

PANORAMIC

REAL ESTATE

Portugal



LEXOLOGY

Real Estate

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GENERAL

Legal system

How would you explain your jurisdiction's legal system to an investor?

The Portuguese legal system is based on civil law with written legislation as the main source of law. Real estate laws apply to the entire country, with some regional variations in Madeira and the Azores, and some local real estate taxes that vary by municipality.

Portuguese judges cannot create law but only interpret and apply it. Case law is merely a complementary source of interpretation and application of the law as the rule of precedent does not exist in Portugal.

The Civil Procedure Code provides for two types of interim remedies: specified (intended to protect against a risk of injury specifically provided for and regulated by the law) and common. The Civil Code and the Civil Procedure Code list the following types of evidence:

- admission;
- documentary evidence;
- expert evidence;
- inspection;
- witness evidence; and
- presentation of movable or immovable objects.

Some types of contracts must be in writing but, depending on the subject matter, an oral contract may be admitted.

Law stated - 6 October 2023

Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The land registry offices are the public bodies responsible for the public system of registration, which is essential to prove the title over a property. Under the principle of priority of registration, if there are multiple entries in the land register of incompatible rights over the same property, the right that was registered first prevails (even if the latter was created prior to the registration date). Ownership of a property is transferred by a deed of sale and purchase, and not by registration. The transfer is subject to mandatory registration at the Land Registry Office and this must be filed within two months of the date of completion (a fine is due after that period). Failure to register means the purchaser is not protected against third parties and cannot transfer the property. Mortgages must be registered to be valid.

Law stated - 6 October 2023

Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Only facts determining the constitution, recognition, transfer or other changes of in rem rights over a property can be registered (eg, acquisitions, leases with a duration of more than six years, mortgages, easements, horizontal property). Registration can be requested in person, by courier or electronically through an active digital signature, either by the interested party or by a lawyer, a notary or a paralegal. The application must contain all the relevant documents that prove the act to be registered. Registration fees are established in the Regulation on Fees for Registries and Notaries and are usually paid by the purchaser, except for cancellation of charges which are paid by the seller.

Law stated - 6 October 2023

Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are no exchange controls in Portugal and no currency restrictions on non-residents. Residents and non-residents are free to hold deposits in any currency with Portuguese banks. Companies and other investment vehicles in Portugal can also organise their books and financial statements in a currency other than the euro (ie, in their functional currency). In this case, parallel books and financial statements in euros must also be prepared and organised.

Law stated - 6 October 2023

Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange controls in Portugal and no currency restrictions on non-residents. Residents and non-residents are free to hold deposits in any currency with Portuguese banks. Companies and other investment vehicles in Portugal can also organise their books and financial statements in a currency other than the euro (ie, in their functional currency). In this case, parallel books and financial statements in euros must also be prepared and organised.

Law stated - 6 October 2023

Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The owner/occupier must comply with legal requirements and do all necessary maintenance and conservation works provided under law or contractually agreed. This includes urban planning and environmental requirements, such as, for instance, the performance of actions for the prevention of rural wildfires and the adoption by employers (regardless of whether they are the owner or the tenant) of measures to ensure that workers' exposure to asbestos is reduced to a minimum and not above the legal exposure limit, which may entail the removal of asbestos. Also, the owner/occupier is liable for any damage caused by the property to third parties, unless it is proven that the owner/occupier was not at fault or that, even with due diligence, the damage could not have been avoided. However, if such damage was caused by construction defects, the seller may be liable towards the purchaser within five years (10 years for structural defects in case of consumers acquiring from professional entities) and the contractor can also be required to remedy any damage suffered by the owner or a third acquiring party within the guarantee period of five years.

The current owner will always be liable towards third parties and the authorities for any illegal works done by a prior owner or prior tax debts attached to the property. However, if a prior owner is responsible for the damage or infraction, the current owner has the right of redress against them.

In addition, in the case of contamination of soil and water lines, where there is no level of contamination likely to be significant for human health, if it is not possible to hold the contaminating operator liable, and the owner needs to carry out construction work involving the excavation of contaminated soil, the owner must first license the soil remediation (decontamination) work and perform it accordance to the licensed terms.

Law stated - 6 October 2023

Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Owners may set forth in lease agreements that the tenants are obliged to carry out periodic analysis to assess contamination of soils and water lines, as well as asbestos levels.

Furthermore, owners can protect themselves from liability through insurance policies. Fire insurance is mandatory, both for the autonomous units and the common parts. There are other mandatory civil liability insurance policies for certain activities (eg, private healthcare units, labs and pharmacies, industrial activities with great impact on the environment and on peoples' safety and health).

Some operators (depending on their activity) must set up one or more financial guarantees that enable them to assume the environmental liability inherent to their activity, by taking out insurance policies, obtaining bank guarantees, participating in environmental funds or constituting own funds reserved for this purpose. The law does not define minimum insured capital, so it should be obtained after a technical audit assessing the environmental risk. If constituted through bank guarantees, the financial institution will be liable under the terms established in the guarantee.

Environmental insurance policies are available on the market, even for operators who are not legally obliged to contract them.

Law stated - 6 October 2023

Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The governing law must comply with Regulation (EC) No 593/2008 of the European Parliament and of the Council. Under this Regulation, where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. In the case of a transaction or lease involving a property located in Portugal, Portuguese law cannot be excluded.

Law stated - 6 October 2023

Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The courts that have subject-matter jurisdiction over real estate disputes are the common judicial courts that deal with civil and criminal cases, with jurisdiction in all matters not allocated to other judicial bodies. If the dispute involves the state or relates to potentially public property, the administrative courts have jurisdiction.

A party does not have to be qualified to do business in Portugal or to be allowed to submit claims or enforce remedies in the Portuguese courts.

Law stated - 6 October 2023

Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Ownership only differs regarding the warranties in the purchase of a property, as the period for complaints about defects is longer for consumers. The urban leasing regulations establish specific rules depending on whether the lease is for residential or non-residential purposes. Specific regulations govern residential mortgages (loan to value with a maximum ratio of 90 per cent) and enforcement proceedings for family homes (special protection against eviction).

Law stated - 6 October 2023

Planning and land use

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Development, construction and the use of real estate must comply with the urban planning legislation and all the administrative procedures regarding licensing and use permits. These are based on the principle that urban development must comply with all relevant plans governing the occupation, use and transformation of land. Territorial management instruments are divided into different levels: national, regional and municipal. In Portugal, the Legal Framework of Urban Development and Construction (RJUE) and the General Regulation of Urban Construction (RGEU) regulate the development, construction and use of real estate. The municipal bodies are responsible for these administrative procedures, including construction and use of buildings and division of land into separate plots. At the beginning of 2024, an amendment to the RJUE came into force which aimed to increase the exemption of urban planning operations from these procedures and to shift the responsibility for compliance with the legal requirements to private developers. Depending on the development, other public authorities could also be called on to give binding opinions. Failure to comply with planning decisions or zoning requirements can lead to fines, embargoes, prohibition on the use, demolition and compulsory works. Planning or zoning decisions can be appealed to the administrative authority and the courts.

Law stated - 6 October 2023

Government appropriation of real estate

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Properties and the rights inherent to them may be subject to compulsory purchase or condemnation for reasons of public utility under the powers, purposes or object of the expropriating entity, upon contemporaneous payment of fair compensation under the Portuguese Expropriation Code. When the need for expropriation arises from a public calamity or from internal security or national defence requirements, the state or the public authorities may take immediate administrative possession of the assets to meet the need that determined their intervention, without any prior formality, following, without further steps, the provisions of compensation established for litigious proceedings.

Law stated - 6 October 2023

Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Whenever there are situations that may put the safety or health of people at serious and imminent risk, the public authorities may, as a matter of urgency and without hearing the interested parties, order the immediate suspension of the activity and temporary closure of the property, in whole or in part.

Illegal use of buildings can result in an order from the local authority to cease the use, and if the order is not complied with, the occupants of the building or unit in question can be evicted without compensation.

Law stated - 6 October 2023

Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Under Portuguese law, insolvency is a process of universal execution whose purpose is to satisfy the creditors through a recovery plan, under which measures may be approved, including a haircut of principal and interest, and amendment of maturities or interest rates, or, if not possible, through the liquidation of the insolvent debtor and the distribution of the proceeds (if any) to the creditors.

As for outstanding rent or expenses, any creditor can submit a credit claim in the insolvency proceedings, as a rule, within 30 days of publication of the insolvency declaration. Thus, a lender's claim would be a claim on the insolvency and would compete with the other creditors' claims, so it may be satisfied in whole or in part. Furthermore, the creditor would be entitled to participate in the creditors' meetings and have the right to vote on any plans submitted.

The Insolvency Code has special rules on lease agreements where the tenant is the insolvent party.

Law stated - 6 October 2023

INVESTMENT VEHICLES

Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Investment entities can simply take on the form of a limited liability company (Lda) or a public limited company (SA), both of which shield owners from liability and can be shaped into real estate trading companies in their articles of association (thus benefiting from a property transfer tax exemption on acquisition of properties for resale if all applicable conditions are met). Branches of foreign entities can and must be established when regularly doing

business in Portugal. However, specific collective investment undertakings (OICs) such as securities or real estate investment companies or funds as well as real estate investment trusts, can also be established (these also shield ultimate owners from liability). These are not pass-through entities but benefit from a specific tax regime under which investment income, property income and capital gains are generally excluded from the determination of the taxable income of the OIC. Moreover, the entities are exempt from the municipal surcharge and state surcharge. Income earned by resident participants (companies and individuals) from OICs is taxed in general terms, while property income distributed to non-residents is taxed by applying a withholding tax rate of 10 per cent. Other income is exempt.

In contrast, income obtained through venture capital funds will only be taxed at the level of the unit holders. Other possible forms of investment entities include joint ventures and economic interest groups (ACEs) or unincorporated joint ventures (under a consortium or profit-sharing arrangement).

Law stated - 6 October 2023

Foreign investors

What forms of entity do foreign investors customarily use in your jurisdiction?

The most common forms used for doing business in Portugal are limited liability companies, public limited companies or established branches of foreign entities. Other vehicles, such as investment funds or investment companies, are also available, particularly for tax reasons, although setting them up is more complicated and time-consuming, and the incorporation and running costs are much higher. They are used in some cases of more complex investment structures or when the aim is to raise money from other investors.

Law stated - 6 October 2023

Organisational formalities

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The equity capital of public limited companies by shares is of €50,000. They must initially have a minimum of five shareholders (or one, if incorporated by a corporate entity). Additional formalities will apply if the shareholders make contributions in kind.

For limited liability companies by quotas, the minimum initial share capital is €2 and a minimum of two shareholders is required. The law also allows limited liability companies to be formed by a sole quota-holder and the minimum initial amount of the share capital is €1.

Public limited companies and limited liability companies by quotas must both be incorporated by a deed of incorporation and registration with the Commercial Registry, and a list with details of the ultimate beneficial owner(s) is required.

A SIGI must be incorporated as a public limited liability company with a minimum share capital of €5,000,000 and maintain its registered office in Portugal. SIGIs may be newly incorporated by a sponsoring entity, by private placement or a public offering, or they may be converted from other public limited liability companies or real estate collective investment schemes (real estate funds or companies). The tax rules for collective investment schemes also apply to SIGIs.

Law stated - 6 October 2023

ACQUISITIONS AND LEASES

Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Ownership in Portugal comprises the full and exclusive right of use, enjoyment and disposal of the property, although fiduciary ownership of assets located abroad is also accepted in the Madeira Free Trade Zone.

Co-ownership of property is admissible and surface rights (rights to build or maintain a construction on land owned by third parties) can be settled perpetually or temporarily and may be constituted by contract, will or adverse possession. The usufruct right is also legally allowed and gives its holder the powers of use, enjoyment and administration – during an agreed period or lifetime. The law imposes the sole limitation that the holder retains its form, substance and economic purpose. It is also possible for a building or a set of functionally interconnected buildings to be subjected to ‘horizontal property’ and condominium regulations.

The transfer or constitution of rights *in rem* is normally completed by a public deed executed before a notary, but it can also be executed by means of a certified private agreement, signed in the presence of a lawyer or a paralegal.

The assignment of use of properties may be agreed by a lease agreement under the Urban Leasing Law. The regime applicable to non-residential properties (such as retail, industrial and offices) gives the parties more flexibility to negotiate the conditions of the lease when compared to residential leases. To assign the use of non-residential properties, services agreement (eg, if services are provided and not only the use of the premises is assigned) or an atypical contract of use of shop agreement (eg, if the premises are in a shopping centre or commercial complex and ancillary services are provided) can also be considered.

Law stated - 6 October 2023

Pre-contract

What are the typical pre-contractual steps?

Typical pre-contractual steps include letters of intent, binding and/or non-binding offers, memorandums of understanding or heads of terms. A reservation agreement to secure the property for a specific period of time could be agreed, to complete the due diligence process (property searches and research into and analysis of any relevant information) and to further negotiate the transaction terms and conditions. To reserve a property, the buyer may be asked to pay a specific amount. Parties should expressly agree whether the reservation payment is refundable at the end of the reservation period if the transaction does not go ahead or is converted into a deposit and initial part-payment of the price if the Parties agree to go ahead. Courts will not enforce non-binding agreements, but pre-contractual responsibility based on the violation of good-faith principles is provided by law and, in certain cases, attended by courts

Brokers are usually involved in transactions, on behalf of each of the contracting parties. The activity of brokers is regulated in Portugal and all real estate agents must be licensed by the Portuguese Real Estate Regulator (IMPIC). By law, real estate agency agreements must be executed in writing and include a minimum set of provisions. A broker cannot be remunerated by both parties for the same transaction and the broker's commission can be a fixed amount or a percentage of the property sale price.

Law stated - 6 October 2023

Contract of sale

What are typical provisions in a contract of sale?

Whenever the conditions to complete the transaction are still to be met, the prospective seller and buyer can sign a promissory contract for sale and purchase in which they undertake to complete the transaction and set the terms and conditions for the transaction, such as conditions precedent to the definitive agreement (eg, completion of works, licensing, financing, due diligence, pre-emption rights to be notified, others). The promissory contract must be in writing and signed by the parties in person or by their legally appointed representatives, and the parties' signatures must be certified under Portuguese law. It is customary for the buyer to be asked to pay a deposit which – according to market practice – varies between 10 per cent and 20 per cent of the price. This payment is specifically regulated under Portuguese law and works both as an initial payment on account of the price and, in the event of a breach of contract, as a penalty for the defaulting party. If buyers default, they lose their deposit and if sellers default, they must pay double the deposit to the buyer. As a rule, this deposit is paid directly to the seller and not held in escrow by any third party. Representations and warranties are normally based on the outcome of the due diligence exercise. Title to the property is evidenced by its land registry certificate, to be provided by the seller. The seller is usually responsible for all expenses relating to the cancellation of any charges over the property, taxes and mandatory contributions relating to a moment prior to the transfer deed of the property. The seller usually also bears the risk of loss until closing.

The definitive contract for sale and purchase is normally completed by a public deed executed before a notary, who will guarantee compliance with the legal requirements for the transaction to take place. Whenever there are any special arrangements desired by the parties or financing arrangements, they are governed in ancillary documents that are annexed to the deed.

Law stated - 6 October 2023

Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Environmental law is built on a logic of accountability, which determines the assumption, by polluting agents, of the consequences of their actions and omissions on natural resources; this is to say that environmental liability is attributed to the subject that caused the damage. Specifically, in the case of environmental damage to soil and water (ie, soil contamination which creates a significant risk to human health and adverse and significant water contamination), as well as in situations where the contamination has caused damage to third parties, remediation can be demanded for 30 years from whoever carries out the activity subject to the environmental responsibility legal regime that produced the damage. Notwithstanding, public authorities may intervene as a last resort if the operator does not act accordingly or if it cannot be identified; also, in contamination situations that are not considered environmental damage, if the current owner wishes to excavate contaminated soil and the liable operator is not identified, the owner may have to take on the remediation (decontamination) operations under the terms of a previous licence that was obtained.

It is possible to use indemnities or other contractual agreements to transfer liability. However, these types of contracts do not bind regulators, which, in the case of environmental damage as defined by law, will always consider the party responsible for the activity that harms the environment. The contracts might, however, have an influence on the regulators, especially where the damaging activity continues and it may be difficult to establish when the fact that caused the damage occurred and establish a causal link with an operator.

Law stated - 6 October 2023

Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Promissory agreements typically include lease related representations and warranties (eg, leases are being complied with; rent roll is accurate; no termination notices have been provided, etc) and covenants to be observed between signing and closing (eg, the seller will not execute new leases or terminate or amend existing leases without the consent of buyer; the seller will not execute any brokerage agreements for leases, etc).

Representation and warranties usually survive completion (time limits and cap compensation amounts usually depending on the size of the transaction). Estoppel certificates are not customary.

Law stated - 6 October 2023

Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Security instruments, such as mortgages, are often created over real estate.

Recent court decisions determined that when a lease is completed over a property subject (before or after the lease) to a security instrument, such lease will not prevent the enforcement of the security instrument and will remain valid and in force in case of judicial sale as a result of enforcement of the security instrument and/or of judicial sale occurring within an insolvency proceeding.

Lenders usually require that upon the creation of security instruments the borrowers undertake not to encumber the property without the lender's prior consent. Lenders may also subject their consent to the creation of an assignment of revenues mechanism, according to which the rents under the lease are allocated to the payment of the debt.

The above applies to all type of leases.

Law stated - 6 October 2023

Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

In transfers of the property by the landlord, the new owner automatically assumes the landlord's position, with the terms of the lease in force between the tenant and the new owner remaining unchanged (an assignment of the contractual position is not required). Guarantees provided by the tenant to the prior owner or landlord remain in force but must be assigned; if consent for the assignment is not foreseen, it must be previously obtained. Security deposits are transferred to the buyer (via direct transfer or adjustment to the purchase price). Leases customarily have annual rent reviews (which is the subsidiary regime, if nothing different is contractually set forth).

Law stated - 6 October 2023

Due diligence

What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Buyers are advised to conduct technical, commercial, legal and other types of due diligence to evaluate the status of the property, check the ownership title, licences and permits, pre-emption rights, tax debts and other charges (eg, condominium), covenants and encumbrances (whether or not registered at the Land Registry Office), etc. Representations and warranties, specific indemnities and conditions precedent to the transaction (eg, obtaining a licence or insurance, a registry correction or a mortgage cancellation, etc) are normally based on the outcome of the due diligence. Provisional registration at the Land Registry Office is also common in asset deals to guarantee priority of the acquirer. In some cases, registry of the promissory agreement itself (with *erga omnes* effects) is also required by the buyer. Depending on the amount of the transaction, warranty and indemnity insurance may also be considered.

Law stated - 6 October 2023

Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

A technical engineering or environmental due diligence or inspection may be performed and can be important to check the quality of the construction and compliance with all applicable legislation and regulations. Depending on the results of the inspection, the parties may agree to a price reduction or partial price retention, and compensation in the case of future sanctions (including fines) or obligation of proceeding to corrective actions may be agreed.

Environmental insurance, or other financial guarantee, is mandatory for certain activities, but environmental insurance policies are available on the market, even for operators who are not legally obliged to contract them.

Law stated - 6 October 2023

Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are usually reviewed by lawyers, namely to check the title of the landlord to assign the use of the premises, to ensure compliance with all the mandatory issues (eg, use permits and energy certificates) and to review the provisions agreed between the parties, such as those regarding the duration, termination, renewal, insurances, guarantees,

obligations concerning costs and works, and its conformity with the applicable law. Duty of care agreements are usually requested by the financing banks.

Law stated - 6 October 2023

Other agreements

What other agreements does a lawyer customarily review?

A lawyer customarily reviews the past acquisition deeds and all the agreements relating to a property, such as brokerage, property management, development, construction, architectural, services, maintenance, and loan agreements, as well as easements, restrictive covenants, supply agreements, and guarantees associated with any of the above.

Law stated - 6 October 2023

Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The timing between the contract and closing depends on the agreed conditions precedent (eg: notification of entities entitled to a pre-emption right, obtaining financing, carrying out repairs, property licensing, etc) and how long these take to be fulfilled. A down payment is usually paid with the promissory contract and the remainder of the price on closing (upon transfer of ownership). Normally, a closing checklist is organised by a lawyer to list all steps and documents required – including documents to verify powers to represent each party – identifying the party responsible for them, which helps the parties monitor the closing deliverables. A typical list of deliverables contains all the documents pertaining to the building such as licences, plans, certificates, original agreements and bank guarantees, pre-emption right notices, payment receipts, etc.

Law stated - 6 October 2023

Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

A contract for sale and purchase (asset deal) is normally completed by means of a public deed executed before a notary, who will guarantee compliance with the legal requirements and documents for the transaction to take place, these being, among others that might apply, title to the property (land registry certificate), a tax certificate, an energy certificate, an official document with the technical characteristics of the unit (if applicable), tax payment receipts (stamp duty and property transfer tax (IMT)), pre-emption rights' waivers, condominium charges certificate and a declaration of the Ultimate Beneficial Owner. Nonetheless, the law provides that the definitive agreement can also be executed as a certified private

agreement, signed in the presence of a lawyer or a paralegal. As the deed is always executed in Portuguese, non-Portuguese speaking parties should appoint an independent translator. Whenever there are any special arrangements agreed by the parties or financing arrangements, they are governed in ancillary documents that are annexed to the deed. In 2022, a temporary legal regime applicable to the performance, via videoconference, of authentic acts and authentication of private documents, including sale and purchase of real estate deeds (through the Distance Services Platform) entered into force. This new service ran until April 2024, after which its continuation should have been evaluated. However, for the time being, it has not yet been renewed.

A lease contract must be made in writing and identify the parties, premises, purpose (residential or non-residential), the rent, use permit and energy certificate. A lease for a purpose different to the authorised use under the use permit is null and void.

In a share deal, the shares are transferred by private agreement between the parties. In certain cases, the acquisition of shares in public limited liability companies must be notified to the company. It should also be notified to the tax authorities and regulatory bodies. Acquisitions of quotas in private limited liability companies must be registered at the Commercial Registry.

Law stated - 6 October 2023

Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

Specific performance is a legal mechanism that allows a non-defaulting party to enforce the completion of a promised sale in court. The mechanism can be used when all the conditions for closing are met but the other party refuses to complete the transaction or breaches the promissory agreement. If the court orders specific performance, it will have the same effect as a deed of sale and purchase and the registration at the Land Registry will be made on the basis of the court order.

The deposit (down payment) is specifically regulated under Portuguese law and works both as an initial payment on account of the price and, in the event of a breach of contract, as a penalty for the defaulting party. If a buyer defaults, it loses its deposit and if the seller defaults, it must pay double the deposit to the buyer. In contrast to many other jurisdictions, as a rule, this deposit is paid directly to the seller and not held in escrow by any third party. Despite this general rule, the parties may agree on specific solutions to secure the reimbursement of the deposit if the transaction is not completed, either due to a breach of contract or for any other external reason, such as the exercise of any applicable pre-emption rights.

Law stated - 6 October 2023

Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general

contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Either party may terminate the lease agreement whenever there is a breach which, due to its gravity or consequences, renders the subsistence of the lease non-demandable to the other party.

In addition, the applicable Portuguese lease regulations establish a non-exhaustive list of cases of default justifying a landlord's decision to terminate the lease contract. The landlord's termination must be declared judicially except when based on the tenant's opposition to works ordered by public authorities or on a delay equal to or higher than three months in the payment of the rent, charges, costs or expenses or delay for a period higher than eight days, in the rent payment, for more than four times, in a row or interpolated, in a period of 12 months with reference to each agreement.

In the case where a tenant does not vacate the premises after lease termination, the landlord may resort to the Landlord and Tenant Desk (*Balcão do Arrendatário e do Senhorio*) to obtain eviction.

A landlord's failure to perform works (if the landlord is obliged to do these works) and if the omission compromises the habitability of the leased premises and, in general, the suitability of the leased premises for the use provided for in the contract, constitutes a breach that gives the tenant the right of termination.

Law stated - 6 October 2023

FINANCING

Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

In Portugal, real estate projects are usually financed by security-backed financing, which usually covers all stages of the property development (subject to the milestones and utilisation conditions contractually agreed). Banks are the typical providers of real estate financing in Portugal but direct lenders are increasingly starting to become significant players in the market.

A facility agreement secured by a mortgage and additional security is the most common financing and security method for real estate projects in Portugal. Securities usually associated with property financing comprise mortgage of property, assignment of income, pledge of shares or quotas, assignment of credits as security, pledge of bank accounts or sureties.

A mortgage creditor is not entitled to benefit from a right of appropriation over of the mortgaged assets under Portuguese law, as only judicial enforcement is permitted. Thus, a mortgage is commonly combined with a pledge over the shares or quotas representing the share capital of the borrower to enable the step-in of the lender. A pledge over shares might benefit from the financial collateral regime which enables the lender to enforce the pledge and the right of appropriation over the shares and benefits from an insolvency protection

regime which permits the enforcement of creditor's appropriation rights even in the context of an insolvency of the collateral grantor. A commercial pledge over quotas can also include appropriation rights but it does not benefit from the same insolvency protection regime.

The assignment of income arising from immovable assets (commonly, the rent) in favour of the lender is also a typical security (it must also be registered at the Land Registry). A similar security is the pledge of credits, which captures other types of credits not covered by the assignment of income. In addition, a pledge of operational bank accounts (notably for receivables) is also a typical security and subject to the financial collateral regime.

Law stated - 6 October 2023

Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The tenant's interest in the lease is a mere contractual right that cannot be given as collateral in favour of the lender. Thus, the common structure in Portugal for leasehold financing is the one under which the bank acquires the real estate asset and then enters into a financial leasing agreement with the lessee (with an option to buy for a residual value).

Law stated - 6 October 2023

Form of security

What is the method of creating and perfecting a security interest in real estate?

The creation of security interests over real estate assets located in Portugal is, under the applicable conflict of laws rules, mandatorily governed by Portuguese law. But obligations secured thereunder may be subject to foreign law.

Mortgages are created by means of a notarial deed, which is a contract made before a notary public. However, to be fully valid and enforceable it must be registered at the Land Registry.

The mortgage automatically covers all the fixtures incorporated in the property pursuant to the exercise of construction rights. Together with the mortgage, incomes arising from the real estate assets are usually assigned to the lender as security for the payment of the financial obligations.

Law stated - 6 October 2023

Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

The appraisal of the immovable property must as a rule be done by real estate appraisers registered with and regulated by the Portuguese Securities Exchange Commission.

The property valuation is a requirement for any mortgage credit agreement (subject to particular rules on consumer mortgage credits) and might be requested by the lender or borrower.

Law stated - 6 October 2023

Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

The provision of lending activities in Portugal is a licensed activity that may only be conducted by entities with a local licence or benefiting from EU passport regime for credit institutions. These requirements apply whether services are provided to consumers or professional clients. Banco de Portugal oversees compliance with prudential and business conduct rules.

In turn, providing collateral does not trigger any licensing requirements, governmental permissions or any other restriction regardless of the lender's home state. Therefore, a lender from another jurisdiction may have loans secured by Portuguese immovable or movable assets. However, there are certain assets (eg, those located in the public domain or connected to public services) that cannot be pledged as collateral.

Mortgages are typically created by means of a notarial deed. Other connected security agreements are also typically entered into before a notary, as such a document would be an enforcement title and could be directly enforced.

Both the financing and the granting of collateral (if not granted and registered simultaneously upon execution of the financing agreement) is subject to stamp duty at a rate of 0.5 per cent or 0.6 per cent of the value of the financing or the secured obligations, depending on whether the maturity is below or above five years.

Law stated - 6 October 2023

Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Property loans can be contracted with a variable, fixed or mixed interest rate.

The reference interest rate generally corresponds to the EURIBOR, the most common being EURIBOR at three, six and 12 months. EURIBOR replacement language is usually included, but no replacement index is typically indicated. The spread is negotiated and freely defined by

the lender for each agreement, taking into account its cost of financing, the borrower's credit risk, the loan-to-value ratio and the security package. Fixed rates are now more common due to the current interest rate hikes.

Real estate financing agreements granted by credit institutions are not subject to usury limitations or other types of caps or limitations on interest rates. In the event of arrears, credit institutions may charge default interest. Default interest is capped at a maximum annual surcharge of 3 per cent, which is added to the compensatory interest rate. The capitalisation of default interest is not permitted, except in the case of debt restructuring or loan consolidation.

Law stated - 6 October 2023

Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

In the case of default of the secured obligation, the mortgage creditor cannot appropriate the mortgaged asset and must initiate enforcement proceedings requesting a judicial sale. Nevertheless, it will take priority over other creditors whose claims are not preferential or who have no registered priority. In the enforced sale, assets are transferred free of any liens and of any other real rights with no registration prior to any seizure, pledge or guarantee.

Enforcement to pay a fixed sum of money where the creditor's claim is backed by a mortgage depends firstly on the enforced obligation being certain, due, and net. Where the mortgage creditor wishes to enforce mortgages constituted in its favour, the enforcement action must be brought against the owners of the assets, even if these are not its debtors.

The mortgage creditor will also be entitled to sue the debtors in this enforcement. Thus, where enforcement is brought by the mortgage creditor only against a third-party owner of the asset and if it is established that the mortgaged asset is insufficient, the creditor can ask for the action to continue against the debtor to fully satisfy its claim. Any creditor may obtain the suspension of the enforcement to prevent the payments by demonstrating that the recovery of the company or the insolvency of the debtor was requested.

It is very difficult to define the average duration of enforcement proceedings, but, in our experience, enforcement proceedings for the payment of a fixed sum of money, where the creditor's claims are secured by a mortgage, normally takes between 18 and 36 months (longer if there are any appeals). This period also varies depending on which court has territorial jurisdiction.

Law stated - 6 October 2023

Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders are entitled to recover money judgments against borrowers or guarantors for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure. There are no limitations on the amount or method of calculation of the deficiency.

Law stated - 6 October 2023

Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

The purpose of a mortgage is to provide security for a loan against property, rather than facilitating possession of the property. For this reason appropriation of the property in the case of default is prohibited. The concepts of receivership and mortgagee in possession are not recognised under Portuguese law.

A mortgage must be enforced in court. Therefore, creditors enforcing a mortgage can only be paid from the proceeds of a forced sale of the mortgaged property and the debtor's other assets can only be pursued if the proceeds of sale are insufficient to pay the debt in full. In enforcement, the property can be sold in several ways, such as sealed bids, private negotiations and auctions. The creditor can also ask for the property asset to be handed over directly to it.

During a foreclosure, a lender may solely collect rents with priority over the remaining creditors in the enforcement proceedings, provided it has a security interest over the rents (eg, a pledge, an assignment of income or even an assignment by way of security). Otherwise, mortgages will not cover the rent arising from lease agreements over the mortgaged property.

Despite the above, upon an event of default, there are no restrictions on the parties agreeing that the outstanding balance should be repaid by way of deed in lieu of the mortgaged property. If there is a financial pledge over the borrower's shareholdings, the lender may also obtain an effect similar to entering into possession of the property in question. Under certain conditions the acquisition of the borrower's shareholdings by the financial pledge beneficiary is allowed and, consequently, so is the indirect acquisition/control of the property.

Law stated - 6 October 2023

Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse

to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

The creditor, usually the lending bank, can pursue the debtor's other assets if its security over the property is not sufficient to pay the debt. Consequently, the creditor will first enforce the mortgage and if its claim is not satisfied. It can seek enforcement against the debtor's remaining assets. Ultimately, the creditor can file a petition for insolvency in the event the remaining borrowers' assets are insufficient for the repayment of the outstanding debt. Typically, the security documents do not make reference to having recourse to all assets of the borrower, because this is the general rule under Portuguese civil law.

Law stated - 6 October 2023

Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is common to find cash management clauses in property loan agreements. This is a standard clause included by a lender in a loan agreement to restrict the borrower's use of income generated by the property secured by the loan, other than for approved purposes (eg, permitted payments to permitted distributions to investors in the case where certain financial covenants and project milestones are met).

Law stated - 6 October 2023

Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Real estate financing projects typically provide for guarantees and security to secure the construction of the project until its completion. These are conceived by the parties to reach the stage at which the project may start operating to generate revenues in the business-like manner on which the project was based.

For example, utilisation requests made during the term of the loan agreement may depend on achieving the milestones and the likelihood of complying with the works schedule by completion (which is typically assessed by an external or independent appraiser). Interest reserve or cash reserve accounts are also typical in financing agreements to develop real estate projects.

Law stated - 6 October 2023

Loan covenants

What covenants are commonly required by the lender in loan documents?

Covenants can be financial, meaning they pertain to some sort of financial requirement (such as loan to value or debt service coverage ratio), or operational, meaning they pertain to property operations. Alternatively, they can relate to the loan's collateral.

An operational covenant relates to the day-to-day operations of a property and its aim is to give the lender an early warning about any material deterioration in the performance of the property or the borrower's financial situation. Common examples include reporting obligations (including material adverse changes) or meeting certain milestones.

Collateral covenants pertain to the collateral securing the loan. Common examples include negative pledges or restrictions to disposals. The purpose of these types of collateral covenants is to ensure the lender will continue to maintain its first position in the repayment priority in the event of default.

A borrower's failure to meet these covenants is typically an event of default event under the financing agreements (remedy periods are also typical).

Law stated - 6 October 2023

Financial covenants

What are typical financial covenants required by lenders?

Property projects and developments usually have financial covenants in line with global market practice (ie, focused on financial ratios), notably: loan-to-value ratios, interest coverage ratios, net debt/EBITDA and debt-service coverage ratios.

Under real estate financing involving non-consumers, these financial covenants have particular relevance as they could involve reinforcing security whenever the ratios fall below what was agreed. In this event, if the borrower does not reinforce the collateral following a lender's request, this constitutes a default event. Therefore, the parties typically give undertakings and reporting covenants (notably, the periodic provision of financial statements and interim balance sheets or periodic real estate valuations) to ascertain compliance with the above ratios.

Law stated - 6 October 2023

Secured movable (personal) property

What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The concept of a security interest is very broad under Portuguese law. In relation to security interests in movable property, the most common category of security is the pledge. This may be created over tangible assets, such as equipment and machinery, or intangible assets, such as accounts, equity interests, and insurance receivables in connection with the project or development. Nonetheless, in real estate financing, the parties typically create additional securities to strengthen the security package securing loans, notably, by way of assignment of receivables, bank guarantees or sureties, etc.

Under the Portuguese Civil Code, a pledge corresponds to an *in rem* security which gives creditors preferred payment status over other creditors, for the value of a specific movable asset or amount of other credits or asset rights which cannot be mortgaged. While the Portuguese Civil Code establishes that only the party that has the right to dispose of the movable assets can create pledges over them (ie, the owner), a commercial pledge or financial pledge (created over funds or securities), subject to certain requirements, grants the creditor the right of appropriation over the security assets.

The concept of 'control agreement' is not common in Portugal, nor it is required to perfect a pledge (or even a security interest). In effect, a symbolic transfer of possession is considered by scholars and case law to be sufficient to perfect a pledge.

Law stated - 6 October 2023

Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

It is not a requirement under Portuguese law and in our experience lenders do not require that each borrower be an SPE. However, this is market practice for certain real estate developments to ring-fence the project and the pledge of shares or quotas representing the borrower share capital in favour of the lenders.

Law stated - 6 October 2023

UPDATE AND TRENDS

International and national regulation

Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Incorporated loan funds are already entering into the initial borrowing transactions market in Portugal. We estimate that these loan funds will become active players in the real estate financing market, competing with traditional banks and diversifying funding available to real estate projects.

Regarding real estate-related legislation, the previous government approved, through Law 56/2023, of 6 October 2023 (in force from 7 October 2023), the More Housing Programme (*Programa Mais Habitação*), which introduced significant alterations in several areas, namely local lodging (*alojamento local*), lease law, mobilisation of vacant properties, residence permits for investment activity and tax benefits.

However, some of these measures, such as (i) the creation of an extraordinary contribution and a tax coefficient applicable to local lodging establishments and (ii) the compulsory rental

of vacant properties, are being progressively reverted by the current government, which was appointed in April 2024.

In terms of urban planning measures, the previous government approved Decree-Law 10/2024 (*Simplex Urbanístico*), on 8 January 2024, with the aim of reforming and simplifying the licensing of urban planning procedures. The purpose of this legislation is to shift the responsibility for compliance from the municipal bodies to private developers. To achieve this, the law redefined the urban planning procedures applicable to urban planning operations, by granting additional exemptions and making the prior communication (a simplified municipal control procedure) a mandatory regime for certain urban planning operations. To accelerate the procedures, the law has also implemented new time frames and the possibility of tacit approval of licensing requests. In addition, the use of buildings is no longer dependent on authorisation for use, but to a prior communication, which in certain circumstances allows immediate use. This law came fully into force on 4 March 2024. The changes to the RJUE apply to all ongoing procedures submitted before the law came into force, except for tacit approval. Although this law is still recent, the new government is preparing some amendments, which are expected to be published shortly.

Contrary to what happened at the end of 2022 – where the Portuguese government, in light of the high inflation rate levels throughout Europe, limited the legal rent update coefficient for 2023 (which should have been 5.43 per cent) to 2 per cent, providing a tax compensation for landlords – the rent update for 2024 did not face any similar limitation and the legal update coefficient was set at 1.0694 (6.94 per cent). However, support measures for housing tenants with low incomes were approved.

In terms of tax measures in the real estate field, the 2024 state budget approved a 5 per cent update on the taxable value for the property transfer tax (*Imposto Municipal sobre as Transmissões Onerosas de Imóveis*) applicable to residential urban properties. Also, the Non-Habitual Resident (NHR) tax regime, which allowed individuals to benefit from a special tax status for a period of 10 years, was revoked. However, it still applies under certain conditions (eg, for those who become residents by 31 December 2024 and declare having, for example, a lease agreement or a promise of acquisition of a real right over property in Portugal, both concluded by 10 October 2023, or a residence visa or permit application submitted to the competent authorities by 31 December 2023).

The growing importance of sustainability remains a trend in 2024. For 2025, real estate players are concerned about compliance with energy efficiency requirements, more efficient use of water, including the use of recycled water for non-drinking purposes, waste reduction strategies and, in general, improving the environmental performance of real estate properties subject to transactions and lease agreements.

Also, with regard to reducing greenhouse gas emissions in the building sector and contributing to its progressive decarbonisation, EU Directive 2024/1760 of 5 July imposes on large companies the obligation to create and carry out a transition plan that includes climate change mitigation measures and goals for the decarbonisation of buildings in accordance with the Paris Treaty.

As regards soil contamination, two legal texts await approval – a national decree-law and a proposal for an EU directive – both containing innovative provisions.

The Portuguese decree-law will oblige certain operators to carry out specific soil assessments that lead to the issuance of proofing documents and to perform further tasks,

depending on the results, which may include further investigations and/or decontamination actions. Also, the text aims to set out a chain of responsibility for soil contamination, making the owner of the land the ultimate responsible entity under certain circumstances. Furthermore, as a rule, the proofing documents will have to be presented to sell the properties and to change the uses they are assigned to. Finally, a database of contamination sites will be developed.

The proposed EU directive aims to create soil districts (according to, among other factors, the soil type and climatic conditions), which must be monitored. Member states must also define sustainable soil management practices, as well as the ones that must be avoided. Furthermore, the European Commission will create a digital portal on soil health, while the European Environment Agency and member states must draw up a public register of contaminated sites and potentially contaminated sites. It should also be noted that the proposed sanctioning regime must include fines proportionate to the turnover of the infractors.

Another issue of relevance to the real estate sector is its entry, from 2025, into the EU's Emissions Trading System regarding greenhouse gas emissions from fuels used in building heating systems. This was introduced by Directive (EU) 2023/959 of 10 May, which amended the EU ETS Directive (Directive 2003/87/EC). It requires complementary regulations and the necessary transposition into Portuguese law to enter into force.

Law stated - 6 October 2023