

1. Real Property Law – Introduction

1.1 General Features and Short History

The main rules on Portuguese Property Law¹ are stated by the civil code of 1967² that entered in force on the 1st of June.

The Portuguese civil code follows the structure of the BGB; it is divided in five books:

- Book One – General Part
- Book Two – Law of Obligations
- Book Three – Property Law
- Book Four – Family Law
- Book Five – Succession Law

Book Three encompasses six titles:

- Title I – Possession (Articles 1251 to 1301)
- Title II – Ownership (Articles 1302 to 1402 – Ownership; Articles 1403 to 1413 – Joint-Ownership; Articles 1414 to 1438 – Condominium)
- Title III – Usufruct (Articles 1439 to 1483) and Use and Residence (Articles 1484 to 1490)
- Title IV – Emphyteusis (*revoked*)
- Title V – Lease Building (Articles 1524 to 1542)
- Title VI – Servitudes³ (Articles 1543 to 1575)

Book III does not have a general part. So, the legislator provided for general aspects on property law in Title II, referred to ownership. For example, defence of ownership is ruled by Articles 1311 to 1314, and Article 1315 extends the application of these provisions to all *ius in rem*. The same happens, *mutatis mutandi*, to the legal regime of joint-ownership (Articles 1403 to 1412); it applies to all situations where a right is held by more than one person.

Some basic legal concepts on Property Law are to be found on the general part (Book One) of the Portuguese civil code (Articles 202-216), such as the concept of things [*coisas*] (Article 202) and their classification (Articles 204 to 211), the notion of fruits [*frutos*] (Article 212), and the definition of improvements [*benfeitorias*] (Article 216).

Securities [*garantias das obrigações*] are to be found in the second book, Articles 601 to 761.

¹ Real property regulation is slightly uniform for the whole country (this includes the continent and Archipelagos of Açores and Madeira).

² Approved by Decree 47344, of 25.11.66.

³ By servitudes, I mean easements in appurtenance. See 1.5.

Since the entering in force of the Portuguese Civil Code, it has too a large extent remained unchanged, in accordance with the common understanding of property law as a static branch of law. However, some modifications might be pointed out:

- *Emphitheusis* [*enfiteuse*] on rural land was extinguished by Decree-Law 195-A/75,⁴ of 16.03 and *emphiteusis* on urban land was abolished by Decree-Law 233/76, of 2.04.⁵ *Emphyteusis* was considered a partitioning of ownership, rather than a *ius in rem*. As so, it was an undesirable vestige of feudal law. In accordance with this idea, this right was extinguished after the Revolution of 1974 (implementing democracy in Portugal).
- Decree-Law 225/84, of 06.07, amending Article 691 (mortgage on enterprises);
- Decree-Law 257/91, of 18.07 amending Article 1525, on lease buildings. This provision states that the purpose of a contract creating a lease building can be the construction or the management of a built under someone's land. This provision aimed at clarifying the current legal regime of lease buildings by expressly including in its scope the construction of an underground car park.
- Decree-Law 267/94, of 25.10, was enacted twofold. First, it made general modifications to the regime of condominium. Second, it provided for liability rules concerning the sale of a building by applying to the seller who has also constructed the building the regime of liability of the developer [*empreiteiro*]; and by increasing the liability of the seller for real and legal defects on a real state.

Apart from the Civil Code, the relevant sources of property law are:

- Decree-Law 275/93, of 05.08., as amended by Decree-Laws 180/99, of 22.05, and 22/2002, of 31.01,⁶ on time-sharing;
- Decree-Laws 268/94 and 269/94, of 25.10, on aspects related to condominium;
- Notary Code, approved by Decree-Law 207/95, of 14.08;⁷
- Land Registration Code, approved by Decree-Law 224/84, of 06.07;⁸

Some public law statutes are also of major relevance, such as:

- Decree-Law 555/99, of 16.12⁹ – Legal Regime on Urban Occupation (*Regime jurídico da urbanização e da edificação*)

4 Amended by Decree-Law 546/76, of 10.07.

5 Amended by Decree-Laws 82/78, of 2.05; 73-A/79, 3.04; and 226/80, of 15.07.

6 Implementing Directive 94/47/CE, Parliament and Council, 26 October 1994, related to the protection of acquirers.

7 As amended by Decree-Laws 40/96, of 7.05; 250/96, of 24.12; 257/96, of 31.12; 380/98, of 27.12; 375-A/99, of 20.09; 410/99, of 15.10; 64-A/2000, of 22.04; 237/2001, of 30.08; 273/2001, of 13.10; 287/03, of 12.11.

8 As amended by Decree-Laws 60/90, of 14.02; 30/93, of 12.02; 267/94, of 25.10; 67/96, of 31.05; 375-A/99, of 20.09; 533/99 of 11.12; 273/2001, of 13.10; 323/2001, of 17.12; 38/2003, of 08.03.

9 Amended by Decree-Law 177/2001, of 4.12.

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- Decree-Law 380/99, of 22.09¹⁰ – Legal Regime on Planning Law Instruments (*Regime Jurídico dos Instrumentos de Gestão Territorial*)
- Law 48/98, of 11.08 –Town and Country Planning Law (*Bases da política do ordenamento do território e do urbanismo*)
- Law 11/87, of 7.04 – Environment Legal Regime (*Lei de Bases do Ambiente*)
- Law 794/76, of 5.11¹¹– Land Law: Mechanisms of Public Intervention (*Lei dos solos: mecanismos de intervenção da administração pública nos solos urbanos*)

From the constitutional framework, I would emphasize the political power concerning property law, the constitutional right to private property and the criteria for property taxation.

According to Article 165 of the Portuguese Constitution,¹² except where legislative power is delegated to the Government, the Assembly of the Republic has exclusive powers with respect to:

- (h) Basic legal rules with respect to the renting of rural and urban property;
- (v) Determination of the property in the public domain, and the arrangements with respect to such property;
- (x) Legal rules with respect to the means of production of property in the co-operative and social sector;
- (z) The basis of territory ordering and urbanism.

The Constitution provides for the right to private property in Article 62:¹³

10 Amended by Decree-Law 310/2003, of 10.12.

11 Amended by Decree-law 313/80, of 19.08.

12 The Portuguese Constitution (with English version) can be found in: www.parlamento.pt.

13 The function of property to serve public policies and social welfare is implied in many constitutional provisions. For example, Article 88 states that means of production that have been abandoned may be compulsorily acquired on conditions that shall be laid down by the law, which shall take due account of the special position of property of workers who have emigrated. And means of production that have been abandoned without good reason may also be compulsorily made available on lease or to a concessionaire, under conditions that shall be laid down by the law.

According to Article 94, 1, “*the law should provide for the alteration of the size of farming units the dimensions of which are excessive from the standpoint of the policy for agriculture; the law shall entitle the owner of estates that are compulsorily acquires to appropriate compensation and to retain an area that is sufficiently large to enable the land to be utilised in a rational and viable way. Land that is compulsorily acquired shall e handed over, in accordance with the law, either for ownership pr holding by small farmers, preferably family farming units or by co-operatives of rural workers or small farmers, or for other forms of land utilisation by workers; these provisions do not prevent the provision of a period of probation, prior to the transfer of full property rights, for the purpose of assessing whether land is being effectively and rationally utilised.*” On the contrary, Article 95, concerning the alteration of the size of very small farms, states that “*without affecting property rights and in*

“1. Everyone is guaranteed, under this Constitution, the right to private property and to transfer it during his or her lifetime and on death.

2. Requisitioning or compulsory acquisition of property for public purposes shall be carried out only under the authority of law and on the payment of fair compensation.”

In what concerns the scope and interpretation of fundamental rights, it is to be mentioned that Article 16, 2, of the Constitution states that *“The provisions of this Constitution and laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights.”*

Article 104 imposes that property taxation must contribute to equality between citizens.

The purchase costs and annual property taxes are, as of 2004, based on a new system. In the old regime, new properties were being taxed according to their economic value [*valor patrimonial*]), while old properties were taxable according to their original economic value, even though that value did not correspond to current market prices. Hence, new properties were paying much higher taxes.

The new system tries to put an end on this inequality. It supposes an updated valuation process to be applied to all properties over the span of a few years. Each property will have a Taxable Value [*valor patrimonial tributável*] set according to harmonized criteria.

The valuation process differs upon the various types of property, namely urban (including villas, townhouses and apartments) and rural property (land). The valuation of existing urban properties will take into consideration as many aspects of differentiation as possible,¹⁴ to establish fair comparable taxable values in the same areas, as well as from one area or municipality to another. The taxable value of new urban properties is established by the authorities on completion of the construction and subsequent licensing of the property. Rural properties taxable value is based on the potential annual production income of the property.

The direct impact of European Community Law or the European Convention on Human Rights on the property law regime have been limited up to this stage.¹⁵

accordance with the law, the State shall promote alteration of the size of the units of land utilisation the dimensions of which are smaller than is appropriate from the standpoint of the policy for agriculture; it shall promote this in particular through legal, tax and credit incentives for integration of the structure of units or, short of that, for their economic integration, especially through co-operative arrangements, or by means of joint share-holdings.”

¹⁴ The variables are basically: construction area; adjacent (not constructed) area; the value per square meter including land; location; quality and comfort levels of the property; characteristic of surrounding areas; and municipal zoning regulations.

¹⁵ Since 1986, when Portugal joined that at the time “European Economic Community“, a highly regulated and underdeveloped financial system (including its mortgaged component) has been subject to deep changes toward innovation, liberalisation and increased competition. To a great extent, the evolution of the mortgage market in Portugal in the last fifteen years or so has been a result of the nominal convergence process with other countries of the European Union, first mainly linked to the

However, contract law relating to buildings and land has been subject to influence *inter alia* by the Directive 93/13/EEC on unfair contract terms, as well as other EU-legislation.

1.2 Property and Estates

The Portuguese civil code provides for a concept of absolute and fully ownership [*propriedade*] in opposition to time-limited interests [*direitos reais limitados*]. Contrary to the first Portuguese civil code, which distinguished between perfect and imperfect ownerships,¹⁶ the code in force (hereinafter CC) does not allow fragmentation of the absolute right of ownership.

Ownership is drawn as an elastic power; it can be compressed or restricted by the constitution of one or more real rights (e.g. a usufruct or/and a mortgage) but gets back its original shape and strength when these rights expire.

Restrictions or compressions of ownership shall be distinguish from partitioning [*desmembramento*] or fragmentation of the right of ownership, which is not at all admitted in the Portuguese legal system. Since 1977, with the extinction of *emphyteusis*, there are no institutions coming from feudal law, in which for a single property many ownerships titles are given.¹⁷

The consequence of this idea is that property can only be exercised individually or in the context of co-ownership [*compropriedade*] or joint ownership [*comunhão*]. In these situations there is still one right of ownership of real property over the thing, which extends to the whole object, but this right is assigned to several persons at the same time.

The co-owner holds an ideal fraction of the common property; the fractions, however, are all quantitatively¹⁸ related to the property as a whole. Co-ownership can result from the law or can be freely agreed upon by parties (legal or contractual source). Accordingly, parties can dispose of their fractions or ask for the division of the thing (*communio pro diviso*). This division can be material or can be in value. Every co-owner is entitled to dispose of his fraction in the property without the assent of the others; however, the co-owners have a legal pre-emption right.

In joint-ownership, each person owns an ideal fraction of the right over the common ownership. The fractions, however, are all quantitatively related to the right as a whole. The source of joint ownership is always the law. Accordingly, parties cannot dispose of their fractions and cannot ask for the division of the thing (*communio pro indiviso*). The common thing is divided when finishes the relationship that grounded the joint-ownership. We might mention as forms of joint- ownership, the property of a civil law partnership (Article 980 CC), joint marital property under a regime of community of property between spouses (Articles 1734 and 1732 of the CC) and the mandatory common parts of an condominium (Article 1420

need of integrating the single market, and after, in order to integrate the European exchange rate mechanism and to participate in the euro project. We are quoting *Mortgage Finance in Portugal*, 33.

¹⁶ The first Portuguese civil code entered in force in 1.07.1867 and it was strongly influenced by the Napoleon Code.

¹⁷ On the contrary, the existence of more than one *right in rem* on the same real estate is possible. On the same object more than one rights may be created in favor of third parties with the same content (e.g. two mortgages) or with a different one(e.g. mortgage and usufruct).

¹⁸ For example ¼ or 25% of a building.

CC).¹⁹

Ownership extends to all movable things so joined to the property that they become essential components parts of it (Article 204, e). Movable things that are materially and permanently attached to the land and items that are inserted, for a structural purpose, into a building are essential component parts of them.

As a general principle, land ownership extends to what is above and below (Article 1344 CC); therefore, *superficies solo cedit*. The Portuguese civil code establishes the accession principle in Article 1325 CC; there is accession when a thing that belongs to someone joins and is incorporated by something of someone else. So, the owner of the land is usually the owner of the building above.

The Portuguese law provides for specific regimes in what concerns incorporation, whether it results from a natural event (1327 ff. CC), or from a human action (with distinct regimes for the incorporation of movable things [1433 ff CC], and incorporation of immovable things [1339 ff CC]). The legal solutions depend on the value of the thing and on the good or bad faith of the owners.

Two exceptions to the principle *superficies solo cedit* can be found in the Portuguese law: the right of *superficies* (lease building) and the condominium (apartment ownership).²⁰

The right of superficies [*direito de superficie*] entitles the right holder to make or to keep a building or to make or keep plantations (in case of a farm) in another's property, perpetually or temporarily (Article 1524 CC).²¹ If the right holder builds a building or makes a plantations it is commonly accepted that he has a proper right of ownership over the thing, transmissible inter vivos or mortis causa.

The apartment ownership [*propriedade horizontal*] is a right over an unit, characterized by the individual ownership of an autonomous fraction of the building (an apartment, a garage, a store, etc.) combined with joint-ownership of the land and other common parts.²²

1.3 Interests in Land

Article 1306 of the Portuguese Civil Code expressly states the *numerus clausus* principle of interests in land:

“It is not allowed the constitution neither of real restrictions to ownership neither of fragmentary interests but in cases legally foreseen; every restriction to ownership, not in this condition, has contractual nature.”

¹⁹ According to this criterion, the ownership of an estate by coheirs is to be considered co-ownership, because each of them can ask for the division of the inheritance.

²⁰ According to Article 1343 CC, in case of encroachment upon adjoining land, the encroacher can acquire the ownership of the encroached land if he is on good faith and he has occupied the land for more than three months. The encroacher has to pay the value of the land and he is liable for losses (for instance, depreciation of the rest of the land).

²¹ See 1.5.

²² See 1.4.

The legislator has distinguished between fragmentation of property rights, that are absolutely not allowed, and restrictions of ownership, that are given only obligational effects.

These provision imposes a strict standardization of property rights. The Portuguese property rights system is characterized by a limited number of forms which are not subject to contractual modification. The principle of closed number encompasses the interdiction of new *rights in rem* and of contracts that would create or transfer those property rights.

The Portuguese doctrine has, however, tried to minimize the effects of such a restrictive provision. For instance, it has been claimed that property rights can have customary origin. It is also generally accepted that the interpreter can characterise a certain right as a real figure even if the legislator did not considered it as such.

Nevertheless, it is possible to find open types of real rights, as in condominium and servitudes. In these cases, parties may, to a certain extent, agree on contractual clauses and may determine its content.

The Portuguese system of interests in land is composed of rights to use;²³ security interests, and pre-emption rights.

Rights to use [*direitos reais de gozo*] provide the holder with a direct power over the thing, to use it or to take its fruits, whether they are civil (rents) or natural.

Security interests [*direitos reais de garantia*] entitle the holder to be paid, by the value of the thing, before any other creditor that does not have a prevailing security interest.

Pre-emption rights [*direitos reais de aquisição*] entitle the holder to acquire a property right over the thing.

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The different rights to use real property are usufruct, right of use and residence, lease building and servitudes.

According to Article 1439, usufruct (*usufruto*) is a real right that entitles the usufructuary to use a property and to take its fruits without impairing its form or substance (*salva rerum substantia*).

A usufruct can be created by contract, by last will, by adverse possession (*usucapio*) or by legal provision (Article 1449 CC).

The usufruct cannot exceed the lifetime of the usufructuary; if the usufructuary is a company, an association, or a foundation, the usufruct cannot last more than thirty years (Article 1443 CC).

According to Article 1476 CC, the right of usufruct terminates:

- a) if the usufructuary dies or when the duration expires;
- b) if the usufructuary acquires the nude ownership of the property;
- c) if the usufructuary does not use the property during twenty years;

²³ Although we can accept the terminology right to use, we must bear in mind that these rights allow the use (direct) and the fruition of the thing.

- d) if the property is totally destroyed;
- e) if the usufructuary renounces to the right.

To create a right of usufruct enforceable against third parties, a written deed containing the usufruct must be executed by a notary and registered against the title deeds of the servient property.

The right of use [*direito de uso*] entitles the usufructuary to use the property and to take its fruits, according to his needs and the needs of his family (Article 1484, n. 1, CC). If the right of use is referred to a dwelling, it is called right of residence [*direito de habitação*] (Article 1841, n. 2, CC).

The needs of the usufructuary are set according to his social condition (Article 1486 CC). In the concept of family of the right holder, Article 1487 CC includes his/her married partner; his/her not-married children; other relatives to whom the usufructuary owes maintenance; and employees living with him/her.

The right of use and residence can be created by contract, by last will, or by legal provision. It cannot be acquired by adverse possession (Article 1485 CC).

The rules on termination of a real right of usufruct apply to the right of use and residence, according to Article 1485 CC.

To create a right of use and residence enforceable against third parties, a written deed must be executed by a notary and registered against the title deeds of the servient property.

The lease building [*direito de superfície*] entitles the right holder to make or to keep a building or to make or keep plantations (in case of a farm) in someone else property, perpetually or temporally (Article 1524 CC). For further details, see 1.5.

Under the Portuguese law (Article 1534 CC), a servitude (easement in appurtenance) is a real right created by the owner of a land, the servient land [*prédio serviente*], to benefit the owner of another land, the dominant land [*prédio dominante*].

The servient tenement may be encumbered by servitudes in many different ways, *e.g.*, the right of passing through. The important is that the charge is imposed on an estate to serve the estate belonging to another holder. Under this scope, commodities can be future or eventual.

Under Portuguese property law, easements in gross [*servidões pessoais*], that is to say, to a personal benefit of another person, are not real rights. They might be agreed upon by parties, but they will only have contractual effects, according to the *numerus clausus* principle (Article 1306, n. 2, CC).

1.3.1. Mortgages and Rent Charges

Securities are accessory right, whose legal existence depends on the existence of the debt to be secured.

As security rights we can mention:

Rent Assignment [*Consignação de rendimentos*] (Articles 656 to 665 CC) – secures the

payment of a debt, by the profit of immovables or movables subject to registration. It can secure the payment of the debt and the payment of interests or only the payment of one of them.

Pledge [*Penhor*] (Articles 666 to 685 CC) – secures the payment of a debt, by the value of a movable or of a right.

Mortgage [*Hipoteca*] (Articles 686 to 732 CC) – secures the payment of a debt, by the value of an immovable property.

Privilege [*Privilégios*] –Some creditors are legally allowed to be paid with precedence, considering the nature of their credit. Privileges are always legally stated and they are not subject to registration. (Articles 733 to 753 CC)

Lien (*Direito de retenção*) (Articles 754 to 760 CC) – the debtor that has a credit against the creditor and is obliged to give back something, can retain that thing if the credit is due to expenses with the thing or losses caused by the thing.

Pre-emption rights, that is, *rights in rem* to acquire real property, can be foreseen legally (for example, the tenant,²⁴ the joint-owner,²⁵ the owner of the land,²⁶ etc.) or can be agreed on in a contract. There is not a specific chapter in the Portuguese civil code on pre-emption rights.

1.4 Apartment Ownership (Condominiums)

Condominium was already foreseen in Article 2335 of the Portuguese Civil code of 1867. However, this provision was only regulated by Decree 40333, of 14.10.1955. In 1967, it was replaced by chapter VI, Title II of the third Book of the Portuguese civil code (Articles 1414 to 1438-A), that constitutes the main current legal body on condominium. It was, then, amended by Decree-law 267/94, of 25.10 and supplemented by Decree-Laws 268/94 and 269/94, both of 25.10.

Condominium is characterized by a group of individuals owning different units in the same estate; each unit comprises a private fraction plus a share of the common parts. The private part can have residential, professional, commercial or other purpose.

Each owner is the individual owner of his own unit and joint owner in forced indivision of the common parts, i.e. land and elements making up the building, as the roof, the staircases, and structural walls. This property which is at once individual and collective cannot be divided (1420, n. 2 CC). The status of ownership is applicable to the individual part and the status of co-ownership is applicable to common parts, with the deviations imposed by law (Article 1422, n. 1 CC).

The management of common parts is in charge of the co-owners assembly [*assembleia de condóminos*] and of a manager [*administrador*].

The apartment ownership is set by the developer. The constitutive title [*título constitutivo*] of

24 Article 47 of Urban Tenancy Law.

25 Article 1409 CC.

26 According to Article 1535, the owner of the land has a pre-emption right in case of the sale of the *right of superficies*.

the right of condominium, that will divide the building, must be done in a public deed and registered in the Land Register. Only after this proceeding a title transfer for the individual units can be signed. The title identifies and describes the individual fractions and their proportional value (to each unit a proportional value is given, expressed in parts per thousand (the *per milagem*).²⁷ The constitutive title might also specify: the purpose of each unit²⁸ or the common parts; a regulation of the condominium for the use, fruition and maintenance of the common parts or of the units; it might also set alternative dispute mechanisms and penalties.

The title may only be modified with the consent of all co-owners. Therefore, the unanimous agreement is required to a change of the planned use of a unit in the estate. So, if the constitutive title sets up that the purpose of the unit is residence and the apartment owner wants to use his apartment for a restaurant, he has to get the agreement of all the others on the modification of the constitutive title. Only if all the co-owners agree to modify the title he is allowed to use the unit as a restaurant.²⁹ On the contrary, if he is entitled by the constitutive act to use it as a restaurant, the other owners cannot prevent him for that use.

Apart from the constitutive title, the legal status of a condominium is also shaped by deliberations of the community of owners. Deliberations are internal rules regulating the use and maintenance of common goods and services; they are set up, by majority vote,³⁰ in the assembly's meeting.

As a guiding rule, the community of owners has only regulatory power over the common parties; it cannot interfere with the private ownership of the apartment. However, both the title and deliberations shape the legal status of the condominium and they are applicable against the future owner in case of transfer of ownership of an apartment.

The distribution of the shared costs is stated by law. According to Article 1424 CC, owners are charged according to the proportional value of their apartments, set in the constitutive title. Charges related to common services (v.g. the porter) can be shared in equal proportion (per capita) or in proportion to the real use of the service. A two thirds majority is required. Besides the monthly costs, a fund [*fundo comum de reserva*] must be created and included in the annual budget. This pecuniary resource must be used by the condominium for maintenance purposes, such as painting, renovations, etc.

The owner has a proper right of ownership over the apartment; to keep pets in the apartments is considered as a normal use of it. Such a restriction would have to be stated in the title or would have to be agreed upon by all the co-owners; it cannot be imposed by a majority by-law. So, except if there is a specific restriction on the constitutive, the owners cannot be prevented by the other co-owners to have a pet in the apartment. The assembly of owners has regulatory powers over the common parties; so it may deliberate how pets are allowed to circulate in common parties, for example, if they need a muzzle.³¹

²⁷ The value assigned in the title determines the rights and obligations of the co-owner within that community (Article 1418 CC).

²⁸ In practice, most of the titles specify the purpose of the unit.

²⁹ Of course, in this situation the unit has also to comply with requisites imposed by public authorities.

³⁰ The majority required depends on the nature of the decisions to be taken.

³¹ Even if it is foreseen in the title, a general prohibition may, in certain circumstances, be inapplicable, as e.g., in the case of a guide dog. Furthermore, some Authors argue that a general prohibition of pets in the apartments is not possible, as there is not a real damage and the other owners

Legally speaking, each unit is an autonomous thing. The apartment ownership of an apartment may be freely mortgaged by its holder without the consent of the co-owners; the effects of the mortgage are exactly the same as those on a property held individually. The land may also be encumbered with the consent of all apartment owners. For instance, they can create an easement of passing through.

The destruction of the building is ruled by Article 1428 CC. In case of destruction of the whole building or more than $\frac{3}{4}$ of its value, each of the co-owners can claim for the sale of the land and of the materials, that is to say, can demand the dissolution of the community. If only less than $\frac{3}{4}$ of the building is destroyed, the assembly, by majority vote, may decide to reconstruct the building. The co-owners that do not want to participate in the reconstruction of the building can be impelled to sell their rights to the co-owners, for the value agreed upon by them or fixed by the judge. The co-owner has the right to choose the co-owner who will acquire his right.

Article 1429 CC provides that insurance of the individual and common parts against fire is mandatory. In practice, banks control compliance with this rule.³²

According to Article 692 CC, if the thing mortgaged disappears, is damaged, or loses its value, and the owner has the right to be compensated for the losses, the holder of the security keeps the same right and the priority rank over the compensation that he had over the thing.

1.5 Building Lease (emphytéose – bail à construction/ Erbbaurecht)

The right of superficies entitles the right holder to make or to keep a building or plantations (in case of a farm) in someone else property, perpetually or temporally (Article 1524 CC). In so far as it allows someone to have a building on (or below the surface of) someone else land, it consists of an exception to *superficies solo cedit* principle. Thus, a building lease provides a right to property which is transmissible *inter vivos* or *mortis causa* (Article 1534 CC), can be subjected to charges, or object of a public taking.

The right of superficies can result from a contract, a last will or from adverse possession. It can also result from the alienation of a building or of trees separately from the soil (Article 1528 CC). The landowner receives the price (always in money) that can consist of a lump sum of money or multiples instalments (though it may also be granted rent-free), according to Article 1530 CC).

According to Article 1536 CC, the right of superficies terminates:

- a) if the right holder does not conclude the building or the plantation before the deadline agreed to by the parties, or before the default deadline of ten years;
- b) If the building or the trees are destroyed and the right holder does not reconstruct the building or renovate the plantation;
- c) When the duration expires, if the right of superficies is temporary;
- d) If the right holder acquires the ownership of the land;
- e) If the soil disappears or becomes useless;

would not be affected by, *e. g.*, a fish.

³² Usually the banks belong to financial groups and offer a pack including the loan and insurance to the client.

f) If there is a taking by a public authority.

To create a right of superficies enforceable against third parties, a written deed containing the right must be executed by a notary and registered against the title deeds of the servient property.

Under the Portuguese regime, the lease building is a *ius in rem*: it is a power to use a land belonging to another owner, by making or keeping a building or plantations.

When the right expires, the owner of the land acquires the ownership of the construction or plantation; he has only to pay compensation according to the rules of unjust enrichment (Article 1538, 1 and 2 CC).

1.6 The Public Law Context of Real Property Transactions

Some public law restrictions on property transactions are to be mentioned:

- Article 43 of Law 177/2001, of 8.09, providing for the policy and regime of cultural patrimony protection and improvement (Bases da Política e do Regime de Protecção e Valorização do Património Cultural) imposes *non aedificandi* areas in order to protect immovables considered as cultural patrimony;

- Plots of land adjoining roads and highways are burden with servitudes *non aedificandi* by Decree-Law 13/94, of 15.01, Articles 3,4 and 5.º) and Article 3 of Decree-Law 294/97, of 24.10;

- National Agricultural Reserve (Reserva Agrícola Nacional RAN): Article 8 of the Decree-Law 196/89, of 14.06³³ establishes that building is not allowed;

- Article 4 of the Decree Law 93/90, of 19.03,³⁴ states that building is not allowed in the National Ecological Reserve (Reserva Ecológica Nacional REN);

- Decree-Law 19/93, of 23.01³⁵, imposes restrictions on the use, occupation and modification of the National Protected Areas (Rede Nacional de Áreas Protegidas).

- Very important restrictions on property transference are also to be found in the so called Subsidized Housing Programs (for example, the special programme of housing in Lisbon and Porto [*Programa Especial de Realojamento das áreas urbanas de Lisboa e Porto*], approved by Decree-Law 163/93, of 7.05³⁶ and the programme for construction of economical dwellings ([*Programa de construção de habitações económicas*] approved by Decree-Law 164/93, of 07.05).³⁷

Are there public subsidies and/or tax benefits aimed at promoting certain kinds of transactions? (e.g. benefits for family homes, for buildings to be rented etc.)

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33 Amended by Decree-Laws 274/92, of 12.12 and 278/95, of 25.10.

34 Amended by Decree-Laws 316/90, of 13.10; 213/92, of 12.10; 75/95, of 20.04; 203/2001, of 1.10.

35 Amended by Decree-Laws 213/97, of 16.08; 227/98, of 17.07; 221/2002, of 22.10

36 As amended by Law 34/96, of 29.09, and Decree-Laws 93/95, of 9.05, 79/96, of 20.07, 30/97, of 28.01; 156/97, of 24.06; 1/2002, of 4.01 and 271/2003, of 28.10.

37 As amended by Decree-Laws 181/94, of 29.06 and 63/95, of 07.04.

In Portugal, there are tax benefits for the payment of credit loan to buy residence; and even notarial fees are lower if the build has residential purposes.

1.7 Brief Summary on "Real Property Law in Action"

An important shortage of decent and affordable housing in urban areas has characterised the Portuguese housing situation for decades.³⁸

Since the seventies, the private rental sector has undergone a significant decline; it represented no more than 21 per cent of the stock occupied as usual residence (including 3.9 per cent of dwellings owned by close relatives of the occupant. Social housing sector was only 3.3. per cent in 2001.

Supply constrains in the private rental sector are at the origin of the decline in the importance of this sector. They are due to several reasons: namely the protracted rent controls, the strict legal regulation protecting tenants, and also the new financial and savings context which tends to divert savings from legal estate.

Meanwhile, the relative liberalisation of the rental market after 1990 has produced a dual rental sector with an old, large and low-rent sub-sector, where market mechanisms were completely absent, and a new but small market characterised by high an uncompetitive rents (comparatively with homeownership).

Without an active, dynamic rental market (private or social), an important supply failure of low-cost affordable housing arose. Portuguese home-seekers, independently of their preferences for homeownership, have been compelled to buy or build their own homes.

In Portugal, for the majority of home-seekers, the housing issue has meant the need to choose the timing of access to owner-occupation and find the best way to finance access to homeownership, rather than decisions associated with a tenure choice between ownership and rental housing.

In 1991, the owner occupied sector represented 65% of the total stock occupied as usual residence; in 2001 the share of the owner-occupied sector grew to 76 %.

As I mentioned above, homeownership is almost the only available alternative to those seeking a home.

Unable to produce effective changes in the private rental housing market (and without any commitment to develop a stronger rental sector), the Portuguese governments used to base their housing policy almost exclusively on a subsidised mortgage credit system designed to help households purchasing or building owner-occupied housing. This system was launched in Portugal for the first time in 1976 and, with several changes since then, constituted the main instrument of Portuguese housing policy until 2002.

The subsidised mortgage system was a credit scheme for the acquisition, building or works of maintenance, rehabilitation or renewal of permanent owner-occupied housing. It was launched by a Resolution of the Council of Ministers, dated from 24th of February, which created a system of incentives for the acquisition or construction of permanent owner-

³⁸ We are quoting *Mortgage Finance in Portugal*.

occupied housing. Its main feature was the possibility of granting mortgage credit with a reduction of the contractual interest rate (the public subsidy).

The most important change to the subsidised mortgage system occurred in 1986 (Decree-Law 328-B/86, of 30 September).

It consisted mainly of three regimes: subsidised young borrowers credit; subsidised credit (general);³⁹ unsubsidised credit.

The unsubsidised credit regime was directed to all households wishing to buy, build, rehabilitate or renew dwellings either for permanent or secondary residence or to let, that do not fulfilled the conditions demanded for the application of the subsidised regimes. As referred, since the 1st of October, this is the only form of credit available for new loans.

In all regimes, the repayment of the loan is usually made through a monthly constant or increasing payment of interest and principal (annuity), depending on the borrowers preferences. The financial institutions are compelled to present the constant payment option to the borrower, without prejudice of other options also being offered (Decree-Law 320/2000, of 15 December).

Mortgage rates can be variable or constant. They are usually variable, since the mid-nineties. Most were indexed, first to the Lisbor and later to the Eurolibor. Index rates result from the sum of the (money market) reference rate with the spread practised by the bank. The rate is revised automatically, with a frequency settled in the loan contract; as a rule, quarterly or half-yearly.

The Decree-Law 224/89, of 5 July, established the maximum maturity of the home loan in 30 years.

The Portuguese mortgage market was relatively thin until the early nineties; but, in the last decade it registered a remarkable boom.

In 1994, only 22% of the homeowners had mortgages outstanding.

The number of mortgages contracts, which used to be less than 50 000 per year until 1992, tripled between this year and 1997. In 1999, the number of contacts (235017) was almost 50 per cent higher than two years before. The average value of mortgage contracts also registered a remarkable increase in the nineties – 6 per cent annually on average, if deflated either by the

³⁹ The subsidised credit regimes (both the general case and young borrowers only) applied when loans were used for acquisition, construction or works of maintenance, rehabilitation or renewal of permanent owner-occupied housing and the household's income was less than a certain ceiling, established taking into account the number of members of the household.

The subsidised young borrowers credit scheme was restricted to households where the sum of the ages of the couple was no more than 55 years or, in the case of a single person, his or her age was between 18 and 30 years old. Since 1990, after the Decree-Law 292/90, of 21 September, such a condition was changed for couples, where the age of the couple together could be up to 60 years old, with each member no more than 30 years old.

It is usual practice to make a down payment to the seller when the deal is contracted (*signal*). Under the young borrowers regime it was possible to finance this down payment through a first loan up to 20 per cent of the dwelling's value for a year at most. Such a loan was repaid against the grant of the following main loan.

In the subsidised credit regimes, the subsidy, supported by the State Budget, is computed as a percentage of reference rate of interest a percentage that is dependent on the corrected annual gross income (income corrected for the number of members of the household).

consumer price index (excluding house) or by the housing price index.

In July 1999, the boom in the mortgage market started fading away. Between the third quarter of 1999 and the first quarter of 2001, there was a significant reduction of new mortgages contracted and it seems that, after the boom, the Portuguese mortgage market has reached a new, higher level than that before deregulation. This more recent experience was mainly linked to the behaviour of interest rates (and its consequent impact on the accessibility indicator)⁴⁰ as well as to a huge drop of consumer confidence.

The borrower pledges the home which is being financed as collateral, i.e. as a guarantee for the repayment of the loan. At the same time, fire insurance is required. Insurance against fire is the only scheme Portuguese households are statutorily obliged to contract when they buy or build a house with a mortgage. The value insured must correspond to the market cost of the reconstruction of the property. The borrower may take out the insurance from any insurance company he/she wishes.

The insurance companies fix the premiums. Other guarantees considered adequate for the risk of the loan by the credit institution may be required. Mortgagers may contract, and frequent lenders compel them to do it, multi-risks building insurance schemes, which, besides the risk of fire, also cover other damages on the property – such as those caused by floods, landslides, earthquakes, storms or other natural phenomena, theft, vandalism, etc.

The property can be partially or completely substituted by other real estate properties or even by giving in ledge assets rated in the stock exchange market. In this case, the market value of those assets cannot be less than 125 per cent of the amount in debt at any moment in the repayment period. To reinforce the mortgage, borrowers may be required to take out life insurances, and usually they are, for the borrower and the spouse, of a value not lower than the amount of the loan. These protect against the risk of borrower's death or permanent invalidity caused by illness or accident. There are no mortgage insurance schemes to cover capital losses on the property value, and insurance schemes to cover the risks of temporarily inability to work, drop in income or unemployment of the borrower are also not common.

In order to facilitate transfers between mortgage regimes as well as from one financial institution to another, the Decree-Law 349/98, granted the mortgager the right to repay (partially or in total) the loan without any penalty other than the commissions and other charges explicitly mentioned in the contract.

Since August 2004, there is a strong consumer protection; Decree-Law 68/2004, of 25.03 provides for advertising and information made available to consumers in the field of the acquisition of real estate with residential purposes.

The information made available to consumers must be inscribed in a technical description of the dwelling (*ficha técnica da habitação*) signed by the technician in charge of the work and by the developer (Article 4).

The technical description of the building is a document⁴¹ describing the technical and

⁴⁰ In May 2002 the Government determined the end of the subsidised mortgage system from October 1st onwards (Law 16-A/2002, of 31 May). All new mortgages contracted since the beginning of October 2002 are unsubsidised.

⁴¹ See Annexes 1 and 2.

functional characteristics of the dwelling.⁴² One copy of the description must be kept by the developer and the other must be deposited in the Town Hall.

The description encompasses information about the people involved in the project, construction, reconstruction, increasing, modification and acquisition of the dwelling; about the parcellation,⁴³ the building,⁴⁴ and the individual unit.⁴⁵ It is a long document, around 11 pages.

Advertising of property must comply with the general rules on advertising (Decree-Law 330/90, of 23.10) and provide for the complete identification of the developer and/or the seller; the date for the conclusion of the works; the area of the dwelling; the kind and brand of products used in the construction; and the conditions of access for handicapped people (Article 12). Further, the photos or images provided to the public shall be adequate for the real identification of the dwelling.

Before the realization of the public deed, the notary has to check the existence of the document with the technical description of the building and that the seller has delivered it to the acquirer/consumer (Article 9). This regime applies also when the seller is not a professional (to contracts among consumers), if the building already has a technical description (Article 18). In this situation, the seller (not professional) must hand over the technical description of the building to the acquirer.

Notaries, registrars, banks and real estate agents play a nuclear role in property transactions.

The activity of notaries is strictly regulated by Decree-Law 26/2004, of 4.02 (*Estatuto do Notário*, hereinafter EN).

Portuguese notaries are a professional group in mutation. They used to be public officials, but a reform of their career is on progress. The so-called process of liberalisation of the notaries implies that they change to be professional with delegation of public powers.

Notaries have a monopoly on conveyance and they have legal authority to officially say that documents are truthful. From now on, the notary is simultaneously a public official that confers authenticity to documents and is in charge of their archive and an independent, impartial liberal professional (Article 1, n. 2). The public and private natures of the function of notary are absolutely interrelated (Article 1, n. 3).

In Portugal, we may find, at least, one notary in each municipality (Article 6, n.1)

42 <http://www-ext.lnec.pt/LNEC/portug.html>

43 The information about the parcellation must include: the number of buildings; the number of dwellings; the number of parking spaces; the number and kind of collective equipments; the identification of the responsible for the promotion, management and maintenance of the referred to equipments; a list of the equipments.

44 The information about the building must contain: its identification: the location, property tax number and date of the using permit; the description of the building, v.g., the number of floors, lifts, parking spaces, the existence or not of doorman service, materials used in the construction and technical solutions adopted.

45 The description of the plot might include its identification and description (v.g. materials used in the construction and technical solutions adopted, utilities, communications, descriptions of kitchens and toilets).

Notaries are subject to control and disciplinary power of the Minister of Justice and of the Notaries Professional Association (*Ordem dos Notários*).⁴⁶

Some principles rule the activity of the Notary:

- Principle of legality (Article 11 EN) - The notary shall assess the legal suitability of the acts he is asked to realize, checking especially, the legitimacy of the submitters, the formal and material validity of the documents and the substantial legality of the act required. The notary must refused to realize: void acts, acts out of his competence field; acts on which he has a personal interest; any act, whenever he has doubts about the psychological integrity of the submitters. The notary cannot refuse an act because it is voidable or inefficace; however, he shall advert parties about the defect and report the advertisement in the public deed (n. 3)

- Principle of autonomy (Article 12) - The notary exercises his function with independence before the State and any other particular interests.

- Principle of impartiality (Article 13) - The notary shall be impartial before both parties; he cannot act as an assessor of one of them.

- Principle of exclusivity (Article 15) - The notary cannot receive remuneration for the exercise of other functions, except teaching, when authorised by the Professional Association. Nonetheless, notaries are allowed to receive copyright and honorariums from the participation in workshops.

- Principle of freedom of choice (Article 16) - Parties are free to choose the Notary they want to work with; there are several restrictions relating to advertising of the notaries' activity.

Notaries are graduated in Law. They concur for the access in the career and are subject to a written exam and an interview; then they have a traineeship in a notary (with a career of seven years minimum) during 18 months. In the first six months they cannot practice specific acts; after that period they can realise the acts authorized by their supervisor.

The notaries that have been approved successfully in the traineeship can entry in a new concur in order to achieve the title of Notary.⁴⁷ The exam is twofold: written and oral; who succeed in this exam gets the title of notary and can apply for a permission to open a public office. These permissions are provided by the Minister of Justice.

Registrars are public officials who assign publicity to property. They are public officials, dependent of the Ministry of Justice, Directorate General of Registration and Notary.⁴⁸

The real estate activity consists of achiving someone interested in acquire, sell, rent or develop a real estate. In Portugal, estate agents act as intermediaries between a seller and an acquirer. Their activity is ruled by Decree-Law 211/2004, of 20.08, and it is limited to those

⁴⁶ Decree-Law 27/2004, of 04.02 created the Professional Association of Notaries.

⁴⁷ The Administrative Regulation (*Portaria*) 398/2004, of 21.04, regulates the title of notary.

⁴⁸ As they used to have common post-graduation, notaries who do not want to let their statute of public officers are now moving to the Registry services.

companies or business persons that are legally qualified by IMOPPI.⁴⁹

Measures taken in order to control the activity of real estate agents include the registration of such persons; the creation of an access threshold in terms of professional aptitude; the option of suspending or withdrawing their licence.

The contract of intermediation must be in written (Article 19), and must contain a long list of elements and descriptions. Before the conclusion of the contract of intermediation, real estates agencies have the duty to check if the parties have legal capacity, the description of the immovable, and if it is burden with any charge or mortgage. After the conclusion of the contract of intermediation, they shall provide clear, objective, and adequate information about the legal and material situation of the building.

The real estate agencies can only receive remuneration from the party that first contact them, usually the seller; it is forbidden to be paid by the two parties of the same contract (Article 16, n. 2 a).

The duty to pay the remuneration exists only after the conclusion of the contract (Article 18, 1) and it is forbidden to receive any amount in advance (Article 18, 3)

The role of banks used to be limited to financing issues. However, Decree-Law 255/93, of 15.07,⁵⁰ as amended by Decree-Law 38/2003, of 8.03 established that the sale and acquisition of a urban building or a unit with residential purposes when there is a loan⁵¹ and the loaner is an authorised credit institution authorized, may be concluded by private document, with certification of the signatures, according the model approved by law. This measure was very controversial.

Transparency with regard to the conditions of credit supply is an essential element for better comparability of products on the market, including those originating in other Member States. Further, it is the precondition for a true free circulation of credit offers. The main rules are provided by Decree-Law 349/98, 11.11.

On 5th March 2001, the European Credit Sector Associations, led by the European Mortgage Federation and the Consumer Organisations, signed the European Agreement on a Voluntary Code of Conduct for Pre-contractual Information on Home Loans. The negotiations, as well as the signature of the Agreement, were conducted under the aegis of the European Commission, which endorsed the Code through Recommendation 2001/193/CE⁵².

Accordingly, the Bank of Portugal issued the Circular Letter⁵³ 20/2001/DSB, of 2.08.2001,

⁴⁹ IMOPPI, the "Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário", was created by the Decree-Law 60/99 Decree, of 02.03, as a public institute with administrative and financial autonomy. It is in charge of promoting and regulating the markets for public and private works; licensing the real estate sector; promoting and monitoring the regulation of these sectors; ensuring the legal dispositions related; to participate, in the European Union scope, in the definition and harmonization of legislation. In 2003, IMOPPI issued 3512 permits.

⁵⁰ Regulated by Administrative Regulation n.º 699-A/93, of 16.07 as amended by Administrative Regulation 882/94, of 01.10.

⁵¹ Whether a mortgage is granted to secure the loan or not.

⁵² L 69/25, 10.3.2001

⁵³ Non-regulatory guidelines.

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recommending the credit institutions to comply with Recommendation 2001/193/CE. Then, it issued the Regulatory Instrument (*Instrução*) 27/2003, that entered in force in 16.01.2004, imposing the banks to comply with the Code of Conduct. See annex 3.

Real property is often enforced before courts; a fair and effective access to courts exists to full extent; the ordinary courts are competent. Neither voluntary nor compulsory mechanisms of alternative dispute resolution are common in the field of property law.

Legal aid in Portugal is ruled by the recent Law 34/2004, of 29.07.

There is legal certainty in real property law: no significant gaps or contradicting statutes exist.

There is also sufficient secondary literature, which is accessible to all lawyers.

2. Land Registration

2.1 Organisation

The Portuguese statutory basis for land registration is the Land Registration Code, approved by Decree-Law 224/84, of 6.07.⁵⁴ (hereinafter CRPre); it is in force for all country.

According to Article 1, land registration aims at giving publicity of the legal status of the land, in order to improve security on real estate transmissions.

Articles 2 and 3 describe the facts (*e.g.*, constitution, recognition, acquisition or modification of *rights in rem*), and judicial procedures that are subject to registration (judicial procedures aiming at the recognition, constitution or modification of a fact subject to registration; judicial procedures aiming at the reformulation, declaration of nullity or avoidance of a registration or its cancellation; the final decisions of these procedures).

In Portugal, the legal registration of land and property is in charge of the Land Registry,⁵⁵ where the rights that are acquired and transferred concerning distinct real estates are registered. The Registrar is a legally certified government worker that works on a functional autonomy basis; registrars depend on the Ministry of Justice, General Directorate of Registries and Notaries (*Direcção Geral dos Registos e Notariado*).

According to Article 19 CRPre, registration is made in the Land Register Office with territorial competence where the building is placed. If a building is located in the area corresponding to multiples Land Registries, registration must be done in all of them.

The Land Registry is divided into independent Registries, with competence in a specific portion of Portuguese territory (a municipality or a parish).

In each Land Registry we might find (Article 22 CRPre):

- A book, Diary (*diário*), where registrars have to settle the applications for registration and the documents attached. Applications must be set on this daily log-book, with an indication of their date and entrance order. This indication is of the greatest importance, since their order decides the priority of rights when various titles over the same property enter the Land Registry.
- Folders for registration of descriptions (*descrições*), inscriptions (*inscrições*), additions (*averbamentos*) and annotations (*anotações*). The folders are ordered by parishes and within each parish by number of the description of the land (article 23 CRPre).

In order to facilitate research of data, in each Land Registry there are a real folder and a

54 As amended by Decree-Laws 60/90, of 14.02; 30/93, of 12.02; 267/94, of 25.10; 67/96, of 31.05; 375-A/9, of 20.09; 533/99, of 11.12; 273/2001, of 13.10

55 There is no Cadastre in Portugal. There is a descriptive database of the physical configuration of properties; its goal is mainly fiscal, in order to set real estate evaluations and calculate the appropriate taxes.

personal folder. The real folder is composed by attachments referring to the land; it includes the place and a brief description of the property, the fiscal number of it, and the number of the description in the Land Registration Office. The personal folder is composed by attachments of the owners of the land, in an alphabetic order; it includes the name, marital status, address of the owners, the number of the description of the building and the parish where it is situated. The attachments are actualised everytime a registration is required.

In Portugal, land registration concerns most of real property, with the exception of estates forming part of the public domain, which are inalienable. Only if there was a grant of the public domain the property has to be registered (Article 84 CRPre).

2.2 Contents of Registration

According to Article 75 CRPre, the registration is composed by the description [*descrição*] of the land, the inscription [*inscrição*] of facts related to the land, addings [*averbamentos*] and annotations [*anotações*] of relevant circumstances.

There is a distinct description for each building (Article 79 CRPre). The description contains the economic, fiscal and physical identification of the building.⁵⁶

The description might contain:

- The number of the description of the land;
- The parish where the land is located;
- The nature of the land: urban, rural or mixed;
- The name of the land and its location;
- The composition and area of the land;
- The taxable value;
- The fiscal number of the property.

The description can be modified, amended and corrected by addings (*averbamento*).

Every legal fact referring to a land must be registered by inscription; the inscriptions aim at defining the present legal status of the building. If the fact is referred to more than one land, it may be inscribed in all the descriptions (Article 91).

The inscription consists of:

- a letter (G - if it is a acquisition or recognition of ownership; C - Mortgage; F – default) followed by the correspondent number;
- The fact to inscribe;

⁵⁶ In case of a description of a condominium or a time-sharing, there is a generic description of the building and of the turistic complex and a subordinated description of each unit. Each right of temporary use is described subordinately to the description of each turistic unit (Article 81 CRPre).

- The identification of the subjects of the fact inscribed (name, marital status, address, name of the spouse and marital regime).

The law imposes some additional inscriptions in Article 95 CRPre. For example,

- If the fact is an acquisition, its cause (sale, donation, for example);
- In usufruct, use and residence, and lease building: the cause and its duration; in usufruct and use and residence, the content of these rights; in a building lease, the duties of the rightholder.
- For a mortgage, its cause, the credit and the accessories and the maximum amount secured; if it is a mortgage of an enterprise, the list where are described the mechanisms and the movables affected to the economic exploitation. If the documents do not mention the value of the interests agreed on, the legal default rate might be inscribed (Article 96 CPre).

The inscription might be amended, corrected and modified by additions (Article 100 CRPre).

Article 28 CRPre states that the description of the fiscal number and the area of the land cannot be in contradiction with the fiscal registry. For every act of registration, the fiscal identification of the building might be proved by a document dated or re-validated less than a year before (Article 31 CRPre). Usually it is proven by the property tax document (*caderneta predial*). When this is the case, the number of the description of the building in the Land Registry must also be inscribed on it.⁵⁷

2.3 Registration Procedure

1.3.1. Application for Registration

The active and passive subject of the legal relationship can apply for registration and, in general, whoever has an interest on it (Article 36 CRPre). A co-owner or a co-possessor can apply for registration on behalf of the co-right holders (Article 37 CRPre).

The applications may be made by a representative with special powers for the act, except if it is a lawyer, a solicitor, or someone with power to sign the deed, because in this case the law extends their powers to ancillary acts, like registration, that will provide publicity for the fact (Article 39).

There is a specific sample for application for registration;⁵⁸ it is provided by the land register and it is for free. It is also possible to download it from internet.⁵⁹

The application may be:

- Handed over in the Land Registry Office;
- Fulfilled and sent by internet;

⁵⁷ Article 25 CRPre provides for special procedures for those rare occasions when estate belonging to private individuals has not previously been included in the registers.

⁵⁸ Approved by Administrative Regulation 38/2002, 10.01.

⁵⁹ See annexes 5 and 6.

The application for a land registration certificate (*certidão de registo predial*) can be done by internet, in <http://certidoes.portaldocidadao.pt>

- Sent by the Notary

The notary can send the application signed by the applicants, with the documents and the amount to be paid (*preparo*), for the Land Register Office (Article 41-A CRPre).

- Sent by mail

The application can be sent by registered mail. In this case, an envelope with the official sample, the documents, and the amount to be paid, must be sent according to Article 65 CPR.

Five days after the registration, the documents are sent back to the applicant, with the copy of the registration done and the excess of the amount paid.

The requisition must be signed by the submitter (*apresentante*) and contains:⁶⁰

- The identification of the submitter (name, marital status, residence, identity card number; if he is a lawyer or a solicitor, he must be identified by the number of the professional identification card);
- The facts to be registered;
- The identification of the land referred to by the facts (by the description number);
- The list of the documents attached to the application; its date and origin and its relation to the facts, and its date.

The facts subject to registration have to be legally grounded on documents (Article 43):

- Always the property tax document (*caderneta predial*), emitted by the tax office competent.
- For a sale or for a mortgage: certification of the deed

Sometimes, a declaration of the owner is needed. For example, a provisional registration of a future mortgage or acquisition is grounded on a declaration of the future mortgager or seller; the signature must be done before the registrar or certified by a Notary (Article 47).

These documents are registered in the Diary, following the order of the delivery of the applications (Article 60).

A receipt (*senha de apresentação*) containing the number and the date of the application and the amount paid is given to the submitter (Article 64).

To each fact is made a distinct annotation in the Diary, that includes:

- The number and the date of the application;

⁶⁰ The parties can ask the notary to request, to other public services, the documents needed to prove the acts (Article 4, n. 3 CRPre).

- The identification of the submitter;
- The fact to be registered;
- The number of the description of the land that the fact is referred to;
- The list of documents attached.

The application can only be rejected in the following situations (Article 66):

- when it enters out of the working hours;
- when documents do not respect to land registration;
- when the presentation made by mail does not respect Article 65 CRPre;
- when the application was not made in the official sample.

1.3.2. Duties of the Registrar

According to Article 68 CRPre, the registrar has the duty to appreciate the suitability of the registration, taking into consideration the law, the documents presented and the precedent registrations. He has to verify, specially, the identification of the building, the legitimacy of the interested, the formal validity of the deeds, and the validity of the transmission.

The owner of the right concerned has to be registered first before any changes or the transfer can be registered (Article 34 CRPre).

According to Article 48, the registration must be refused when:

- the land registry is not competent (the land is placed in another's Land Registry office area);
- when it is clear that the fact is not proved by the documents joined to the application;
- when the fact is already registered or is not subject to registration;
- when it is clear that the fact is void;
- when the registration was made provisional for doubts and the doubts were not removed;
- when the registration was not paid;

and the registration cannot be accepted as provisional.

If the registration is refused, a note is made in the folder, following the number and the date of the application.

If the registrar does not refuse the application, the next step is the characterization of the registration.

The registration can be definitive or provisional; a registration can be characterised as provisional de per se (*provisório por natureza*) or by doubts (*provisório por dúvidas*).

The decision of rejection or the characterization as provisional has to be notified within five days.

Registration must be provisional by doubts when a reason that does not lead to the rejection of the registration prevents the registration as it was demanded (Article 70 CRPre).

Article 72 CRPre states that any act subject to tax duties can be registered without proof that the tax duties were complied with. The registrar does not have the duty to check if the amount paid is correct; he only has to verify the declaration of the Tax Office.

Registration is done within 15 days and following the order of the annotation in the Diary (Article 75 CRPre); however, this provision is not mandatory.

From the decisions of the registrar, the parties can make a administrative contentious appeal [*recurso hierárquico*] to the General Director of Registries and Notaries [*Director-Geral dos Registos e Notariado*] or appeal to the Court of First Instance [*Tribunal da Comarca*] where the Land Register Office is located.

2.4 Access to information

The database of the land registry aims at organizing and keeping up to date the information referring to the legal status of properties, in order to get legal security; it cannot be used for another incompatible purpose (Article 116 CRPre).

The data referred to the legal situation of the property can be accessed by everyone who asks for it, according to Article 109-A CRPre. It is possible to search information by the registration (or fiscal) number of the property and by the identification of the owner.

Any person can ask for a certification of the registrations and ask oral or written information about their content (Article 104 CRPre).⁶¹

The proof of registration is made by certification and photocopy (Article 110 CRPre). See annex 7.

The certifications and the photocopies are required in an official sample, and they are handed over in the Land Registry Office or send by mail. They requisitions might contain:

- the identification of the submitter;
- the number of the description of the building;
- and the name of the parish where the building is located.

Photocopies and certifications might give the description of the building and every inscriptions in force (except if it asked only a specific fact), within five days. Negative certifications must be given in an official sample.

In particular, it is possible to access to the data referred to the legal situation of the property:

- if someone has a *ius in rem* in the real property;
- if someone is negotiating with the owner about the purchase of the property;
- if someone has an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure;

⁶¹ Only the staff has access to the books, folders and documents; in special circumstances judicial authorities and other entities of police have also direct access.

- if a bank wants to check whether an applicant for a loan owns real property;
- if the press wants to inquire on how much real property a politician owns.

2.5 Substantive Effects of the Registration

The function of registration in Portugal is to provide publicity to the legal status of the property, so registration of the fact is necessary for its enforceability (*oponibilidade*) against third parties (Article 5 CRPre). If the owner sells the same property to two different acquirers, whoever registers first becomes the new owner. Preference among the successive buyers depends on the order of entrance of their respective titles in the Land Registry.

Under the Portuguese legal system, registration is not necessary for the creation or transfer of a real right, except in what mortgages concerns. Ownership and real rights over property are validly acquired without the necessity of registering them. Facts subject to registration are still effective *inter partes* and may be invoked by their heirs (Article 4 CRPre).

The role of land registration is to solve conflicts between different assignees of one person, when these assignees claim for incompatible or conflicting rights on the same property; preference is given to the one who has his interest first registered.

Registration on the land registry offers a presumption of property, that is to say, that the registered right exists and belongs to the person stated in the register (and to the assumption that a right that has been cancelled, no longer exists [Article 7 CRPre]).

Registration can be legally inexistent or null.

According to Article 14, the registration is legally inexistent when it was inscribed in a non competent Land Registry Office;⁶² or when it was not signed by the registrar. The inexistent registration does not produce any effect and can be invoked by any person at any time.

According to Article 16, the registration is null [*nulo*] when:

- it is grounded on false deeds;
- the deed is not sufficient to prove the fact;
- the deed does not contain complete information, or the contained information is not correct, about the individual or the object of the legal relation that the registration is referred to;
- it was signed by someone not competent;
- a previous application for registration was not made;
- registration goes against the principle of chain of titles (*princípio do trato sucessivo*).

The nullity [*nullidade*] has to be declared by the Court. The declaration of the nullity of the inscription cannot prejudice the rights acquired on consideration, by individuals on good faith,

⁶² In this situation the registrar might send the documents and a copy of the registers for the competent office, that will make *ex officio* the registration and will communicate it to the rightholder.

if the registration of the facts is submitted before the registration of the judicial procedure for declaration of nullity (Article 17 CRPre).

According to Article 291 CC, the declaration of nullity or the voidation of a contract over immovables or movables subject to registration, does not prejudice rights acquired over the same property, in consideration, by third parties on good faith (who did not had acknowledge of the nullity or voidability).

2.6 Rank and Priority Notice

Article 6 of the CRPre states:

“1 – O direito inscrito em primeiro lugar prevalece sobre os que se lhe seguirem relativamente aos mesmos bens, por ordem da data dos registos e, dentro da mesma data, pelo número de ordem das apresentações correspondentes.

2 – Exceptuam-se da parte final do número anterior as inscrições hipotecárias da mesma data, que concorrem entre si na proporção dos respectivos créditos.

3 – O registo convertido em definitivo conserva a prioridade que tinha como provisório.

4 – Em caso de recusa, o registo feito na sequência de recurso julgado procedente conserva a prioridade correspondente à apresentação do acto recusado.”

That is to say:

The right firstly inscribed prevails over other rights referred to the same property, according the date of registrations, or, if they have the same date, by the number of the respective application.

There is an exception referred to inscriptions with the same data on mortgages; they concur among themselves in the proportion of the credits guaranteed.

The registration converted in definite keeps the priority that it had as provisional.

If the registration was refused and then ordered by judicial procedure, it keeps the priority of the application.

As the registry Office is competent for registration of the real estates placed in its area, the question of rights registered in different sections of the land register does not arise.

Case: Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

As, in Portugal, the registration of a mortgage as a constitutive effect the rank would be: B, C, A.

However, the parties may agree on another ranking; their agreement must be registered (Article 101, n. 1, c) CRPre).

It is possible to secure a future registration, or at least its rank, by a provisional registration (*registo provisório*), which is valid for 6 months (Article 11, n. 3 CRPre).

According to Article 6, n. 3, CRPre the provisional registration converted in definitive keeps the rank it had as provisional. A provisional registration does not block other registrations; however, registrations affecting the secured claim or its rank do not prevail.

The provisional registration requires the consent of the owner of the right concerned. The registration of a mortgage or an acquisition of ownership, before the conclusion of the contract, is done by a declaration of the owner. The signature of the owner must be done in the Land Registry Office, before the Land Register, or certified by the Notary.

2. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

The seller usually uses the services of a real estate agent in order to find a buyer. So, if someone wants to buy a house, the usual proceeding is to look for it in the catalogue of the real states agencies.

After the buyer finds a house, he usually goes to the bank and check if he can get a loan. The bank makes an assessment of the income of the buyer, of the value of the house, and of the amount asked); thereafter the bank proposes a concrete offer, where it specifies the interests to be paid and the securities required.

A preliminary contract might be signed (*contrato promessa*); this contract is normally drawn up by the lawyer or the real estate agent that is involved in the sale. The preliminary contract commits both the seller and the buyer; it sets out the exact conditions of the sale. When the contract is signed, the purchaser usually delivers a dawn payment, around 10% of the purchase price.

In the Land Registry Office, the seller submits a provisional registration in favour of the acquirer. When the bank approves the loan, a provisional registration of the mortgage is submitted.

The next step is to go to the notary and book a date for the conclusion of the sale. Meanwhile, the seller has to provide the documentation of the dwelling and the acquirer has to pay the taxes.

The transfer of the title deed is drawn up at the Public Notary Office. The sales contract is concluded in an oral hearing, usually at the notary's office,⁶³ in the presence of both parties.⁶⁴ At that time, the buyer pays the purchase price to the seller (unless parties agree differently, the purchase price is paid immediately) and the seller allows the buyer into possession. Simultaneously, the mortgage title is signed.

The presence of either parties (purchaser and seller) or their legal representatives (using a power of attorney) is required to sign the deeds.

The Public Notary is responsible for checking and certifying the legal exactness of the entire transaction, ensuring that all documents are in perfect order, that any applicable purchase taxes have been paid, and that all parties agree upon the terms of the transaction.⁶⁵

When payment is financed through a mortgage loan, both notarial acts (deed of sale and of mortgage) are usually signed in the same act, and the bank gives the loan in that moment, even if the mortgage is not still registered.⁶⁶

The documents necessary for the public deed are:

⁶³ Parties may agree to conclude the contract somewhere else (for instance, in the Bank). The Notary can provide for this external service under an extra payment.

⁶⁴ And a Bank' representative, if a mortgage is to be concluded.

⁶⁵ As this act is in Portuguese, it is usual for foreign buyers to have a translator present (Article 65 CN).

⁶⁶ The banks rely on the provisional registartion of the mortgage.

- Identification documents and Portuguese tax numbers of the parties (the tax number of a foreign purchaser is obtained prior to the act);
- Property Tax Document [*Caderneta Predial*]⁶⁷ of the property, issued by the Tax Office of the area in which the property is located;
- Registration Certificate [*Certidão do Teor da Descrição Predial*]⁶⁸ issued by the Land Registry Office of the area in which the property is located; (see annex 8)
- Using License [*Licença de Utilização*] certifying that the property is licensed for use issued by the local Town Hall;
- Declaration of the payment of the tax over the transmission of real estates with consideration [*IMT*], issued by the respective Tax Office. If there was an exemption of the impost, that must also be certified by document.⁶⁹
- If the acquirer is a consumer, the technical description of the building [*Ficha Técnica de Habitação*] – see 1.7.

The original deed document is then held by the Public Notary, and a copy is registered with the Central Registration Office.

The buyer (already the owner) requests⁷⁰ a certified copy of the deed (See annex 9.) and:

- Applies for registration of the purchase in the Land Registration Office [*Conservatória do Registo Predial*] of the area where the property is located (usually, a conversion of a provisional inscription into a definitive one, keeping the same rank);
- Applies for registration in the respective Tax Office (Repartição de Finanças);
- Contracts provision of utilities.

The registration on the tax office will serve to establish the annual property taxes, that are based on the property's taxable value.

All property owners have to pay Property Municipal Tax [*Imposto Municipal sobre Imóveis – IMI*], with the amount due depending on the rate approved by the Town Hall; this annual municipal tax was introduced in 2004 to replace the existing municipal annual tax system, which was obsolete and in many aspects, unfair.

The rates are:

- Urban property (existing) - between 0.4% and 0.8% of Taxable Value
- Urban property (new) - between 0.2% and 0.5% of Taxable Value
- Rural property – set at 0.8% of Taxable Value

⁶⁷ If the real estate is not described in the fiscal cadastre, copy of the submission to the inscription.

⁶⁸ Certification of the content of the description of the land and all inscriptions in force.

⁶⁹ The notary has the duty to communicate to the Tax Administration the conclusion of acts deriving tax duties.

⁷⁰ At any time it is possible to request new certified copies to prove ownership.

- Properties owned by persons or companies domiciled in foreign 'tax havens' - set at 5% of Taxable Value

The payment of the IMI tax is to be paid during the year following that for which it applies. It is payable as follows:

- If the tax amount is less than €10, no payment is due;
- If the amount is less than €250, it is due in April;
- If the amount is more than €250, it may be paid in two instalments, in April and September.

The time frame of a sale of real estate depends on the bank and on the notary availability.

3.2 Real Estate Sales Contract

According to Article 875 CC and Article 80, 1 of the CN, a real state sales contract must be in notarial deed; if the contract does not meet the formal requirements, it is void.

However, Decree-Law 255/93, of 15.07, ⁷¹ as amended by Decree-Law 38/2003, of 8.03, established that the sale and acquisition of a urban building or a unit with residential purposes, when there is a loan and the loaner is an authorised credit institution, may be concluded by private document, with certification of the signatures, according the model approved by law. See Annexes 10 and 11.

According to Article 3, of Decree-Law 255/93, the transfer of ownership made according to these provisions is subject to mandatory registration; and the application for registration is in charge of the credit institution.

Credit institutions also are in charge of:

- Controlling the correct fulfilment of the sample;
- The collection of taxes and their deposit in the State Account.

The preliminary contract (*contrato-promessa de compra e venda*) consists of a commitment of buying and selling, and is ruled on Article 410 ff of the Portuguese Civil Code. Provisions that rule the promised contract apply also to the preliminary contract, except the ones concerning formalities.

The preliminary contract has to be signed by the parties to be legally bounding. If the future contract is for the acquisition or constitution of a real right over a dwelling, the notary must certify the signature of the parties and the existence of a permit of utilization or construction of the property. However, the party that promises to sell or to create the real right may only invoke the non compliance with these requirements when it was due to fault of the acquirer.

If the person who pays the dawn payment does not comply with the contract, the other party has the right to keep it as it owns. If the party that received the dawn payment, the seller, does not comply with, the acquirer has the right

71 Regulated by Administrative Regulation n.º 699-A/93, of 16.07 as amended by Administrative Regulation 882/94, of 01.10.

- to receive it in double; or
- to demand specific performance.

Under the Portuguese Law, there is also a third possibility. If there was dawn payment and *traditio* of the property, the acquirer can ask for:

- the difference between the objective value of the property minus the price agreed upon by parties and the value of the deposit.

If there was *traditio* of the property, the party (ex-future acquirer) that has

- the right to receive the dawn payment in double
- or the difference between the objective value of the property minus the price agreed upon by parties and the value of the deposit

holds a lien (*direito de retenção*). This lien will prevail over an eventual mortgage (Article 755, f, CC)

If a preliminary contract is concluded, parties can agree on conferring real effects to it. They have to mention their intention on the contract and they have to submit it to registration. What is the advantage of conferring real effects? With a normal preliminary contract, if the seller does not comply with, the acquirer can ask for reparation; everything happens under the field of contract law and freedom of contract. Parties may choose do not comply with the contract; and they are liable.

If a preliminary contract with real effects is signed between A and B, and A sells the house to C, this sale does not produce effects against B. From the contract with real effects results a right to acquire the property that is enforceable against third parties.

The requirement for the transfer of ownership is a valid obligation contract. The Portuguese system is a causal one; it requires a valid *causa* of transmission, as under the Napoleon Code.

The buyer has the duty to pay the price and the owner has the duty to deliver the thing. The registration is only a requisite for the enforceability against third parties.

According to Article 885 CC, the payment is due at the moment and in the place of the delivery of the thing sold.⁷² If the parties agree upon, or if it is a custom, to defer the payment, it might be done in the residence of the seller at the moment payment shall be complied with.

The consideration is essential to the sale; however, the payment of the price is not a condition for the conclusion of the sale.

Rarely the payment is made in cash; parties usually use bank cheques or bank transfers. It is not the responsibility of the notary to guarantee this payment to the seller.

In Portugal, no insurance is used for the risks of the payment.

⁷² The Notary states in the public deed that the seller received the price . The usual expression in Portuguese is “recebeu o preço e dá quitação”.

If parties deferred payment, it is mentioned by the notary in the public deed. The notarial deed sale has executory power, that is to say that the obligations resulting from it are enforceable immediately before Courts.

The Portuguese civil procedure has two phases:

the declaration of the existence of the right and subsequent condemnation of the debtor (declarative procedure [processo declarativo]);

if the debtor condemned does not comply with the decision voluntarily, it follows the execution [processo executivo] of the decision. The decision of the Court that condemned the debtor is an executive title; it will ground this second procedural phase.

If the acquirer does not pay the price, the notarial deed is enough to enable the seller to go directly to the second phase, that is to say, to the executive procedure.

In counterpart to the payment of consideration, the seller has an obligation to deliver the property sold. Usually, during the notarial act, possession to the buyer is formally transferred, with handing over the keys of the property. Practice provides for entry into enjoyment at the same time as the transfer of the property; however, as for the payment, entry into enjoyment may also be deferred.

3.4 Seller's Title

As I mentioned before, multiple documents have to be delivered to the notary or exhibited before him, so that he may ascertain that the seller has a valid title.

The notary must check if the real estate is registered in favour of the seller. According to Article 54 CN, a notarial instrument aiming to transmission and creation of a real right may only be done if the property is inscribed in name of the seller, in the Land Registration Office.⁷³ Registration gives rise to an assumption that the right registered exist and belong to the person stated in the register.

In order to ascertain the absence of encumbrances, the buyer may ask for a certification of the description and all the inscriptions in force over the property, in the competent Land Registry Office. Doing so, the buy will have acknowledge of all existing encumbrances of the real estate which are registered in the land register.⁷⁴

⁷³ Although the registration in the Land Registry is not constitutive nor does it validate material or formal defects on titles, it does protect the buyer on good faith against possible cancellations of his transferor's title (Article 17 CRPre).

⁷⁴ Article 905 CC states that if the property is burdened, the contract is voidable, by reason of mistake or intentional fault. The cancellation of the burdens validates the contract, except if the existence of the burden caused prejudice to the buyer or the buyer has already claimed the declaration of nullity of the contract.

If the property was burdened, the seller is liable. If there was intentional fault, the seller might compensate the acquirer for the damages he would have suffered if he had not concluded the contract (908 CC); if there was mistake, the seller has to pay the damages resulting from the conclusion of the

Then, the future seller asks for a preliminary registration of the acquisition, to assure priority to his rank.

Let's take an example.

In 2002, A buys a house with mortgaged credit loan from Bank 1. In 2004, A will sell the house to C, who asks for a loan Bank 2 and wants to grant a mortgage over the property.

First, A asks for a provisional registration of the acquisition and of the new mortgage, in favour of B2.

In the Notary, B1 receives the amount of money (provided for B2) and gives acquaintance necessary for cancelling the mortgage. Then, A and C conclude the sale, and C conclude the new mortgage with B2. This all happens before the notary and at the same time, so there are no risks.

After that, Bank 2 may go to the Land Registry Office:

- to cancel the first mortgage (with the acquaintance provided by Bank 1);
- and to ask for the conversion of the provisional mortgage and the provisional registration of the acquisition into definitive.

The buyer is not affected by any debts taken out by the seller. These are not enforceable against the new owner unless they are accompanied with real security, as are mortgages or privileges. Only these guarantees subscribed for debt reimbursement are carried on with the property, whoever the owner may be.

The mechanism of preventive legal security functions reasonably well: the Notary draws up the deed and controls the existence of charges on the property, and the Land Registry Certification reports any possible encumbrances. Therefore, cases of legal conflict in real estate matters are very rare.

The role and responsibilities of the notary in the operation are sufficient to provide an absolute guarantee to the buyer. It has therefore not been necessary to set up a system of insurance to cover any risks affecting the seller's property title; there is no title insurance in Portugal.⁷⁵

An unknowing existing leasing is a defect in the seller's title. Lease contracts only require registration if they are to last for more than six years. There is no other way for the buyer but to ask to the seller whether there are leases and to check the situation visiting the premises.

The buyer is bound by a lease, if it is anterior to the sales contract (Article 1057 CC proclaims the principle *emptio non tollit locatio*).⁷⁶

contract (909 CC). This rule is default (Article 912 CC).

⁷⁵ However, if the notary has not checked the land register properly, he is liable to the parties. Since malpractice insurance is mandatory for Portuguese notaries (up to 100.000 Euro), according to Article 23, n. 1, m) of the Statute of the Notary, the buyer is protected (unless the value of the property is higher than the insurance).

⁷⁶ The tenant has a statutory pre-emption right (Article 47 of Urban Tenancy Law). The seller is under legal duty to inform the tenant about the terms of the sale once the sales contract has been agreed. Then the tenant is in position to exercise his right of pre-emption. The tenant cannot waive his right of

Tenant rights cause few problems in practice, since the tenant always occupies the property; and normally, the buyer has visited and examined it before deciding to buy it, so he is aware of the existence of the contract.

3.5 Defects and Warranties

Restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract, are supposed to be known by everybody. It is commonly understood that the buyer acquires the property with the corresponding legal regime, although it might imply a constraint on his powers.

If the property has a defect that causes a depreciation on it or prevents the fulfilment of its function, or does not have the qualities granted by the seller, the acquirer has to give notice⁷⁷ of the defect within a year after the acknowledge of the defect and within 5 years of the conclusion of the contract.

Concerning a defect of title or defects affecting the quality of the property, the buyer has the following legal rights against the seller:

- To have the property repaired (914 CC) – this duty does not exist if the seller did not know the defect of the thing;
- reduction of the price (911 CC);
- rescission of the contract (Article 905 ex vi 913 CC);
- compensation for damages incurred (if the seller is responsible for the defect).

The seller is liable. If he had intentional fault, he has to compensate the acquirer for damages that he would have not suffered if he had not concluded the contract; if there was mistake, he is liable only for damages resulting from the contract (Articles 908 and 909 CC). This rule is default (Article 912).

There is a customary expression that we can find in the notary deeds: the property is transmitted “*livre de ónus ou encargos*”. It means that the property is transmitted without any charges.

The buyer is not liable for arrears of the seller regarding real state taxes, or other kinds of taxes. The same applies to charges for garbage collection, water and gas delivery, or charges for the administration of condominium apartments.

3.6 Administrative Permits and Restrictions

pre-emption before the sales contract has been concluded. Afterwards he may wave his right.

⁷⁷ Except if there was intentional fault of the seller (Article 916 CC).

The need of a using permit [*licença de utilização*] is stated in Articles 4 and 62 of the Law 555/99, of 16.12 – Legal Regime on Urban Occupation [*Regime jurídico da urbanização e da edificação*].

If a preliminary contract for the acquisition or constitution of a real right over a dwelling (Article 410 ff of the Portuguese Civil Code) is concluded, the notary must certify the signature of the parties and the existence of a permit of utilization or construction of the house. However, the party that promises to sell or to create the real right can only invoke the non compliance with these requisites when it was due to the other party fault.

For the notarial deed, it is necessary to exhibit the using License (*Licença de Utilização*) issued by the local Town Hall certifying that the property is licensed for use. Articles 1 and 2 of the Decree-Law 281/99, of 26.07, state that no public deed regarding urban buildings can be sign without the using licence.

The tenant has a statutory right of pre-emption, for the apartment or the all building if the subdivision into apartments was not made yet.⁷⁸

Article 27 of Land Law states that administrative authorities can have a pre-emption right in transmissions of land or buildings, between private persons, when the land or the buildings are located in areas needed for the expansion, development or renovation of urban areas, or for the execution of any other undertaking of public interest, according to the correspondent planning law instrument. This is a special kind of pre-emption right, the so called *direito de preferência urbanística*; although the public authority exercises the pre-emption right, it may declare that it does not accept the price agreed by parties and pay the price it would have to pay in case of a public taking (Article 28).

The compliance with the legal pre-emption rights is checked by the notary.

3.7 Transfer Costs

Transfer costs are responsibility of the purchaser.

Notary fees are payable at the Public Notary for drawing up and witnessing the signing of the deed, and are due on the date of the signing.

- Sale and Purchase: €175 (Article 20.1.1. of Decree-Law 322-A/2001);
- Fees for Central Registration: 9 (Article 20.1.6. of Decree-Law 322-A/2001)
- Certificate of the deed: 5 euros (the first)

The cost of registration of the purchase is €125 (Article 21.2.1. of Decree-Law 322-A/2001) .

On what concerns transfer taxes, firstly, the acquirer has to pay the Property Transfer Tax (IMT).⁷⁹ It is paid in the Tax Office, before the deed. The amount paid is based on the

⁷⁸ For condominium of apartments, Article 1423 CC excludes the existence of a pre-emption right (it does exist for joint ownership) in favour of the co-owners; the co-owners in their regulation cannot set the requirement of the consent by the manager or by the co-owners to any transfer of ownership.

⁷⁹ This one-off tax, known as IMT (Imposto Municipal sobre a Transmissão Onerosa de Imóveis), was introduced in 2004, to replace the existing SISA tax system.

Taxable Value of the land or the transaction price, whichever is higher. Usually the purchase price is the higher of the two. The tax rate applicable depends on the type of property in question:

- Urban property for residential use (villas & apartments) - ranges from 0% to a maximum of 6% of Taxable Value or the transaction price, whichever is higher, using a sliding scale which changes annually. The table below gives the current formula for calculating the IMT tax payable on these properties.

Purchase Price	Tax Calculation
Up to €100,000	Exempt
€100,000 to €137,500	Price x 2%
€137,500 to €187,500	Price x 5%
€187,500 to €312,500	Price x 7%
€312,500 to €625,000	Price x 8%
More than €625,000	Price x 6%

- Urban properties not for residential use such as office spaces and other commercial property - taxed at the rate of 6.5% of purchase price.
- Rural property – taxed at the rate of 5% of purchase price.
- Urban land plot for construction - 6.5% of purchase price.
- If the purchaser is domiciled in 'tax haven' territories, the rate is fixed without exemption, at 15% of the purchase price.

Before conclusion of the contract, the notary requires a document of the tax authorities certifying that IMT has been paid.

Secondly, the acquirer has to pay the Stamp Duty.⁸⁰ The notary is required to collect and withhold the tax.

For the deed – 25 Euros (Article 15.1.1.);

0,8 % of the right inscribed in the title (for a sale of 100 000 Euros – 800 Euros; for a sale of 300.000 Euros – 2400 Euros)

0,6% of the value of the mortgage.

Maybe some 90% of real estate sales among consumers are arranged by real estate agents.

The agents usually charge 3 to 5% of the real estate price, and it is, usually, paid by the seller.

⁸⁰ Stamp Duty Code: Law 150/99, 11.09

3.8 Buyer's Mortgage

Very frequently, the buyer finances a part of the price (up to 80%) through a mortgage.

As it was stated above, when the payment is financed through a mortgage loan, both the notarial acts of sale and of mortgage are usually signed at the same time. The bank therefore pays the loan's amount during the notarial act, even if the mortgage is not yet definitively registered.

The non-existence of serious risks, due to the provisional registration in the Land Registration Office, removes any important security problems for the buyer and the bank. For this reason, insurance guaranteeing the buyer against any risks stemming from the sale are absolutely non-existent.

In case some previous mortgages might be cancelled, the presence of the representative of the bank that granted the initial loan be present at the signing is required, so that he can collect the amount left to be paid and cancel the mortgage loan.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

The contract has not binding legal effect. For a legally bounding preliminary contract (*contrato-promessa de compra e venda*) for the acquisition or constitution of a real right over a dwelling:

- It has to be signed by the parties;
- the notary must certify the signature of the parties and the existence of a permit of utilization or construction of the property.

4.2 Seller's title

4.2.1. Consequences of an invalid Sales Contract

A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

- a) because it lacked the required form;**
- b) because A did not possess legal capacity;**
- c) because an administrative permit required for the contract has never been applied for.**

May C go ahead with the contract and acquire the property validly?

If the contract lacked the required form, it is void. B is not the owner and therefore he cannot sell the property.

Situations b) and c) might not happen in Portugal, because the notary has the duty to check both the legal capacity of parties and the existence and validity of required administrative permits.

4.2.2. The Seller is not the owner

A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

In the situation where A is not the true owner of the property sold to B, and this information is found out before the notarised deed is drafted, the project for sale cannot be continued. Title in the property is one of the conditions for concluding a contract of sale; without it the sale cannot be signed.

As I mentioned above, the notary must check if the real estate is registered in favour of the seller. According to Article 54 CN, a notarial instrument aiming to transmission and creation of a real right may only be done if the property is inscribed in name of the seller, in the Land Registration Office.⁸¹

4.2.3. Execution against the Seller

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

Are there risks for the buyer (e.g. to lose his payment)?

How may the buyer be protected (e.g. in drafting the sales contract)?

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According to Article 600 CC, for the fulfilment of his obligations, the debtor is responsible with all of his assets. Article 817 CC states, as a general principle, that if the debtor does not comply with his duties, the creditor can demand judicially its compliance and execute his assets.

After the signature of the sale contract, before the notary, the buyer is the owner. Hence, he is protected against distraint on the property. If the property has been sold and it is proven that the property has passed to another person, the creditor cannot seize it, because it no longer belongs to the debtor. Only if the creditor had claimed the credit before the sale and registered the seizure at the Land Registry, before the buyer had registered his acquisition, he is protected. In this situation, the buyer does not receive any protection as the claim is prior to his purchase, and registration of the seizure in the Registry had made the encumbrance of public knowledge.

4.3 Payment

4.2.1. Delay in payment

The buyer pays late. What are the seller's remedies?

May the seller rescind the contract?

Does the buyer have to pay a (statutory) penalty or is he liable for damages?

After the transfer of ownership, and the delivery, the seller cannot rescind the contract by delay in payment, except if parties have agreed on the contrary (Article 886 CC).

If the acquirer does not comply with the obligation of payment, the creditor can judicially

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⁸¹ Although the registration in the Land Registry is not constitutive nor does it validate material or formal defects on titles, it does protect the buyer on good faith against possible cancellations of his transferor's title (Article 17 CRPre).

proceed against the debtor and execute his assets.⁸²

Buyer is liable for damages. If payment was due on a fixed date, then liability arises even if seller did not send a reminder. Otherwise, seller has to remind buyer before he can claim damages for the delay. As a minimum damage, seller may claim statutory interest for the delay (Article 806).

Because the deed is a notarised document, it does have executory power, that is to say it offers the possibility of enforcing the obligations resulting from the contract, such as the payment of the consideration for example, without needing a court judgement to confirm the debt.

4.4 Defects and Warranties

4.4.1. Misrepresentation

Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.

In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.

An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

For which of these defects is the owner liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is at the date of the conclusion of the contract? What are the buyer's remedies?

For the defects, please see 5.1.1.

For the building permission, see 3.6.

4.4.2. Destruction of the house

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

May the buyer rescind the contract or does he have to pay the purchase price?

May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

Risk lies with the property owner. If the property is destroyed before the sale, delivery is impossible and the sale cannot be concluded. On the other hand, destruction after the sale is signed has no effect on the relationship between the parties: the buyer must assume this loss.

⁸² Article 817 CC.

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According to Article 796 CC, in the contracts for transmission of property, the risk for destruction or damage on the thing runs for the acquirer, if there is not fault of the seller.

5. Sale of a house or apartment by the building company (vente d'immeuble à construire/Bauträgervertrag)

5.1 Statutory Basis

If the seller also constructs the house which he is selling, the seller is responsible in the same extent as a developer (*empreiteiro*). This legal solution, that is to say, the equivalence of regimes, was implemented by Decree Law 267/94, of 25.10. It clear aimed at increasing consumer protection, *rectius*, the acquirer protection.

According to Article 1225, when the seller has also constructed, repaired or modified the building, he is liable for damages, during five years,

if the damages are caused by defects of the soil;

if the damages are caused by defects of the construction, modification or reparation;

if the works were not correctly made,

if the building ruins totally or partially or has defects.

Notice might be given within one year after the knowledge of the defect and compensation might be asked within one year after that.

5.2 Procedure in general

5.2.1. Single houses

Please describe the procedure for a standard contract: A construction company (the „builder“) buys a large piece of land and splits it up into several small parcels. On these small parcels, it plans to build town houses. Now, the builder sells the small parcels with the houses (which have not yet been built) to several buyers. Let us assume that all the buyers are consumers, and that the builder uses his own standard contract terms.

The obvious advantage of buying at this stage is that the prices are usually well below the final finished property value. Another advantage is that the purchaser can often arrange with the seller to make some changes to the property layout and/or to the finishes, which is not possible with a ready-built property.

According to Article 408 CC, a contract of sale of a future property⁸³ has only contractual effects; so, in the situation described, if a sales contract was concluded, the transfer of ownership would only occur when the building would be already finished. So, a contract of sale is not a suitable solution. As so, we might figure two situations out:

1 – The builder and the buyer can conclude a normal promise of sale and purchase of the land and the building.

⁸³ A property is to be considered as future if it does not yet exist, or if it already exists but the seller is not the owner at the time.

As the transfer title may only be concluded when the house is build, which may be quite some time in the future, the promise of sale and purchase contract is of even greater importance than for finished properties. The identification of the building permit (*Alvará de Construção*) obtained from the local Town Hall is mandatory (Article 410, 2 CC). Some additional clauses are common, including;

- A copy of the plan of the specific property (villa, apartment or plot of land), with the description of the materials to be incorporated and equipments to be installed;
- Due dates for completion of construction and for the signing of the public deed are specified, as well as any agreed penalties in the case of delay.

With the signature of this contract, a dawn payment is made (10-15%). During the construction, no further amounts are demanded in many cases. When the payment of some additional amount is agreed upon, the conditions for these stage payments might be described in the contract (for instance, according to the state of the house).

2- The buyer can buy the land and conclude a contract with the construction company to build the house.

This undertaking (*contrato de empreitada*) is the best solution for the buyer:

- firstly, he gets ownership of the land (and can mortgage it to get a loan);
- secondly, the price of the house might be paid in the moment of the acceptance of the building (Article 1211, 2 CC);
- thirdly, article 1212, 2 CC, states that in case of a contract of development for construction of an immovable, if the land belongs to the owner of the building, the materials will also belong to the owner after their incorporation in the soil (even if they are provided by the developer).

Construction by cooperatives companies might also be mentioned. The cooperative purchases the plot and pays the costs of the construction; the members pay a fee every month. At the end, the cooperative (the owner of the building) is dissolved and the constructed dwellings are distributed among its members. Usually, this system is used for the construction of subsidized housings.

5.2.2. Condominiums

Let us assume that the builder does not sell a single house, but an apartment in a condominium which he is planning to build. Are there any differences as compared with the previous case?

If the builder is planning to build a condominium, the legal proceeding would be as follows:

- First, the builder would ask for a provisional registration of the constitutive title of the condominium. This provisional registration remains in force for three years.
- Thereafter, parties would conclude the promise of sale and purchase;

- After the termination of the building, the builder would require the conversion into definitive of the provisional registration (only after that title transfers for the individual units can be signed).⁸⁴

- Lastly, the contract of sale is concluded.

5.2.3. Renovation

Another variation: Let us assume that the builder has bought an old house which he wants to renovate and split up into separate apartments. He sells the apartments before completing the renovation. What, if any, are the differences as compared with the first and second case?

The builder cannot sell an apartment before the constitutive deed of the condominium is registered.

However, he can create the condominium (that is to say, split up the single house), and sell the separate apartments before the completion of the renovation. In this case, liability under Article 1225 CC applies. However, I would recommend the acquirer to sign a promise of sale and to wait for the completion of the renovation works before signing the public deed of transfer of ownership.

5.3 Conclusion of the Contract

The conclusion of the contract must be in written, according to the new regime of construction activity (Article 29 Decree-Law 12/2004, of 9.01).⁸⁵ The contract must mention:

- the complete identification of parties;
- identification of the licences;
- identification of the property (including a copy of the plan of the specific property (villa, apartment or plot of land);
- value of the contract;
- due dates for completion of the building;
- payment conditions.

If the contract does not comply with these conditions, it is void (Article 29, Decree-Law 12/2004).

⁸⁴ When the construction of a development is completed, the developer applies to the town Hall to inspect the property, to ensure that it conforms to the approved plans and other statutory regulations. The result of this inspection, provided it is positive, is that the Town Hall issues a license of use (*licença de utilização*) of the property. Without this license the notary will not make the public deed.

⁸⁵ Some other formalities related with the construction company have to be complied with; for example the identification of the company and the number of its registration in IMOPPI (Article 24, n. 2 of Decree-Law 12/2004).

5.4 Payment

5.4.1. Payment date

See 5.2.1.

This contract is not directly enforceable without the intervention of a court. Therefore if the acquirer does not pay, the developer has to follow the two phases of the judicial procedure: condemnation and execution.

5.4.2. Acquisition of Ownership

See 5.2.1.

5.4.3. Building

See 5.2.1.

5.4.5. Financing of the Buyer

How can the buyer finance his purchase? (e.g. Can he set up a mortgage on his future property? From what moment on? How is his mortgage related to a prior mortgage granted to the construction company? Do the banks have special duties of care when granting loans secured by a mortgage to the construction companies (because a future buyer may thus be prevented from taking up a loan on the parcel bought from the company?)

Proceeding 1 – If parties agree on signing a promise of sale, the buyer might need credit to pay the down payment; this for this credit banks usually ask for a personal security (from the borrower or from a third party). To lend the purchase price, the bank will ask for a mortgage of the property.

Proceeding 2 – If the construction company sells the land and concludes a contract for the building of the house, the acquirer can mortgage the land to get a loan from the bank and finance the building of the house.

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

The content of the contract is mandatorily established by law. See 5.3.

5.5.2. Late Termination of the Building

The contracts usually provide for an exact date, when the building must be completed. It is often distinguished between the completion for immediate occupation and the completion of the facilities outside the building. In case the seller does not perform his obligation in time, the buyer may claim damages for the delay (Article 804, ICC) or even rescind the contract (Article 808).

5.5.3. Material Defects

The buyer shall verify if the work respects the conditions agreed upon and to check if the house has no defects before the acceptance of the building (Article 1218 CC). This examination shall be done in the usual time or if there is no usual time, in a reasonable time and it may be done by specialists, on one party requirement. No examination implies acceptance of the work or of the building.

The developer is not responsible for the defects of the work, if the acquirer knew them and accepted the building without reservations (Article 1219 CC). The visible defects (*defeitos aparentes*) are presumed to be known, even if there were no examination of the works.

The acquirer can claim for the elimination of the defects; or if they cannot be eliminated, the acquirer can demand a new construction, except if the costs are not proportional (Article 1221 CC).

Article 1222 CC provides that if the building is not repaired or reconstructed, the acquirer can demand a reduction of the price (Article 884 CC) or the rescission of the contract, if the defects prevent the building to be used for its normal function.

According to Article 1223 CC, the above mentioned rights do not exclude the right to compensation for damages.

The developer is responsible and has the right of redress against the companies commissioned (Article 1226 CC). The right of redress expires if the developer does not communicate to the companies commissioned within 30 days after the reception of the notice of the defect.

5.6 Builder's Insolvency

5.6.1. Unfinished Building

Let us suppose that the buyer buys an apartment on the third floor of a building yet to be built and that the builder goes insolvent after completing the basement. Is there any protection for the buyer?

In compliance with the ordinary law of bankruptcy, the buyers retain the possibility of calling in their debts. The success of this approach, however, depends on the existence of assets on the part of the seller.

5.6.2. Repayment

Let us suppose that the buyer rescinds the contract because the builder is late in finishing the building and that there are many material defects in the already completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

If there is rescission of the contract, parties have to give back everything they have received. In respect of the instalments already performed the buyer may demand repayment. But if the assets of the seller are insufficient, he is in no better position than any other creditor.

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

The Rome convention of 19 June 1980⁸⁶ applicable to contractual obligations applies to contracts for the sale of real property. Therefore, if the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. To the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is located (*lex rei sitae*).

6.1.2. Formal Requirements

Article 9 of the Rome convention determines which law is applicable to formal requirements of a contract.

A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under the Convention or of the law of the country where it is concluded (n. 1).

However, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property located if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract (n. 6).

6.2 Real Property Law

Possession, ownership and further real rights on real properties are regulated by the *lex rei sitae*. Article 46, n. 1 CC provides:

“O regime da posse, propriedade e demais direitos reais, é definido pela lei do estado em cujo território as coisas se encontrem situadas.”

6.2.1. Formal Requirements

Formalities of land registration always follow the place where the property is located; therefore, registration of a property must be made in the competent Portuguese Land Registry Office, in compliance with Portuguese law.

Nonetheless, is it possible to register the transfer of real property in a Portuguese Land Register Office also when the act of transfer has not been celebrated in Portugal.

In order to be accepted in the Land Registry, documents written in a foreign language must be

86 Approved by Resolution of the Parliament 3/94, and entered in force in 01.09.94.

translated, according to the Notarial Code (Article 43 CRPre).

Documents written in a foreign language can be accepted in a Portuguese Notary, without any official procedure, if they come together with translation (Article 44, n. 3). If the Notary has serious doubts about the authenticity of the document, a judicial procedure has to be followed with.

It has to be mentioned that a notarial deed can be done in a foreign country, in a diplomatic office (*Agentes consulares competentes*); they are registered in the Central Land Registry (*Conservatória dos Registos Centrais*), according to Article 206 CN.

6.3 Restrictions for Foreigners to acquire Land

In Portugal, there are no restrictions for foreigners to acquire real property⁸⁷ and **no** additional permits are required for foreigners acquiring real property.

However, if there is suspicion of money laundering, Law 11/2004, of 27.03, imposes special duties of communication on credit institutions (Article 7); real estate agencies (Article 20, b)); notaries and registers (Article 20, f)), tax office staff (Article 31.^o).⁸⁸

6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider to transfer the ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties. What way do you recommend – or what is considered to be the best practice?

Even if it may be possible for a couple to conclude the contract abroad, in a Portuguese diplomatic agency, it might be better to conclude the contract in the country where the real estate is located, with the help of a local lawyer or someone on their behalf (also because registration has to be done in a local Land Registry Office where the building is located). Therefore a notarial power of attorney would be necessary.

⁸⁷ Property purchases in Portugal can be completed effortlessly and in absolute security, as the law covering property transactions is very specific and complete. When used effectively, this law represents a very powerful tool to protect both buyer and seller in any property transaction.

The easiest way to effect any payments is to open an account with a local bank; this is a very simple procedure, and only nominal amounts are necessary to open the account initially. Many local banks have offices in other European capitals.

Non-residents have the option to open either a normal or an offshore account. The offshore option allows tax-free interest on fixed deposits, as well as multi-currency accounts.

The transfer of funds is then simplified. A SWIFT transfer can be done from a bank (in the foreign country) to the local account, and money should arrive in a few days. Most banks now have an internet banking facility, which is especially convenient for payment of utilities and services after the completion of the transaction.

⁸⁸ Communication must be done to the Attorney-General's Office [*Procurador Geral da República*].

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

Securities (*garantias reais*) can be classified as general or special securities. General securities are those which are attached to all the debtor's assets including his real property. They must be provided for by statute; Portuguese law does not allow anyone to bind all of his possessions by contract (Article 716 CC). Special securities are attached to specific goods.

A secured debt consists of giving the creditor a right of preference that will enable him to be paid on the sale price of the property with priority over other creditors. The right of preference is one of the essential elements of the mortgage. The creditor who benefits of the mortgage is paid prior the debtor who does not hold a mortgage. If there are several mortgagees, their debts paid according the order of registration (their rank). Rank is determined by the date of the request for land registration. A creditor with priority rank had his right registered before a second rank creditor, and he is paid before him.

A security involves the right to be paid by the value of the property attached to the security, even if it is not owned by the person who consented to it. This is the creditor's right to pursue the debt, the so-called "sequela" (*droit de suite*).

The debt can be future or under condition (Article 686, n. 2, CC)

Rent Assignment (Consignação de rendimentos) (Articles 656 to 665 CC) – secures the payment of a debt, by the profit of immovables or movables subject to registration. It can secure the payment of the debt and the payment of interests or only the payment of one of them. This security right can last for a certain number of years or until the total payment of the debt. When the object is the rent of an immovable property, this right cannot last more than 15 years (Article 659). It is created by a public deed and is subject to registration (Article 660).

Pledge (Penhor) (Articles 666 to 685 CC) – secures the payment of a debt, by the value of a movable thing or of a right.

Mortgage (Hipoteca) (Articles 686 to 732 CC) – secures the payment of a debt, by the value of an immovable property.

Privilege (privilégio) – the law allows some creditors to be paid with precedence, considering the nature of their credit. Privileges are always legally stated and they are not subject to registration. (Articles 733 to 753 CC)

Lien (Direito de retenção) (Articles 754 to 760 CC) – the debtor that has a credit against the creditor and is obliged to give back something, can retain that thing if the credit is due to

expenses with the thing or losses caused by the thing. For example, the transporters might retain the transported things if the transport is not paid.

Depending on their sources, securities can be:

- created in a contract between the creditor and the debtor, or a third person acting as guarantor [*direitos reais de garantia de origem legal*];
- are given directly by statute because of the person or the debt: privileges and liens [*direitos reais de garantia de origem legal*].
- granted by a court order [*direitos reais de garantia de origem judicial*].

A distinction can also be drawn between securities subject to registration or not.

Privileges are a type of mortgage created only by statute and which take precedence over other types of mortgage; their rank is independent of the date of registration.

A mortgage can secure an obligation which already exists, but which amount is unknown: for example, the obligation to pay interest agreed at a variable interest rate; in this situation, the criterion applicable to the assessment must be clearly determined (e.g., the official exchange rate on the expiration date).

A mortgage does not grant its holder the right to acquire the object. According to Article 694 CC, it is forbidden to establish that in case of non-fulfilment the creditor would have the right to acquire the granted property (the so called agreement from the *Lex Comisoria*). The sale of the mortgaged object is made by means of an auction ordered by the court, and cancels the debt with the money obtained from it.

If there were still some money left, it should be given to the debtor (or to other eventual creditors demanding it). And if the money obtained from the sale is not enough to pay the debt, the creditor has the right to demand to be paid against other properties of the debtor (as an ordinary creditor).

Mortgages are *ius in rem*. They entitle the creditor to enforce payment of a claim of money from the real estate, and they are effective towards third parties, up to the maximum secured amount: if any other person purchases the mortgaged property and the debtor fails to pay the debt, the creditor may ask the sale of the property by court order, and through an auction.

If more money than the amount secured is obtained, the rest shall be paid to the future purchaser of the property. And if the final debt is less than the maximum secured amount, the rest shall also be given to the purchaser. Furthermore, the purchaser must be summoned to appear during the legal proceedings of mortgage foreclosure and may stop the sale ordered by the court order by paying the debt up to the maximum mortgage secured amount.

The so called “mortgage of the owner”, which is created and exists as independent from a particular obligation, does not exist in Portuguese Law. A mortgage is necessarily attached, accessory, to the secured obligation: it can only exist if the obligation already exists. Once the secured debt is paid, the mortgage is automatically deemed inexistent (even if it is not cancelled in that moment at the Land Registry), so the mortgage can not be used again, to secure another debt. The reason for this is that any possible purchaser of the property shall

thus be able to know exactly what charges encumber it: which precisely is the secured obligation.

If there is a usufruct over the thing mortgaged, and then it terminates, the mortgage extends to all property as if the usufruct had never existed. If the mortgage was over the right of usufruct, and the usufruct terminates, the mortgage expires (Article 699 CC).⁸⁹

7.2 Setting up a mortgage

To establish a security right over real property owned by the debtor, the bank starts by making a preliminary assessment of the economic situation of the debtor, the economic value of the land and the amount of the loan.

According to this assessment, the bank makes a proposal of loan to the future acquirer. If the future acquirer accepts the proposal, the next step will be to provide the bank with all necessary documentation and apply for the provisional registration of the mortgage; it is grounded on a declaration of the owner, and his signature has to be done before the functionary of the Land Registration Office or to be certified by a Notary (Article 47 CRPre). It is a registration provisional de per se (Article 92, 1, I).

The loan of more than 20 000 Euros must be done in public deed (Article 1142 CC). The contract creating the mortgage is a formal contract which must be duly certified by notarial deed according to Article 80, n. 2, g), CN and 714 CC.⁹⁰ So, the loan and the mortgage will usually be signed in the same notary deed and at the same time.

Once the contract is signed, the security must be registered at the land registry office.

The inscription of the mortgage might contain (Article 93 CRPre):⁹¹

- a letter C, because it is a mortgage;
- the number and date of the application for registration;
- the mortgage to be inscribed;
- the identification of the parties of the mortgage (name, address, marital status).

In particular, an inscription of mortgage might also contain (Article 96 CRPre)

- the cause of the mortgage;
- the credit, the accessories, and the maximum amount secured. If it derives from documents that interests have to be paid and parties did not agreed upon the rate, the legal rate is applied by default (Article 96, n. 2)

The validity and enforceability of the mortgage result from its registration (Article 687 CC and Articles 2, n. 1, h) and 4, n. 2, CRPre). The date of registration determines his rank in the

⁸⁹ Applies to pledge (Article 678 CC) and to privileges (Article 753 CC).

⁹⁰ According to Article 714 CC, the constitution or modification of a mortgage must be done in a public deed.

⁹¹ The registration of a mortgage created by law or by a court order is grounded on a certification of the title that gave rise to the guarantee and a declaration with the identification of the thing, if necessary (Article 50 CRP).

order of payments (Article 686, 1 CC). Article 6, n. 3, CRPre, states that the definitive registration takes the priority of the provisional registration. However, inscriptions of mortgages with the same date have the same rank and they are concurrent at the proportion of the credit (Article 6, n. 2).

The costs for a mortgage are:

Notary fees:

- Mortgage: €142 (Article 20.1.6. of Decree-Law 322-A/2001);
- Fees for Central Registration: 9 (Article 20.1.6. of Decree-Law 322-A/2001)
- Certificate of the deed: 5 euros (the first)

Registration fees:

- Registration of mortgage: €135 (Article 21.2.3. of Decree-Law 322-A/2001).

Tax fees:

The Stamp Duty⁹² is collected and withheld by the notary. It consists of_

- For the deed – 25 Euros (Article 15.1.1.);
- 0,6% of the value of the mortgage

7.3 Causality and Accessoriness

If the loan contract is invalid, the mortgage is affected, although it complies with all other requirements.

As it has been said, mortgage is legally attached to the secured loan. Therefore, if the loan is null and void, so shall the mortgage be also null and void, or rather, inexistent (Article 730 CC).

Unless parties agree differently, the mortgage is indivisible; it remains integrally over the burdened thing, even if the debt is partially paid (Article 696 CC).

7.4 Enforcement and other rights of the bank

The bank must go to court in order to make the mortgage enforceable. The procedure used is nearly always the judicial enforcement, and normally lasts for 1 or 2 years, depending on the speed of the enforcing courts and of the hindrances the debtor might place.

7.5 Overriding interests and priority

About distribution of proceeds, see 7.1.1.

⁹² Stamp Duty Code: Law 150/99, 11.09

There are two exceptions to the priority principle to be mention: privileges and lien.

Privileges are charges imposed by statute in favour of privileged creditors, such as State (for expenses with judicial procedures referred to the land) or local authorities (property taxes). They are not subject to registration and they prevail over mortgages.

Also the lien prevails over the mortgage even if the mortgage was registered first (Article 759, 2). Publicity to the lien is given by the possession of the thing. The rightholder of the lien is always someone that has possession of the thing.

7.6 Scope of the mortgage

7.6.1. Buildings

As a general rule, a mortgage on a real estate encompasses *ipso iure* a house already built on it and all new constructions.⁹³ A separate mortgage on a building is possible only if there is separate ownership of the building.

7.6.2. Machinery

According to Article 691 CC, if there is a mortgage of a factory, the mortgage extends to its assets such as machinery and movables, even if they are not considered a component part of the immovable. The owner of the factory cannot sell or take these elements without the consent of the creditor.

According to Article 96, n. 1, CRPre the inscription of a mortgage over a factory might contain:

- the cause of the mortgage, the credit and its accessories and the maximum amount secured;
- the list of the machinery and the movables used for the industrial activity, when they are comprised in the mortgage.

7.6.3. Insurance

If the mortgagee notifies the insurer about the mortgage, the insurer may pay to the owner only with the consent of the mortgagee (Articles 692 and 702 CC).

7.7.4. Right to redeem

The security agreement spells out under which conditions the mortgagor may redeem the mortgage. He has a statutory right of redemption, if all the claims secured have been paid.

According to Article 56, the cancellation of the registration of the mortgage is grounded on the consent of the creditor (laid down on a notarised document).

7.7.5. Redemption after foreclosure

⁹³ Parecer da Procuradoria Geral da República, of 23.1.1967 (BMJ, 177, p. 97 and ff).

The mortgage terminates when the secured credit is extinguished (Article 730, a) CC)

Someone who acquires the mortgage thing, and registers the title of acquisition, but is not personally liable for the secured debt, may redeem the mortgage paying integrally the debts (Article 721, a) CC).

The mortgage can be reduced, at will or by judicial order (Article 718 CC).⁹⁴ The judicial reduction is admitted:

- if the debt is reduced to less than 2/3 of the initial amount, due to the partial compliance or another reason for expiration;
- if, because of accession caused by nature, or improvements, the value of the property increased more than 1/3 of its value since the mortgage was concluded.

The reduction is possible even if the mortgage is over a single property, if it is susceptible of division (n. 3).

On the contrary, the creditor may enforce his right against the acquirer of the property if, by his fault, there was a diminution of the security of the credit (Article 725 CC).

7.8 Security granted by a third party

The mortgage provides the creditor with the right to be paid on the value of an immovable property, belonging to the debtor or a third party, with preference over the other creditors that do not have a special privilege or a registration with priority (Article 686 CC). It derives from the definition of mortgage that it is possible to be established by a third person.

It is possible and frequent that the bank gives one person a loan, which is secured by a mortgage established by another person. The non-debtor mortgagor has the right to prevent the execution of the mortgage paying the debt up to the secured amount.

According to Article 698 CC, if the mortgage is granted by a third person, he can use all the legal remedies against the creditor, even if the debtor is not planning to make use of them. For example, he can deduce opposition to the execution when the contract between the creditor and the debtor is voidable.

7.9 Plurality of mortgages

A second mortgage can be set up and registered without consulting the owner of the first mortgage. However, in a foreclosure procedure, the first mortgage has priority.

According to Article 713 CC, the owner of a mortgage property can set up a second one mortgage; if one of them extinguishes, the property will secure integrally the rest of the debts.

⁹⁴ According to Article 719, the reduction of a mortgage is subjected to the same regime as the renounce to securities.

The creditor ranked in second place can only be paid after the complete payment of the first credit mortgagee.

If the loan of the first mortgage has been repaid, the second mortgage gets the better rank. The second creditor may ask the owner to cancel the first mortgage,⁹⁵ if the owner has paid the underlying debt and therefore has acquired the mortgage.

Mortgages can be of equal ranking, if it has been agreed upon and if it is registered so (Article 6, 2 CRPre)

The rank of mortgages can be altered by agreement of the parties involved and registration (Article 729 CC).⁹⁶

7.10 Several properties

Mortgage on more than one property is not uncommon. The creditor with mortgage over more than one property can only transmit it to the same person and in its totality (Article 727, 2 CC).

7.11 Transfer of the mortgage

According to Article 727, the mortgage that was not concluded *intuitus personae* [*que não for inseparável da pessoa do devedor*] can be transferred without the secured debt,⁹⁷ to secure another debt of the same debtor to a different creditor; following the rules of credit assignment [*cessão de créditos*].

If the property belong to a third party, her consent is necessary.

A mortgage may not be split up and be only partially transferred. Article 696 provides that, except if parties agree differently, the mortgage is indivisible; it remains integrally over the burden things, even if the thing or the credit is split or the credit is partially paid.

7.12 Conflict of Laws Issues

⁹⁵ The registration of a cancellation is made by an adding to the inscription of the mortgage (Article 101, 2, f) CRP).

⁹⁶Its registration is done by an adding to the inscription of the mortgage (Article 101, 1, c) CRPre).

⁹⁷ The cession of the mortgage is registered by an adding to the inscriptions of the mortgage (101, c) CRP)

The mortgage will always be subject to *lex rei sitae*. The loan may be subject to another law, provided that it has a link with the legal relationship.

The law applicable to the loan contract is the law chosen by the parties. In accordance with the provisions of the Rome Convention, “contract shall be governed by the law chosen by the parties”. If there is no express or implicit choice by the parties, “the contract shall be governed by the law of the country with which it is most closely connected”. It is presumed that the contract is most closely connected with the country where the party obliged to supply the qualifying service has his main place of business or if the service must be provided by a secondary place of business, the country where this secondary place of business is located.

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Annexes

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