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Adapting rights in rem

 Portugal

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European Judicial Network
(in civil and commercial
matters)

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

First of all it should be noted that rights in rem can be rights of use (*direitos reais de gozo*) or rights of security (*direitos reais de garantia*).

Secondly, besides rights in rem over material objects, part of the doctrine defends the existence of rights in rem over immaterial objects.

Finally, in Portugal the law enshrines the principle of *numerus clausus*, or the exhaustive nature of rights in rem (Article 1306 of the Civil Code (*Código Civil*)).

RIGHTS THAT MAY BE SUBJECT TO SUCCESSION

The body of rights that do not expire on the death of their holder but continue beyond it may be subject to succession.

Article 2025 of the Portuguese Civil Code refers to what can be subject to succession. Legal relationships that are extinguished by the death of their respective owner, by reason of their nature or by force of law, are not subject to succession; waivable rights may also be extinguished upon the death of the holder if the holder so provided.

By way of example, usufruct and the right in rem of use and habitation are rights in rem that are extinguished by the death of their holder, by force of law (Articles 1476(1)(a) and 1485 of the Civil Code).

The current version of the Civil Code can be found in Portuguese at the following [link](#).

With the exception of usufruct (Article 1443 of the Civil Code), of the right in rem of use and habitation (Article 1485 of the Civil Code), of rights in rem that fall under any of the situations provided for in Article 2025 of the Civil Code, or other cases specifically provided for in other legal provisions, as a rule the remaining rights in rem may be subject to succession.

There are limitations on certain rights, such as rights in rem concerning declared weapons, which can only be subject to succession under certain conditions referred to in Article 37 of the Legal Framework on Weapons and Ammunition (*Regime Jurídico das Armas e Munições*), namely an authorisation from the national director of the Public Security Police (*Polícia de Segurança Pública - PSP*).

The Legal Framework on Weapons and Ammunition approved by Law No 5/2006 of 23 February 2006 can be found in Portuguese at the following [link](#).

RIGHTS IN REM OF USE

The law provides for the following rights in rem of use (Articles 1302 to 1575 of the Civil Code and the Legal Framework on Timesharing (*Regime Jurídico da Habitação Periódica*) referred to below):

- Right of ownership (*direito de propriedade*) (Article 1302 of the Civil Code)
- Joint ownership (*compropriedade*) (Article 1403 of the Civil Code)
- Apartment ownership (*propriedade horizontal*) (Article 1414 of the Civil Code)
- Usufruct (*usufruto*) (Article 1439 of the Civil Code)
- Right in rem of use and habitation (*direito real de uso e habitação*) (Article 1484 of the Civil Code)
- Timesharing rights in rem (*direito real de habitação periódica*)
- Right of superficies (*direito de superfície*) (Article 1524 of the Civil Code)
- Easements (*servidões prediais*) (Article 1543 of the Civil Code)

The Legal Framework on Timesharing was approved by Decree-Law No 275/93 of 5 August 1993, which can be found in Portuguese at the following [link](#).

RIGHTS IN REM RELATING TO GUARANTEES

The Civil Code provides for the following rights in rem relating to guarantees:

- Rent assignment (*consignação de rendimentos*) (Article 656)
- Pledge (*penhor*) (Article 666)
- Mortgage (*hipoteca*) (Article 686)
- Real estate privilege (*privilégios imobiliários*) (Articles 743 and 744)
- Lien (*direito de retenção*) (Articles 754 and 755)

RIGHTS IN REM OVER MATERIAL OBJECTS

Article 1302 of the Civil Code provides that only movable or immovable material objects (including water) can be subject to the right of ownership governed by that code.

RIGHTS IN REM OVER IMMATERIAL OBJECTS

Article 1303 of the Civil Code refers to intellectual property, which is in turn governed by the Industrial Property Code (*Código da Propriedade Industrial*). Part of the doctrine establishes that intellectual property is a concept that incorporates copyright and related rights, and industrial property. Portuguese law maintains the two denominations: intellectual property (in the Civil Code) and industrial property (in the Industrial Property Code, published in the Annex to Decree-Law No 110/2018 of 10 December 2018).

According to Article 2 of the Industrial Property Code, the fisheries, agriculture, forestry, livestock and the extractive industries, industry and trade in the strict sense, as well as all natural or manufactured products and services, fall within the scope of industrial property.

The doctrine is not unanimous as to whether national law accepts the right of ownership and other rights in rem over immaterial objects, e.g. ownership of a commercial establishment or intellectual property. This matter is subject to interpretation by the courts.

The Industrial Property Code governs rights to patents, utility models, semiconductor products, designs, trade marks, rewards, logos, designations of origin and geographical indications, as well as their modification and transfer.

Rights arising from patents and utility models, as well as records of topographies of semiconductor products, designs and trade marks, and other distinctive trade signs may be given as pledges – Article 6 of the Industrial Property Code.

The current version of the Industrial Property Code can be found in Portuguese at the following [link](#).

With respect to commercial companies, succession to rights over participating interests or shareholdings due to

the death of one of the partners and the requirements thereof are regulated in the Companies Code (*Código das Sociedades Comerciais*), namely:

- Article 184, with respect to succession due to the death of a member of an ordinary partnership,
- Articles 198, 225 and 252, with respect to succession due to the death of a member of a private limited company,
- Articles 469 and 475, with respect to succession due to the death of a partner of a limited partnership.

The current version of the Companies Code can be found in Portuguese at the following [link](#).

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

Yes, as a rule these rights are recorded in a register, as explained below.

LAND REGISTRY OFFICES

At Land Registry Offices (*Conservatórias do Registo Predial*), acts relating to the legal status of buildings are recorded, including the following rights in rem (Articles 1 and 2 of the Land Registry Code (*Código de Registo Predial*)):

- Legal acts determining the establishment, recognition, acquisition or modification of rights of ownership, usufruct, use and habitation, superficies or easement;
- Legal acts determining the establishment or modification of apartment ownership and timesharing rights;
- Land ownership changes resulting from the dividing up of land, the conversion of the joint ownership structure and division, as well as the respective amendments;
- Offer of conveyance or encumbrance, preferential covenants and preferential provision of a will, if they have been given real effect, as well as the assignment of the contractual position arising from these acts;
- Assignment of assets to creditors;
- Mortgage, its assignment or modification, assignment of the degree of priority of the respective registration and the rent assignment;
- Transfer of receivables secured by mortgage or rent assignment, when transfer of guarantee is involved;
- Lease for more than 6 years and its transfers or subleases, except for tenant farming;
- Pledge of credit secured by mortgage or rent assignment, and any other acts or arrangements affecting the same receivables;
- Any other restrictions on the right of ownership, subject to registration under law;
- Legal acts that bring about the extinction of rights, encumbrances or registered charges.

It is mandatory to record the acts cited above, with the exception of those listed under Article 8-A of the Land Registry Code.

Pursuant to Article 687 of the Civil Code, the mortgage must be registered, or will not otherwise be recognised in relation to the parties.

The conditions for the registration of land are specified in the following legal provisions of the Land Registry Code:

- Those subject to the obligation to register, the deadlines and eligibility of rights over real estate are set out in Articles 8-B, 8-C, 8-D and 9;
- Pre-registration, continuation of registration – in particular the principle of succession in title and exemption from pre-registration in the purchase ledger based on partition/succession – are set out in Articles 34 to 35;
- Eligibility to apply for registration and the possibility of representation are provided for in Articles 36 to 39;
- The form and means of submitting an application for registration – in particular the right to register electronically – are laid down in Articles 41 to 42-A;

- The documents to be submitted are those provided for in Articles 43 to 46.

The Land Registry Code can be found in Portuguese at the following [link](#).

More detailed information on land, commercial and motor vehicle registration applications, such as how to send the application, the requirements and services, is available online at <https://justica.gov.pt/>

COMMERCIAL REGISTRY OFFICES

Acts intended to publicise the legal status of individual traders, commercial companies, civil law associations in commercial form and individual establishments with limited liability are recorded at Commercial Registry Offices (*Conservatórias do Registo Comercial*). The registration of certain acts concerning the legal status of cooperatives, public undertakings, complementary groups of undertakings and European economic interest groupings is also recorded at Commercial Registry Offices (Article 1 of the Commercial Registry Code - *Código do Registo Comercial*).

The acts set out in Article 15 of the Commercial Registry Code must be recorded in the register at Commercial Registry Offices.

The conditions for registration in the commercial register are specified in Articles 28 to 53 of the Commercial Registry Code.

Pursuant to Article 32(1) and (2) of the Commercial Registry Code:

- Only acts established in documents that legally substantiate them can be registered;
- Documents written in a foreign language can only be accepted when translated, unless they refer to acts that are subject to registration by transcription, are written in English, French or Spanish, and the competent official is fluent in that language.

As regards fiscal obligations, under Article 51(1) of the Commercial Registry Code, no act subject to charges of a fiscal nature may be definitively registered without the tax duties being paid or secured.

The Commercial Registry Code can be found in Portuguese at the following [link](#).

REGISTRATION OF SECURITIES

The following, among others qualified as such by law, are eligible as securities:

- stocks and shares;
- bonds;
- equity;
- units in collective investment undertakings;
- the liable rights of the securities referred to in the previous paragraphs, provided the liability covers the entire issue or series, or is provided for at the time of issue;
- autonomous warrants;
- other documents representing homogeneous legal situations, provided they are able to be transferred on the market.

(Article 1 of the Portuguese Securities Code - *Código dos Valores Mobiliários*)

Securities are in registered form (Article 52 of the Portuguese Securities Code).

The acquisition of securities, as well as the establishment, modification or extinction of usufruct, pledge or other legal situations that encumber securities are registered (as a rule with the issuing entity or with a management entity) and may be subject to succession.

The registration of securities, the registration entities, registration requirements, the effects of registration on the establishment, transfer and exercise of rights and succession to such rights, vary according to the categories of securities referred to above.

This matter is governed by the Portuguese Securities Code, approved by Decree-Law No 486/99 of

13 November 1999, the current version of which is available in Portuguese at the following [link](#).

REGISTRIES OF MOTOR VEHICLES

Acts relating to the legal status of motor vehicles and their trailers are recorded at Registries of Motor Vehicles (*Conservatórias do Registo Automóvel*).

For the purpose of registration, vehicles are considered to be motor vehicles and their trailers which, under the Highway Code (*Código da Estrada*), are subject to registration.

Article 117 of the Highway Code states which vehicles and trailers are subject to compulsory registration. The Highway Code approved by Decree-Law No 114/94 of 3 May 1994, in its current version, can be found in Portuguese at the following [link](#).

Article 5 of the Motor Vehicle Registration Code (*Código de Registo Automóvel*) lists the situations in which registration is mandatory.

Motor vehicles cannot be pledged – Article 8 of the Motor Vehicle Registration Code.

Motor vehicle registration requirements can be consulted at the following [link](#).

Motor vehicle registration is governed by Decree-Law No 54/75 of 12 February 1975, which can be found at the following [link](#).

Also of note is the Motor Vehicle Registration Regulation (*Regulamento do Registo de Automóveis*), governed by Decree-Law No 55/75 of 12 February 1975, which can be found at the following [link](#).

NATIONAL REGISTER OF AIRCRAFT

Aircraft or autonomous equipment (engine, rotor, propeller, etc.) must be registered in the National Register of Aircraft (*Registo Aeronáutico Nacional*).

The application for registration is made using the form accompanied by the following documentation:

1. Contract of Purchase and Sale or other bill of sale;
2. Certificate of scrappage on the aircraft register of the country of previous registration, or certificate of non-registration;
3. Certificate of customs clearance in the case of an aircraft imported from a non-EU country;
4. Two photographs of the aircraft, one front and one profile, with the nationality and registration marks painted, in 9x12 format, borderless and printed in neutral colours.

Documents issued in foreign countries must contain the signatures of persons duly notarised and legalised, with the Apostille affixed, in accordance with the provisions of Articles 3 and 4 of the Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents, ratified by Decree-Law No 48450 of 24 June 1968, or duly notarised and legalised by a Portuguese diplomatic or consular agent in that country.

Documents issued in Portugal by a legal entity must bear the signatures of the legal representatives recognised by law with the words ‘duly authorised in due exercise of their powers.’

Further information can be found on the website of the [National Civil Aviation Authority](#) (*Autoridade Nacional de Aviação Civil*).

REGISTER OF VESSELS

The registration of vessels is governed by Decree-Law No 265/72 of 31 July 1972 (General Regulation on Port Authorities - *Regulamento Geral das Capitánias*), which can be found at the following [link](#).

Decree-Law No 96/89 of 28 March 1989 establishing the International Vessel Registry of Madeira (*Registo Internacional de Navios da Madeira*) and [Ministerial Implementing Order No 715/89 of 23 August 1989](#) (*Portaria n.º 715/89, de 23 agosto*), which governs certain aspects thereof, are also applicable.

Note: Decree-Law No 96/89 of 28 March 1989 is republished as an annex to Law No 56/2020 of 27 August 2020. It can be consulted in its current wording [here](#).

Under this legal framework:

- National vessels, with the exception of those belonging to the Navy, must have registered ownership in order to carry out the activity under which they are classified (Article 72(1) of the General Regulation on Port Authorities).
- Merchant vessels are also subject to commercial registration pursuant to the relevant law (Article 72(3) of the General Regulation on Port Authorities).
- National vessels are registered with maritime offices, except for recreational craft, which are registered with the organisations indicated in the prevailing legislation (Article 73(1) of the General Regulation on Port Authorities).
- In the case of new acquisitions or new constructions, the maritime office indicated in the respective authorisation is competent (Article 73(2) of the General Regulation on Port Authorities).
- In the case of acquisitions or replacement constructions, the maritime office in which the replaced units were registered is competent for registration (Article 73(3) of the General Regulation on Port Authorities).
- A vessel constructed or acquired at a port in any part of the national territory may be sold or registered in another port of the same or other part of the territory, provided it has the corresponding authorisation (Article 73(4) of the General Regulation on Port Authorities).
- Light vessels on board, even if they are lifeboats, small auxiliary fishing vessels and small unmotorised beach craft without sails, such as dinghies, skiffs, inflatable boats and pedalos, for use up to 300 m at low tide, are exempt from registration but subject to the jurisdiction of the maritime authority, which is responsible for issuing licences for their operation (Article 77 of the General Regulation on Port Authorities).

The requirements for vessel registration are set out in Article 78 of the General Regulation on Port Authorities.

In particular, regarding the registration of vessels in the event of succession by death:

- In the event of succession, amendments to registration are based on attestation of the deed of partition, or the partition table and the respective ratification ruling, accompanied by a document issued by the competent finance office confirming that the respective inheritance tax (Article 82(2) of the General Regulation on Port Authorities) has been paid, secured or is not due;
- Foreign vessels acquired by succession or in action brought before Portuguese courts shall be registered at the maritime office determined by higher authority (Article 75(3) of the General Regulation on Port Authorities).

REGISTER OF WEAPONS

The Legal Framework on Weapons and Ammunition approved by Law No 5/2006 of 23 February 2006 can be found in Portuguese at the following [link](#).

Weapons and ammunition are subject to mandatory declaration and registration by the PSP (Public Security Police).

Succession by death is subject to the requirements set forth in Article 37 of the Legal Framework on Weapons and Ammunition referred to above.

REGISTRATION OF INTELLECTUAL PROPERTY takes place at the National Industrial Property Institute (*Instituto Nacional da Propriedade Industrial*).

The grant of patents, utility models, semiconductor products, and design or model, trade mark, reward or logo registrations, designation of origin and geographical indication registrations is made by the National Industrial Property Institute, to which the respective applications must be submitted.

The requirements and effects of the application for granting or registration are set forth in the Industrial Property Code for each of the above categories, without prejudice to the legislation of the European Union and applicable international conventions.

For practical information on how to submit and prepare a grant or registration application, the website of the National Industrial Property Institute can be consulted at <https://inpi.justica.gov.pt/>

3 Which effects are linked to the registration of the rights in rem?

As a rule, the registration of rights in rem over immovable property is not constitutive of an entitlement in law. However, for other categories of property this rule may include exceptions provided for in special legal provisions.

EFFECTS OF LAND REGISTRATION

The effects associated with the registration of rights in rem over real estate are those provided for in Articles 4 to 7 of the Land Registry Code, namely:

- effect between the parties;
- enforceability against third parties;
- priority of registration;
- presumptions arising from registration.

The Land Registry Code can be found at the following [link](#).

EFFECTS OF COMMERCIAL REGISTRATION

The effects of commercial registration derive essentially from the provisions of Articles 11 to 14 of the Commercial Registry Code, namely:

- presumptions arising from registration;
- priority of registration;
- effect between the parties;
- enforceability against third parties.

The Commercial Registry Code can be found [here](#).

EFFECTS OF THE REGISTRATION OF SECURITIES

The effects of the registration of securities can be consulted in the Securities Code (*Código dos Valores Imobiliários*), available [here](#), and vary according to the category of securities concerned. The registration may be constitutive of a right with respect to certain categories of securities (Article 73 of the Securities Code).

EFFECTS OF REGISTRATION OF THE REMAINING CATEGORIES OF GOODS REFERRED TO ABOVE

The effects of the registration of weapons, aircraft, vessels, motor vehicles, intellectual or industrial property can be consulted in the special legislation already mentioned, for each of those categories of goods.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

The legal provisions that can be applied to the adaptation of rights in rem in cases of succession are, in principle, Articles 15 of the Civil Code (e.g. when the adaptation is made by the court in a judicial process) and 43-A of the Land Registry Code (e.g. when the adaptation is made by the registrar in the deed of registration).

Adaptation in the strict sense, which can occur when there is a technical problem resulting from the application of two different laws on succession. For example, in the case of an adopted child whose adoptive and biological parents die, if the law of country X is applied to successions arising from the death of the adoptive parents, and the law of country Y is applied to successions arising from the death of the biological parents, this may lead to a result that is not intended by either of the legal systems concerned (e.g. the adopted child is, ultimately, heir of

neither the adoptive parents nor the biological parents). The court must resolve this problem through adaptation.

Another situation, not adaptation in the strict sense of the word but rather substitution/transposition, occurs when a doctrine enshrined in another law is replaced by a doctrine known in the domestic legislation.

The concept of substitution/transposition provides a more fitting framework for cases of adaptation of rights in rem as referred to in Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. For example, a case in point would be substituting the doctrine of 'leasehold' (enshrined in the law of another State but non-existent in Portuguese legislation) with the right in rem of superficies (enshrined in Portuguese legislation).

Both the Court, in judicial action, and the registrar, at the time of registration, may carry out such substitution/transposition. The decision of the registrar may be appealed before the court (Articles 140 to 146 of the Land Registry Code).

NOTE

The information contained in this factsheet is not exhaustive or binding on the Contact Point, the Courts or other entities and authorities. Although they undergo regular updates, the factsheets may not contain all revisions made to the law, and are therefore no substitute for consulting the legal texts in force at any time.

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