

UNIVERSIDADE NOVA DE LISBOA
FACULTY OF LAW

PORTUGUESE LAW

an Overview

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PORTUGUESE LAW – an Overview

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CHAPTER 14

Property Law

RUI PINTO DUARTE

SUMMARY: 1. Introduction 2. Ownership 3. Transfer of ownership and of other rights in rem 4. Usufruto, uso e habitação 5. Superfície 6. Servidões 7. Timeshare 8. Mortgage and pledge 9. Other security rights 10. Possession 11. Land registration 12. Future trends

1. Introduction

As may be observed in other languages with the words of the same etymological origin, the word *propriedade* in Portuguese has several meanings and may be used to designate either a right or the object of a right. In legal language, it is used almost always to designate the right of ownership, *i.e.* the highest right *in rem*. In day-to-day language however *propriedade* is also used to designate things, in particular immovables.

The main Portuguese legal concept in this area is that of *direitos reais* or *direitos das coisas*, equivalent to *derechos reales*, *droits réels*, *diritti reali* and *Sachenrecht*. As in the legal literature of other continental European countries, the core of this concept relies on the idea of a direct and immediate authority over things effective *erga omnes* - which encompasses not only rights to use (*direitos reais de gozo*) and rights of security (*direitos reais de garantia*) but also, at least according to a major current of opinion, some rights to acquire (*direitos reais de aquisição*). It goes without saying that possession (*posse*) also belongs to this field, although its exact location is disputed.

As in the case of its continental equivalents, the branch of law named *direitos reais* does not cover some of those topics that are considered by English lawyers to fall within the scope of property law, *inter alia* succession on death and marriage settlements.

The category *direitos reais de gozo* comprises not only ownership but also the rights known by the Latin words *ususfructus*, *usus*, *habitatío*, *superficies* and *servitutes*, as well as one of the types of the rights to use immovable properties on a timeshare basis. The category *direitos reais de garantia* comprises mortgages, pledges and the equivalents of priorities and liens. The category *direitos reais de aquisição* comprises mainly rights to acquire when they are effective against third parties.

The vast majority of the rules on *direitos reais de gozo* are inserted in the third book of the Civil Code, entitled *Direito das Coisas*, but the rules on *direitos reais de garantia* appear in the second book of the Civil Code dealing with the law of obligations, on the grounds of their securing this type of relations.

The idea that rights *in rem* are subject to a *numerus clausus* principle has an express basis in the Civil Code. Indeed, Article 1306 states that save as otherwise stated in the law restrictions cannot be created with real nature on the right of property or on rights that correspond to parts of the same.

The first article of the Civil Code dealing with the right of ownership (Article 1302) states that it can only relate to tangible things. The following article begins by saying that copyright and industrial property are ruled by special laws but adds that the rules of the Civil Code are applicable to these rights on a subsidiary basis. Some authors construe the category of *direitos reais* as embracing only tangible things and others extend it to intangible things. It should be stressed that the Civil Code permits both the *ususfructus* and the pledge of credits and of other rights.

Portuguese law does not favour fiduciary ownership. Trusts do not exist, except in the context of the legislation of the Free Trade Zone of Madeira.

2. Ownership

Article 1305 of the Civil Code, entitled "contents of the right of ownership", begins by stating that the owner benefits from the rights to use, to enjoy and to dispose of his things in a full and exclusive manner, but adds "within the limits of the law and observing the restrictions imposed by it". This formulation is compatible with the evolution of law, including the development of regimes that restrict the use of land. Portuguese courts and legal authors have debated whether the right to build is co-natural to the ownership of land or if it only exists when an administrative law or act permits construction on the land in question.

Co-ownership (*compropriedade*) is of course admitted by Portuguese law but its stability is not favoured. Indeed each co-owner has the right to put an end to co-ownership and agreements waiving such right have a maximum duration of five years. The model of *compropriedade* corresponds to the English ownership in common – not to the English concept of joint ownership.

A special reference must be made to *propriedade horizontal*, the normal legal instrument for the division of buildings into flats. The law states that the parts of a building that can constitute independent units may belong to different owners under this regime and describes this by saying that each of such owners (*condóminos*) is the exclusive owner of his flat and co-owner of the common parts.

It should be stressed that in spite of the word *horizontal*, the division of the buildings can be either horizontal or vertical. Moreover the regime may be applicable to complexes of separate buildings.

Rules on *propriedade horizontal* give to each *condómino* a kind of ownership that is very close to full ownership. Legal writers discuss if *propriedade horizontal* is a *species* of ownership or if it should be characterized as a different right *in rem*.

3. Transfer of ownership and of other rights *in rem*

Transfer of ownership is a topic that cuts across private law and shall be addressed here only in connection with basic aspects of its relation with contracts.

The Civil Code says that, in principle, contracts effect by themselves the transfer of rights *in rem*. However the Civil Code sets out some deviations from this rule, *inter alia* for cases where, at the time of the contract, the object of the contract does not exist, is not fully determined or belongs to a third party.

Contracts are in any case the instruments of the conveyance of property. When their object is land they must take the form of a notarial deed.

The code on land registration says that facts subject to registration only produce effects vis-à-vis third parties after registration. This concept of third parties has been narrowed down by many writers and by the courts, meaning that registration is generally not the crucial factor when the rights over a certain piece of land are disputed between two or more persons.

The law accepts that parties may derogate the rule whereby contracts bring about the automatic transfer of ownership, mainly by stipulating the reservation of title until full payment of the price.

4. Usufruto, uso e habitação

The law defines usufruto as the right to enjoy a thing that belongs to another person, fully but temporarily and without altering its form and substance.

Usufruto may be constituted by contract or by will.

When it is constituted in favour of a corporation, its duration may not exceed thirty years. When it is constituted in favour of an individual it may not exceed the duration of his life. Nevertheless *usufruto* may be transferred, such transfer not altering its duration.

Almost anything may be the object of *usufruto*, but its main field of application is land.

Portuguese rules on *usus* and *habitatio* were inspired by the Italian Civil Code. The *direito de uso* consists of the faculty of using a thing belonging to another person within the limits of the needs of its holder and of his family. This right is called *direito de habitação* when its object is a home. *Direito de uso* and *direito de habitação* are not transferable.

5. Superfície

The law defines *direito de superfície* as the right to build or to maintain a construction on land belonging to another person or to cultivate or plant on such land.

The *direito de superfície* has two dimensions: the right to build or to plant and the right over the building or the plantation. Prior to the existence of the building or of the plantation the right consists of the faculty to build or plant. Once the building or the plantation exists, the right consists of the ownership of the same (but not of the soil).

Law says *direito de superfície* can be either perpetual or temporary, but in practice all *direitos de superfície* tend to be temporary.

6. Servidões

The Portuguese descendant of the Roman *servitus* is *servidão*. The law defines it as a charge imposed on a piece of land for the benefit of another piece of land belonging to a different owner. The term embraces English law's easements, *profits à prendre* and restrictive covenants effective *erga omnes*.

Servidões may relate to any kind of utilities and may result from the law, contract, will or possession.

7. Timeshare

The first Portuguese law on the use of immovable properties on a timeshare basis was published in 1981. It attempted to protect persons investing money in this type of development by ascribing to them a right with effects against third parties. The original name of this right was *direito de habitação periódica* but this was changed to *direito real de habitação periódica* in 1989, when a new law replaced the first one, thereby acknowledging both rights with and without real nature.

8. Mortgage and pledge

According to Portuguese law, the distinction between mortgage (*hipoteca*) and pledge (*penhor*) depends on the nature of the object of the security. When the object of the security is an immovable or a movable subject to registration, *hipoteca* is applicable; when the object of the security is a movable, a credit or another similar right, *penhor* is applicable.

The effects of mortgage depend on it being registered. The effects of the pledge of tangible things depend in principle on the delivery of its object to the creditor. In some cases, such delivery may be replaced by the delivery of a document that confers title to the object of the pledge. Pledge in favour of banks may be effective without delivery of the object.

The mortgagee does not have a right to take possession of the property in the event of default in payment of the security, but only a right to cause the judicial sale of the property and to be paid by the proceeds of such sale. In the case of a pledge, the law accepts that the parties may stipulate that the sale is made out of court.

9. Other security rights

Portuguese law establishes other security rights besides mortgage and pledge. The most relevant are *privilégios creditórios* and *direito de retenção*.

Privilégios creditórios result directly from the law. They consist of the right of a creditor to be paid from certain property with priority over the other creditors. Their object can be immovable or movable. They may or may not be effective against third parties. Portuguese legal writers consider them as *rights in rem* when they have this kind of effect.

There is no common regime for *privilégios creditórios*. Some prevail over contractual security rights and others do not grant such prevalence.

The most important *privilégios creditórios* are those that secure tax and social security credits.

Direito de retenção also results directly from the law. It consists of the right of a creditor that is in possession of a thing belonging to the debtor to retain it until payment is obtained, as well as the right to cause the judicial sale of the thing in question and be paid with priority out of the proceeds of the sale. It can relate to either immovable or movable things.

10. Possession

Portuguese legal writers are still discussing the nature of possession. It is variously contended that it is a mere fact, a right *in rem* or another kind of right. In addition, the role of *animus possidendi* is still a subject of debate, mainly because the Civil Code makes contradictory references to it.

The Civil Code regulates possession in the first title of its book dealing with *direito das coisas*. This title is divided into six chapters, of which one contains the rules on the defence of possession and another contains the rules on the acquisition of ownership as a consequence of possession (*usucapião*).

Possessory rights are very widely defined, to include *inter alia* fruits and income, as well as remedies against disturbance.

11. Land registration

The Portuguese land registry presents, amongst others, the following features: it is the responsibility of the administrative authorities, more precisely of departments of the Ministry of Justice (the *conservatórias de registo predial*); it is geographically decentralized; and it is organized by reference to the pieces of land, each piece of land having a number.

The list of facts subject to registration is very wide and includes all those that determine the constitution and the transfer of rights *in rem*. However there are substantial areas of territory (mainly in the countryside) not covered by the land registry.

12. Future trends

Over recent decades the impact of public law on property law (more precisely on land law) has grown very significantly. In all probability, this impact will continue to grow, mainly due to town and country planning.

Another foreseeable tendency is the development of the influence of European law on property law. This tendency is becoming apparent, *inter alia* in certain rules on securities consisting of movable property and will develop in keeping with the pace of consolidation of European Union.

At a different level, it is foreseeable that the rules on land registration will be amended, with registration playing a larger role in the transfer of ownership.

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