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Legal aspects of buying residential property in Portugal

Synopsis

Portugal has a rich seafaring past and is one of Europe's well-preserved gems with its land of traditional villages, vibrant and tech-enabled cities, and a countryside strewn with historical treasures. A member of the European Union ("EU") since 1986, Portugal is one of the most cost-effective countries to live in Europe.

Portugal has long been a destination for foreign second-home buyers. During the last decade Portugal has experienced increased investment into residential real estate by expats and in recent years increased investment into commercial real estate by institutional investors.

Legal framework of real estate in Portugal

A member of the European Union (“EU”) since 1986, Portugal is one of the most cost-effective countries to live in Europe. The country is robustly equipped with a well-developed infrastructure network and a globally competitive workforce.

Portugal’s free market allows foreign individuals and companies to acquire, hold, or sell a property in Portugal without any restrictions. When acquiring property in Portugal foreign individuals and companies are afforded the same rights as Portuguese citizens.

Property ownership rights are well protected and regulated by law. Issues regarding real estate in Portugal are governed by Portuguese law alone.

Rigorous control is enforced on new construction and refurbishment of properties, in line with the long-term goal of retaining architectural unity or avoiding the overdevelopment that has blighted other parts of Europe.

In Portugal, the right attached to real estate is classified as a right in rem. It means the right is associated with a particular property rather than a person. The owner will always have an absolute right over the property and a tenant will solely be a party to a rent/lease agreement.

Portuguese Land Registries are organized locally and supervise the registration of ownership, title, description of properties, charges, encumbrances or liens, mortgages, and third-party interests.

Key aspects

Portuguese law differentiates between greenfield sites and urban property. A given property serves as a greenfield site (rural property) or as an urban property in accordance with the registered use on the Land Registry, in line with State land management and urban planning policies. These policies are key in determining whether a greenfield site can be converted into an urban property and be built upon. A single property may be divided internally in an urban property and a greenfield site.

Subdivision of land for construction purposes is subject to prior authorization. Furthermore, the construction of a building, its modification or demolition can only take place under a license granted by the City Hall. However, this license may not be required for modifications to the inside of a building or part thereof, if they do not entail any modification to the building's main structure, roofing, or façade. Licensing is always required if historic buildings or buildings of historical importance are involved. Applications for such a license must include an architectural plan as well as all additional legally required plans.

Where the license was applied for on behalf of a specific person or entity, and this person or entity transfers ownership of the property to a third party, an amendment to the application must be requested, so that the license can be issued to the new owner.

In Portugal, apartments are generally sold under the Propriedade Horizontal (Commonhold or Condominium) regime. The regime applies to apartments that meet the requirements to be considered independent units sharing a separate entrance to common areas of the building or directly to the street.

Unitholders will be the exclusive owners of their apartments and co-owners of the common parts of the building. In a block of apartments or building, common parts usually include the ground, roof, entrance hall, stairs, gardens, parking areas, and swimming pools. The maintenance of the common parts of the building, mandatory fire insurance, security services, and other common expenses are paid by the unitholders in accordance with their units' percentage value. A common fund is generally set up to face these expenses.

Conveyancing in the residential property market

Conveyancing can be substantially more complex in Portugal than in common law jurisdictions, given the many steps involved in the transfer of the ownership of a property, as well as in urban construction and land subdivision.

In Portugal, due diligence is key for a successful negotiation and acquisition. Preliminary legal due diligence is advisable to ascertain the condition of the property, its characteristics, restrictions of use or construction, size, location, tax liabilities, the identity of the seller, if there are any liens or encumbrances, mortgages, and third-parties' rights such as pre-emption rights or tenancy rights. It is also important to determine if the seller is in a situation of bankruptcy or if any pending lawsuit would make the assignment of assets ineffective.

Reservation Agreements have become increasingly frequent because of many brokers' tactics to lead buyers to commit funds to the deal as soon as possible. These agreements are often portrayed by brokers as granting the buyer some time to decide on the acquisition while the seller would refrain from offering the property to a third party. Often a refundable fee is agreed upon.

In truth, these contracts are often void of enforceability. In many cases, the buyer has no obligations to refrain from selling because he/she is not a party in the contract, the realtor does not have exclusivity in promoting the property, or they are simply disregarded because a better offer came along.

Promissory contracts of purchase and sale are widely used in Portugal. Many aspects of promissory contracts are directly regulated by law but can and should be fine-tuned by the parties. Common to most promissory contracts is the use of a deposit paid by the promissory buyer to the promissory seller, which serves as a first installment and determines some aspects of indemnities for default.

In the event of a breach of contract, the non-defaulting party may seek to enforce the contract, trigger a specially designed penalty clause, or terminate the contract and receive compensation determined according to the original deposit. The promissory seller usually retains the initial deposit, but the promissory buyer may claim twice such amount.

Conveyancing in the residential property market cont.

The transfer of ownership takes place with the execution of a public deed before a Notary Public. Still, it is also possible to take place using a private contract validated by a lawyer under the latter's notarial powers.

It is important to determine if the sale of particular property requires giving notice to third parties due to the existence of pre-emption rights which they may choose to exercise.

The Public Deed grants ownership of the property to the acquirer, but until it has been registered, it is enforceable against the seller only, not against third parties acting in good faith.

Banking

Opening of a bank account is recommended because property owners must frequently make several payments, mostly related to utilities and taxes, and collect rents. For the conveyancing process itself, the opening of a Portuguese bank account is not required in most cases, and many clients use their lawyer's client account.

Taxes

Obtaining a taxpayer number is required to acquire property, and it must be issued by a tax office. It is also needed to open a Portuguese bank account and, of course, to pay taxes associated with the transaction — Property Transfer Tax and Stamp Duty. The appointment of a local fiscal representative is required for non-EU resident individuals and companies. The fiscal representative must be an entity resident in Portugal.

Property Transfer Tax is payable on the transfer of real estate properties and the transfer of any rights in rem. It must be paid by the buyer. Other acts and contracts where the transfer of real estate property rights is deemed to have taken place are also liable to Property Transfer Tax.

It is levied on the purchase price set out in the deed or on the taxable value of the real estate property, whichever is the higher. Please note that the criteria used for determining the taxable value of urban buildings are substantially different from that of rural properties. It is payable immediately before the taxable event, such as the execution of a Public Deed.

Rates differ between Urban and Rural properties, and between residential, second homes and commercial properties. In the event the acquirer is a resident or is domiciled in a blacklisted jurisdiction, the tax rate may be exponentially higher.

Stamp duty is also due on the transfer of real estate and also applies to donations.

Advisory

When buying a property, you should validate the credentials of all parties and advisors involved.

Buyer-side realtors are uncommon in Portugal. As a rule, Portuguese realtors receive a commission paid by the seller and do not act on behalf of the buyer nor represent the latter according to their professional rules. Understanding the dynamics of the market and its agents is key to avoiding conflicts of interest and self-dealing risks. All real estate brokers must be registered with the Associação de Mediadores Imobiliários and hold a license number.

Although it is not mandatory for buyers or sellers to be represented by a lawyer, buyers should seek independent legal advice from registered professionals before signing any documentation in respect of a property, regardless of the size of the investment.

In Portugal, legal professions include two categories: Advogado and Solicitador. The Advogado is a qualified lawyer, enrolled with the Bar Association, and can represent clients regarding all legal matters, including court proceedings, regardless of type and value.

Law practice requires a Law degree, passing the Bar exam, and enrollment with the Portuguese Bar Association. Legal advisory provided by non-registered advisors constitutes a criminal offense and creates several risks for the clients.

All steps of the acquisition process can be conducted by a lawyer with a valid power of attorney.

About GFDL

Gil Figueira & Devillet Lima Advogados is a Portuguese law firm.

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