



Port in a storm

Portugal has become a popular destination for property investors. **Vicky Rodrigues** looks at some of the succession issues involved

Portugal has become one of the top destinations for purchasing property, either for investment purposes or for personal enjoyment and, eventually, retirement. This is because the country is politically stable, welcomes foreign business and investment, has the world's 19th highest quality of life (according to the Economist Intelligence Unit), enjoys 220 days of sunshine a year, and is just a short flight away from most major UK mainland airports.

Many British people who have bought property there are now starting to ask what happens to their assets in Portugal in the event of their death. Their main concerns relate to which law will be applied to their succession, the validity in Portugal of their existing English will, the tax position under Portuguese law, and how probate is processed there. There is a general fear that if nothing is done, their estate will go to the Portuguese government. This could not be further from the truth.

FORCED HEIRS

It is true that there is not a tradition of wills among the Portuguese. This is partly due to the stigma about talking about death, and partly because, under the Portuguese system, which is similar to much of European continental law, close relatives – or 'forced heirs', as they are known – stand to gain the greater part of a person's inheritance automatically, and the person bequeathing gets to dispose freely of only a portion of their estate. This means that someone of Portuguese nationality cannot, by will, leave his estate to whomever he wishes; there are always certain classes of heirs who are entitled to a portion of the estate, irrespective of what is stated in the will. Many Portuguese people do not, therefore, see a reason for executing a will.

However, taking the time to think about one's estate after death is very

pertinent if you are not of Portuguese nationality, but have assets there.

APPLICABLE LAW

It is the personal law of the deceased which governs a person's succession in Portugal, irrespective of their residence, domicile or *rei sitae*. This personal law, in turn, is considered to be the law of nationality. This has a significant impact on

Second, most English wills make reference to trusts and trustees, which is a concept not recognised under Portuguese law. A trust is not considered a legal entity for the purposes of Portuguese law. As a result, there is a constant battle with Portuguese notaries and registrars to explain the concept of a trust, a trustee and a beneficiary, and this can cause many problems and delays, especially in relation

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how someone can distribute their assets in Portugal, so it is important to look at the law of a person's nationality and see what that law prescribes in terms of succession and freedom of testamentary disposition.

EXECUTING A PORTUGUESE WILL

An English will dealing with property in Portugal can put the testator's wishes into effect, providing that it abides by the laws of the country where it was drafted. However, clients should always seek to execute a separate Portuguese-form will to deal specifically with their Portuguese assets. This is due to two main reasons.

First, it simplifies probate proceedings in Portugal, in that there is no need to wait for probate to be obtained in England first (the English will is only valid in Portugal if it has been granted probate in England). Probate can be applied for in Portugal immediately, using the Portuguese-form will, and this can sometimes mean obtaining the much-needed release of assets for the heirs to meet with testamentary payments and debts.

to assets subject to registration, and also to obtaining release of the assets to the beneficiaries. Removing all reference to trusts in the Portuguese will and using other concepts more familiar in Portugal will help simplify probate proceedings and ensure that the client's wishes are fully met.

THE PRACTICALITIES

Formally, the will needs to comply with Portuguese law on the execution of wills. This means that it will need to be signed by the client in Portugal, before a Portuguese notary. The will can either be a private or public will. The former is kept by the testator, the latter archived by the notary, but in both cases, the will needs to be formalised before a notary in the presence of two witnesses, and a translator, if the client does not understand Portuguese. The contents of the will are regulated under the testator's law of nationality, and the notary will not attest to its contents.

If a client wants to make changes to their will at a later date, codicils are not admissible under Portuguese law, so a will

can only be validly changed by a subsequent will, subject to the same formalities stated above.

TAXATION

Inheritance tax has effectively been abolished in Portugal in relation to estates for deaths occurring from 1 January 2004, and replaced by stamp duty, which is charged at a fixed rate of 10% on the taxable value of the assets. There is, however, an exemption available for spouse, issue and parents, which means that assets left to these classes of heirs effectively do not pay any tax at all. Certain types of assets are also exempt from payment of stamp duty.

In addition, stamp duty is only payable on assets located in Portugal.

There is a double taxation treaty in force between Portugal and the UK, which means that, if stamp duty is paid on any assets in Portugal, this can be offset against any inheritance tax paid in the UK on the same assets (for those domiciled in the UK and taxed on their worldwide estate).

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VALUE OF ASSETS

For the purposes of calculating the stamp duty payable, the value to be given to the assets that comprise the estate depends on the items in question.

Cars and other means of transport are attributed their respective market value.

Some items, including individual artwork and collections, antiques and jewellery, need an official valuation, and this will be the value to indicate on the tax department forms, together with a copy of the official valuation.

Deposits in banks will have the value of the deposit at the date of death. For this purpose, it is necessary to contact the bank and request that they issue a statement at the date of death, and this is then submitted to the tax authorities.

The value of shares in companies depends on whether the companies are publicly listed or private limited companies. In the former case, the value will be the share value at the date of death, and it is necessary to lodge a declaration from the Portuguese stock exchange to this effect. In the latter case, the value used will be

that resulting from the accountants' report submitted to the tax authorities for the preceding year.

In relation to immovable assets, all immovable property in Portugal has a 'tax value', which is the value of the property at the tax department. Traditionally, this value was extremely low in comparison with the property's market value and, as a result, since 1 January 2004, all transfers of

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immovable assets are subject to an official revaluation in an attempt to bring the tax values more in line with market values. Updated plans must be submitted to the tax authorities to allow for this revaluation. The stamp duty payable will then be based on the revalued amount. In accordance with the most recent state budget, the requirement for revaluation no longer applies to spouse and issue on transfers upon death.

DETERMINING THE ASSETS

In Portugal, a person's estate includes the total of everything owned in his or her name, and the share of anything owned jointly. The concept of joint tenancy does not exist. As a result, anything held jointly will be held under tenancy in common, including immovable property and bank accounts. The asset will, therefore, not pass automatically to the other joint owner, but will fall under the estate of the deceased, and be dealt with under the general terms of his or her will.

OBTAINING PROBATE

Applying for probate in Portugal is a two-stage process. The first stage is signing a deed of entitlement of heirs. This is a deed that is entered into before a Portuguese notary, in which three witnesses confirm that the testator has passed away, and the heirs of the testator are identified, in accordance with the will. If there is no will, the rules of intestate succession will apply, and this will also be stated in the deed.

Due to the fact that the law of nationality applies, if the deceased was not a Portuguese national, the notary will

require a certificate of law of the nationality of the deceased (this can be provided by a lawyer of that specific jurisdiction), confirming that the will is valid in accordance with the law of nationality.

The second stage is informing the Portuguese tax department, for the purposes of determining the stamp duty (if any) payable. This is achieved by filling in an official form and identifying the

deceased, the beneficiaries of the estate and the list of the deceased's assets. The tax department will then notify the executor or beneficiaries of the stamp duty payable, if any.

Once the deed of entitlement of heirs has been executed and the tax department has determined whether any stamp duty is payable and this tax has been paid, where applicable, the assets may then be released to the beneficiaries, and any assets subject to registration (namely cars, immovable assets and so on) can be registered in the names of the respective beneficiaries.

FORMAL REQUIREMENTS FOR DOCUMENTS

Foreign documents will need to be legalised (apostilled) in accordance with the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

They will then need to be translated into Portuguese, and the translation needs to be certified. In addition, it may be necessary to obtain a power of attorney from the executor or beneficiaries if they are resident overseas, in order to represent them before the relevant authorities. This power of attorney can be signed before a notary in the UK, and will also require an apostille in order to be valid in Portugal. ■

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