the guarantees requested by the lender and on the complexity of the loan structure itself.

The lender must inform the client of the applicable interest rates and of any other costs of borrowing money in real estate transactions in compliance with Decree-Law 220/94.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The most common method by which the lender seeks to protect itself from default by the borrower is by holding a mortgage over the real estate.

In some cases, the lender also demands from the borrower a personal surety by a third party (guarantor), or a pledge of part of his income.

8.3 What minimum formalities are required for real estate lending?

If the lender is a credit institution the signing of a contract is the minimum formality required. If the lender is not a credit institution a loan of more than 20,000 will only be valid if executed by public deed and a loan of 2,000 up to 20,000 will have to be executed at least by a written contract (values are all in euros).

When a mortgage is granted, a public deed must be signed before a Notary, and will only be enforceable (inter alia as well as to third parties) after it is registered at the Land Registry Office.

8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

A claim by a lender with a mortgage on the real estate will in most cases prevail over other creditor's claims, including other mortgagees, as long as it was the first registered. The sole

exception is the existence of a “privileged credit”, for example for judicial costs or unpaid taxes, which because of its nature must be paid prior to any other regardless of registration.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Yes, transfers of real estate are subject to a transfer tax: the “Imposto Municipal sobre as Transmissões Onerosas de Imóveis”, (“Municipality’s Tax on Real Estate Transfers”), or just IMT.

The tax rates are: 5% for rural properties; 6% for urban residential properties that were purchased for more than 532,700 euros; 6.5% for all urban non-residential premises; and 8% if the purchaser is a tax haven based company; and are charged on the basis of either the purchase price, or the value of the property as set by the Tax Authorities.

Generally the buyer pays this tax, along with a “Stamp Tax” at the rate of 0.8% of the purchase price.

However, there are some legal exemptions to the payment of IMT, for example: if the purchaser is a commercial enterprise seeking to develop any industrial or agricultural activity considered of a superior economical and social value, and the real estate is located in an economically disadvantaged region of Portugal, the real estate transfer may be exempt of IMT; and, the purchase of a real estate by a Real Estate Investment Fund may also be either totally or partially exempt of IMT payment.

9.2 When is the transfer tax paid?

The IMT must be paid just until the execution of the public deed of purchase and sale.

9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Generally, real estate transfers are not subject to VAT. However, the parties may choose to pay VAT in order to deduct such payment on the VAT due by their professional activities.

The option for taxation given to the parties can only be enacted if certain conditions related to the premises; the agreement and the parties themselves are met. Some specific restrictions are imposed to this ability to choose whether to be taxed or not for VAT when the activities developed by the parties are not eligible for a legal deduction under that tax’s legal regime.

In order to prevent fraudulent behaviours, such as artificially setting values for transactions when choosing VAT taxation, the tax base is the real estate’s regular market value.

The VAT tax rate is currently 21% and should be paid by the buyer, who must deliver it to the tax authorities.

9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

Unless otherwise stipulated by the parties the seller is liable only for the income tax due from the capital gains on the sale.

9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

No, taxation is not different if ownership of a company owning real estate is transferred.

If by the acquisition of a participation in a quota company that owns real estate 75% or more of the company’s capital becomes the ownership of one sole partner IMT over the value of that real estate is due.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The lease of business premises is mainly regulated by the Portuguese Urban Lease Regime (“Regime do Arrendamento Urbano”), which is included in the Portuguese Civil Code, articles 1022 to 1113.

Within that regime there are some specific rules applicable to the lease of commercial spaces. These rules apply to all non-residential lease contracts for urban premises, and specify the terms of commercial and industrial lease contracts.

10.2 What types of business lease exist?

Under the Portuguese law, there are no specific types of business leases.

10.3 What are the typical provisions for leases of business premises in your country regarding: a) length of term; b) rent increases; c) tenant's right to sell or sub-lease; d) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and e) repairs?

a) Length of term

The parties may stipulate the length of the lease. However, if they do not specify the applicable rules and the contract’s duration, it will be considered to have been entered into for 10 years. There is a minimum period of one year of time protection.

b) Rent increases

It is up to the parties to stipulate the rent increases. If nothing is said in the contract, the rent may only be increased annually.

c) Tenant’s right to sell or sub-lease

Unless stipulated otherwise, the sub-lease of the premises by the tenant along with the industrial or commercial establishment there installed needs the landlord’s authorisation to be valid. The landlord must be informed of such transference within 15 days of the sub-lease.

The tenant can also sell the use of the commercial or industrial space without the landlord’s authorisation, as long as the activity remains the same, and all of its contents are also transmitted. The new tenant must not use the premises for a purpose other than the one pursued by the prior tenant, or the landlord may dissolve the lease.

The conveyance agreement must be written and communicated to the landlord, who unless the parties have previously stipulated otherwise, has preference over any other purchaser who attempts to acquire the premises by accord and satisfaction or sale.

- d) (i) Change of control of the tenant

It does not affect the lease contract.

- d) (ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)

There are no specific legal provisions on such matter. The legal requirements imposed for sub-lease and sale of the premises (see answer to c)) must be met.

- e) Repairs

The parties may freely stipulate the rules for repairs undertaken in the premises. If nothing is stipulated, the landlord will be responsible for maintenance, and the tenant will be allowed to perform works demanded by law or by the lease contract.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

If the lease is entered into for more than 30 years IMT must be paid. Real estate leasing is VAT-exempt. However, it is the parties' prerogative to waive such exemption in the same terms as stated in the answer to question 9.3 (see above).

If IMT is not due, and the parties do not waive the VAT exemption, stamp tax at the rate of 10% of one month's rent is due upon the execution of the lease. If the rent is increased, this tax will be due as a percentage of such amount.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

It is within the parties' rights to stipulate specific rules on the breaking of the lease, so that they can choose when and for what reasons they can terminate it.

In any case, both landlord and tenant can terminate the contract when the other party breaches the agreement in a way that it would be unjust for the injured party to be forced to keep it. The law specifies some situations in which the parties are able to dissolve the contract on these grounds: serious and repeated violations of health and safety ordinances, noise violations or violations of neighbourhood rules, using the premises for a different purpose than the one specified in the lease, a three-month delay in paying the rent, etc. However, any other wrongful conduct can be used to terminate the contract.

The lease of commercial space can also come to an end by forfeiture, by lapse of time, or by any other fact that makes it impossible to maintain the validity of the contract, (e.g. the loss of the leased premises due to a violent earthquake).

Compensation will only be due for damages illegally caused to the counterpart. The tenant is obliged to maintain and leave the premises, after the contract ceases, just as he found it when he first received it from the landlord, excluding normal wear and tear inherent to its regular use. If the premises are damaged the tenant will be held responsible unless he proves that he was not liable for such damages.

It is also in the parties' choice to stipulate any rule on the automatic renewal of the lease.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

Yes, once the parties have sold their interest, they cease to be liable for default of the contract's obligations.

Liability for pre-sale non compliance will depend on the nature of the default.

11 Zoning and Environmental Issues

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land and buildings? Please briefly describe them and include environmental laws.

Zoning and urban planning are governed by land use plans issued by the Administrative Authorities.

Decree-Law 380/99 regulates the elaboration, approval and execution of the plans, which include three different levels of intervention: national; regional; and municipal.

At a national level, the "National Program for Zoning Policies" is in the process of being drafted and as yet has not been approved. The existing national plans are the "Sectorial Land Use Plans", which regulate the influence that the consequences of certain State policies might reflect on the territory, such as energy, transportations, tourism, or industry policies; and the "Special Land Use Plans", which were mainly created in order to protect certain environmentally sensitive areas, such as coastal waters, public water reservoirs, and protected areas as defined by law. The "Special Land Use Plans" due to their specific relevance shall prevail over any Municipal Land Use Plan.

Regional Plans are halfway between the national and the municipal levels. They are designed to establish the guidelines to which municipal plans must comply, as well as to develop in a regional scope the options made at a national level.

Within the municipal scope, there are two principal types of land management plans: (i) "Inter-municipal Land Use Plans", which articulate the regional plans with the Municipal Plans; and (ii) "Municipal Land Use Plans", which are approved by each municipality to define the use and occupation of its lands. This last type of plans can either be "Municipal Director Plans", "Urbanisation Plans", or "Detailed Plans", according to their territorial coverage.

In addition, Decree-Law 555/99 establishes the legal regime of construction and land development.

As for environmental laws, Decree-Law 69/2000 determines what public and private projects must be subject to an "Environmental Impact Assessment" prior to its approval, as well as the regulation for such process.

11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

It is the Municipalities' authority to determine the use and occupation of their land through the execution of a Land Use Plan. Municipalities are therefore the competent bodies to issue construction permits and land/building use permits.

In some cases, other State bodies must be heard during the

administrative process of licensing regarding for example environmental aspects, for the operation to be approved.

To prevent the uncertainty about the compliance of a given project with Land Use Plans and other rules on construction and land use, the Portuguese Regime of Urbanization and Construction stipulates that the interested party can submit to the Municipality any project in order to obtain binding information on its legal viability. If according to this “Prior Information” the project complies with all applicable laws, the Municipality is bound to approve it, provided that the request is submitted within one year.

Note that the Portuguese Administrative Procedure Law grants to every interested party the right to be informed by the Administrative Authorities on any matter that might concern him.

11.3 What main permits or licences are required for building works and/or the use of real estate?

Building works require a prior permit issued by the Municipality of the location of the real estate.

That permit can be either a “licence” or an “authorisation”, which is a simpler process than the “licence”.

If a “Detailed Plan” (see answer to question 11.1) covers the real estate’s location, or if it is located in a previously allotted area, a construction “authorisation” is necessary. Otherwise, a construction “licence” will have to be obtained.

Once built, the use of the real estate is subject to another permit, which will be issued after the municipality’s experts verify the compliance of the building with the project as it was approved.

11.4 Are building/use permits and licences commonly obtained in your country? Can implied permission be obtained in any way (e.g. by long use)?

Building use permits are commonly obtained. If a building is under construction or already constructed without the necessary permit the authorities may order the works to stop or the building to be

demolished, respectively. If an already constructed building is being used without the necessary permit the authorities may as well forbid its use until such licence is obtained.

It is impossible to obtain by long use or any other way an implied permission to build or use construction.

11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

The costs of the licensing/authorisation processes will depend on the Municipality in which they run, since Municipalities are authorised to set their own taxes.

A building authorisation can be obtained in one to two months, and a building licence in approximately one year or more depending on the Municipalities in which the procedures run.

11.6 In what circumstances (if any) is environmental clean up ever mandatory?

The operator must restore the real estate to such a state that it represents no danger to the neighbourhood, public health and nature and the environment in general.

12 General

12.1 Are there any current proposals for significant reform of real estate law in your country - please give details.

There are not any current proposals for significant reform of real estate law in Portugal.

12.2 Date at which law is stated.

January 2007.

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She was Coordinator of the team involved in providing legal assistance in the 1st and 2nd phases of the project "*Cidade Administrativa*", involving the future construction and re-location of several ministries and public services to a new area of Lisbon, and also in the definition of the measures for the urban requalification and rehabilitation of the areas involved. This same team is involved in the implementation of several other projects concerning urban development and rehabilitation.

She has been one of the most active lawyers providing legal assistance on real estate contracts and arbitration, as well as on expropriation projects related to public construction project.

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Mr. Pereira Reis occupied several posts in the Public Administration: Coordinator of the legal office of the National Commission for the Environment; Legal Adviser to the members of the Government; and Secretary of State for Local Administration and Land Use Planning. He is currently a lecturer at the Nova University in Lisbon.

Member of the Portuguese Bar Association since 1978 and also of the the Conseil Européen du Droit de l'Environnement and Vice-President of the Portuguese Association of Environmental Law, he has authored several articles in specialty reviews.

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We have a significant international practice in all major areas of law and represent multinational corporations, international financial institutions, sovereign governments and their agencies, as well as domestic corporations and financial institutions. We maintain close contacts with major law firms in Europe, United States and South America and are the sole Portuguese member of Lex Mundi.

Our 11-member team is experienced in the areas of land use planning for industrial, commercial and residential real estate, obtaining approvals to construct, advising on hotel acquisitions, and management agreements. We have proposed innovative solutions in urban legal matters, such as the use of securitisation funds.

The team also advises industrial and financial clients on all aspects of Portuguese and EU environmental law, representing them in applications for permits, environmental impact assessments, procedures, public inquiries and appeals.