**INTERNATIONAL JOURNAL OF SOCIAL SCIENCE HUMANITY & MANAGEMENT RESEARCH**

ISSN (print) 2833-2172, ISSN (online) 2833-2180

Volume 02 Issue 02 February 2023

DOI:10.58806/ijsshmr.2023.v2i2n01

Page No. 90-105

# Short-Term Rental and the Condominium

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**ABSTRACT:** This study analyses the tensions, even the dichotomy, between Airbnb and short-term rentals and the condominium. Accordingly, we firstly reflect on the evolution, regime and legal nature for short term rentals and condominiums. This then underpins the subsequent assessment of the scope of the restrictions imposed by the statutes of condominiums and the competences attributed to the respective general assembly on exercising short-term rental activities within such properties. This takes particular account of the content of the recent decision and the standardising jurisprudence (AUJ) handed down by the Supreme Court of Justice.

**KEYWORDS:** Airbnb; short-term rental, gentrification, touristification, sharing- economy; housing; hotel; tourist enterprise.

## 1. INTRODUCTION

In view of the most impressive and landmark contributions made by Professor José de Oliveira Ascensão to the fundamentals of Property Rights, this article approaches an aspect related to a right in rem of gratification, the condominium, an issue currently very much on the social agenda. In effect, there is a clear need to ascertain whether exercising short-term rental activities, in a building unit structured into a horizontal property or a condominium, is compatible with the registration inserted into the property deed of the respective housing unit. We naturally take into account the corresponding doctrinal and jurisprudence disagreements and, above all, the content of the very recent Standardising Jurisprudence (AUJ - acórdão uniformizador de jurisprudência) set out by the Supreme Court of Justice.

## 2. The Evolving Constraints of Short-Term Rentals

As short-term rentals constitutes an accommodation type catering for tourists or the tourism sector more generally, we may clearly identify the existence of antecedents to this service, above all, in the strictly contractual sphere of private law. Indeed, hostels, lodgings, the renting of vehicles for short periods, emerging as alternatives to hotel establishments, were, and still are, practices displaying certain similarities in relation to short-term rentals. However, this figure has not only evolved independently of the legal-private contract in seeking to provide the enjoyment of a property or the provision of complementary services but has also taken on different levels of density and complexity.

Furthermore, short-term rentals account for another radically different and autonomous figure in accordance with the epistemological break generally highlighted by those who study this phenomenon. In effect, access to technological platforms advertising and rendering tourist accommodation available, whether in flats or other housing structures in city centres, represents a very relevant aspect of a new economic and organisational model, the collaborative economy[1]. The exponential growth of this appealing and modern phenomenon has triggered the corresponding need to provide a legal framework for what were formerly informal and residual activities. Contemporary times have seen a growing number of establishments set up for tourists and vacationers, with a range of structures and facilities now competing directly both with the classic tourist resorts and, in particular, with hotels.

In addition, other aspects require taking into account. Thus, while on the one hand credible electronic platforms have established greater supply at lower prices, and with greater quality control, on the other hand, there has been an overwhelming surge in short-term rental establishments, located in the oldest and most characteristic neighbourhoods of the historic areas of large cities. There has correspondingly been a worrying depopulation of the traditional inhabitants coupled with notable gentrification[2] processes

[1] The collaborative or sharing economy, seeking to avoid waste and drive new economic relations motivated by bringing consumers closer together through electronic platforms, which incorporate quality and fair prices as essential features, has quickly taken on its own momentum within the scope of local accommodation or Airbnb. On this subject, Pilar García Saura, *Viviendas de Uso Turístico y Plataformas Colaborativas en España*, Madrid, 2019, pp. 29 et seq., Jeroen Oskam, *The Future of Airbnb and the Sharing Economy*; London, 2019, pp. 21 et seq..

and distortions in market prices with the successive disappearance of very significant numbers of apartments from rental markets[3]. Therefore, in addition to the legal framework for short-term rentals, guidelines had to be approved in order to limit these activities so as to both prevent the desertification of historic centres and reduce unfair competition with other types of tourist accommodation[4].

This reflects a phenomenon on the global scale and generating the need to take measures that limit and regulate certain usages and practices. As a result, restrictive and regulatory guidelines, whether national, regional or local in scope, have been approved, already into the 21st century in the vast majority of cases, for cities throughout the world[5]. In the Portuguese case, the legal regime specifically designed for this type of tourist accommodation, the short-term rental, was approved in 2008. It was then subject to alterations on several occasions. In fact, Decree-Law 39/2008 of 7 March was amended by Decree-Laws 228/2009 of 14 September and 15/2014 of 23 January. The latter then received several further modifications following the entry into force of Decree-Law no. 63/2015 of 23 April and, afterwards, following intense parliamentary debate, of Law no. 62/2018 of 22 August.

The matrix of these changes stemmed, on the one hand, from the need to establish the framework for tourism accommodation services without any formalism or regulation and, on the other hand, from antinomically separating short-term rental and tourist resort or hotel activities. In fact, Decree-Law no. 15/2014 of January 23, when making the second alteration to the legal regime for the installation, exploitation and operation of tourist resorts, as approved by Decree-Law no. 39/2008, of March 7, already previously amended by Decree-Law no. 228/2009, of September 14, set tourist resorts in opposition to short-term rentals and expressly assumed a need to separate these two tourism activities.

Tourist resorts are establishments designed and built to provide accommodation services in exchange for payment and which therefore incorporate a set of complementary structures, facilities and services appropriate to their operation[6]. Conversely, facilities or establishments which, although intended to provide accommodation while operating on a non-profit basis, that become short-term rental establishments, understood as houses, flats and lodging establishments that, after taking out the respective permit, provide temporary accommodation services against payment while not meeting any of the requirements of tourist developments, are nevertheless not tourist developments[7]. Thus, the authorities determined that short-term rental establishments should be regulated by specific legislation[8] and was therefore prevented from recourse to the designations of tourism or tourist[9]. In turn, tourism development projects could correspond to hotels, tourist villages, tourist flats, tourist complexes or resorts, residential tourism developments, rural tourism developments and camping or caravan parks[10].

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[2] Gentrification reflects a phenomenon of change in the composition of a neighbourhood or region, and quickly came to take on a derogatory or negative sense when applied to short-term rentals. Thus, in relation to the city of Lisbon, Paulo Almeida Sande wrote that within the glass, preserved in formaldehyde, the city allows itself to be contemplated by hordes of myopic tourists. However, they cannot see the soul of the city as it has already moved to the suburbs. Thus, the city, as a living being, with people living within, now presents a memory of a time now over. Cf. “Gentrificação” in *Jornal Observador*, 25 July 2017, https://observador.pt/opiniao.

[3] On these complex circumstances, in particular gentrification and the exponential increase in tourism and touristification in the city of Lisbon due to the exponential increase in local accommodation, see Joana Almeida, Frederico Oliveira and Jorge Baptista e Silva, "Understanding Short-Term Rental Regulation: A Case Study of Lisbon" in Critical Housing Analysis, Vol. 8, no. 1, 2021, pp. 177 et seq.. In a similar vein, regarding an identical phenomenon in other major cities, Laura Crommelin, Laurence Troy, Chris Martin and Christopher Petit, “Is Airbnb a Sharing Economy Superstar?” in *Urban Policy and Research*, Vol. 36, no. 4, 2018, pp. 431 et seq.. Patrick Bradley, “Beware-Bnb?: Adapting the Regulatory Approach of Community Associations to Residential Sharing and Zoning Trends” in *Real Property, Trust and Estate Law Journal*, 2019, Vol. 53, no. 2, pp. 373 et seq..

[4] On the restrictions implemented in the city of Los Angeles following the market distortions caused by Airbnb activities, Dayne Lee, “How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations” in *Harvard Law and Policy Review*, Vol. 10, 2016, pp. 244 et seq.. Similarly, for certain European cities, Philipp Schäfer and Nicole Braun, “Misuse Through Short-Term Rentals on the Berlin Housing Market” in *International Journal of Housing Market and Analysis,* Vol.9, no. 2, 2016, pp. 287 et seq.. Noemi Bhalla, Isaak Meier and Nicola Müller, “Aibnb aus Sicht des schweizerischen Rechts” *Festschrift für Anton K. Schnyder*, Zurich, 2018, pp. 519 et seq.. Christoph Busch, “Regulating Airbnb in Germany: Status Quo and Future Trend” in Journal of European Consumer and Market Law, no. 8, 2019, pp. 39 et seq.. Shirley Nieuwland and Riaanne van Melik, “Regulating Airbnb: How Cities Deal With Perceived Negative Externalities of Short-Term Rentals” in *Current Issues in Tourism*, Vol. 23, no. 7, 2020, pp. 811 et seq..

[5] As regards American cities, Alexander Cloonan, “The New American Home: A Look at the Legal Issues Surrounding Airbnb and Short Term Rentals” in *University of Dayton Law Review,* Vol.42, no. 17, pp. 28 et seq.. Regarding Spanish cities and autonomous and state legislation, Manuel Fernández, “El Arrendamiento de Viviendas de Uso Turístico y el Reparto Competencial entre Estado, Comunidades Autónomas y Municipios: Principales Problemas Que se Plantean” in *El Alojamiento Colaborativo: Problemática Actual de las Viviendas de Uso Turístico,* Madrid, 2021, pp. 61 et seq.. On the Italian rules, Corrado Fogliani, Paolo Scalettaris, *Le Locazioni Brevi nel Settore Abitativo*, Piacenza, 2020, pp. 18 et seq.. On the subject of German law, Werner Siepe, *Immobilien verwalten und vermieten: Die Eigentümergemeinschaft: wer zahlt was?*, Berlin, 2022, pp. 19 et seq..

[6] Cf. Article 2(1) of Decree-Law no. 15/2014

[7] Cf. Article 2(2) and Article 3 of Decree-Law no. 15/2014.

[8] Cf. Article 2(3).

[9] Cf. Article 3(7).

[10] Cf. Article 4.

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Accordingly, in order to regulate short-term rentals as a category opposite to that of the tourist resort, the transformation of something formerly informal and incipient into a very relevant accommodation service with undeniable tourism purposes, was inherently accepted. In fact, this was clear in the initial version of Decree-Law 128/2014 and also remained in Decree-Law no. 63/2015, which sought to densify the regime applicable to a certain category of short-term rental, the hostel. In addition, at a later stage in the wake of the exponential boom in short-term rentals, the Portuguese parliament staged a wide-ranging debate on the topic. On that occasion, several bills were put forward within the scope of improving the applicable regime while, above all, taking into account the gentrification of historical centres and the conflicts ongoing between the condominium and short-term rentals taking place in residential units. In fact, the legislation proposed by the PCP (Portuguese Communist Party) emphasised the need to combat gentrification and the excessive expansion of tourism in historical centres and thus suggested limits on the installation of new short-term rental establishments[11]. In turn, the draft CDS-PP (Popular Party) and PS (Socialist Party) legislation alluded to the need to reconcile the interests of the inhabitants of condominiums with those of the owners of properties either to host or already hosting short-term rentals[12].

The aforementioned conciliation of interests became the order of the day given the repeated dissent in decisions handed down by higher courts on this matter. For example, we may note that in 2016 the Oporto Court of Appeal (TRP) declared that the concepts of housing and accommodation did not coincide and neither did housing and temporary accommodation for tourists[13]. In these terms, while acknowledging that the term housing was broader, the Court accepted that accommodation was therein contained. Therefore, to be housed constituted something more than merely being lodged. Nevertheless , the person receiving lodging would not in practice, in their place of lodging, do anything different from persons residing there by sleeping, resting, staying overnight and/or storing their possessions[14]. This became especially the case as the accommodation service provider was not providing hotel facilities, with food and/or cleaning services, but merely supplying the tourist with a place of accommodation, furniture and household equipment, allowing access and usage in return for remuneration[15]. In short, because the incorporation deed did not prohibit short-term rentals, the Portuguese Court of Appeal dismissed the allegations that short-term rentals either disturbed the tranquillity of the other condominium residents or caused insecurity, even positing that tourists would also be careful and respectful[16].

However, the Lisbon Court of Appeal (TRL - Tribunal da Relação de Lisboa), after the submission of another factual situation, in turn issued a different ruling. In effect, the owner of building unit letter E, which was intended for residential use, had requested registration as a short-term rental from the Municipal Council, which Turismo de Portugal had in the meantime granted. However, by a majority vote, the building's condominium assembly approved a resolution preventing the exercising of the short-term rental activities within its domain[17]. Nevertheless, the owner of the building unit in question requested an injunction suspending the resolution as well as reversing the responsibility for this action. In turn, the defendants attached the minutes of the condominium assembly and requested the dismissal of the injunction procedure[18]. After the first instance had adjudged the injunction to be valid, the Court of Appeal considered the destiny of each unit was not indifferent[19]. Thus, as the building units were intended as places of residence under the terms of the incorporation deed, they could not be used for any other purpose. Furthermore, the licensing issued by the administrative entities was irrelevant as these authorisations lacked the power and authorisation to alter the status of horizontal properties established by incorporation deeds[20].

### 3. The Short-Term Rental Regime

In view of this situation, the Portuguese Parliament approved Law no. 62/2018 in order to introduce certain changes into the current regime, including the re-publication of Decree-Law no. 128/2014. Symptomatically, there has henceforth been an impressive level of stability in the short-term rental legal regime. It is important to highlight its most relevant features before moving on to characterise the legal nature of short-term rentals. We shall correspondingly focus on the short-term rental concept, the requirements for exercising this activity, the modalities, the service provision, the operation of both these establishments and short-term rentals in general.

As regards the specific concept, the expression short-term rental establishment[21] and a series of cumulative requirements[22] stand out. These include the following: the provision of temporary accommodation services; remuneration; registration,

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[11] Cf. Draft Law no. 574/XIII-2ª of PCP.
[12] Cf. Draft Laws no. 524/XIII and 535/XIII-2ª of the PS and CDS-PP, respectively.
[13] Cf. TRP judgment of 15 September 2016.
[14] Ibidem.
[15] Ibidem.
[16] Ibidem.
[17] Cf. TRL judgment of 20 October 2016.
[18] Ibidem.
[19] Ibidem.
[20] Ibidem.
[21] Cf. Article 2.
[22] Cf. Articles 2, 5, 12, 13 and 17.

identification and advertising; maintenance and operation conditions of the facilities and equipment; supply of hot and cold water; suitable furniture and utensils; doors and sanitary facilities with security systems; a complaints book and internal rules of use; and user accessible fire extinguishers, fire blankets and first aid equipment.

In terms of the respective modalities, we may list the villa, the apartment, the bedroom, the lodging establishment and the hostel. In these terms, while the villa constitutes an establishment with an accommodation unit made up of an autonomous building of a single-family character, the apartment corresponds to the unit constructed as an autonomous unit in a building or as a section of an urban building designed for independent usage[23]. In turn, the bedroom corresponds to exploitation of the lessor's own residence, corresponding to his/her tax domicile. However, this type of short-term rental may only have a maximum of three units/bedrooms[24]. On the contrary, in a lodging establishment, the accommodation units consist of bedrooms, integrated into an autonomous unit of a building, in an urban building or section of a building endowed with independent use[25]. Conversely, in the accommodation establishment, the units in the hostel are those where the number of users, sleeping in dormitories, turn out to be greater than the number of users sleeping in rooms[26].

In terms of the actual provision of services, the legislation reflects the care taken to distinguish between tourism activities and rental services. Accordingly, in addition to the dichotomy between short-term rentals and tourist activities enacted by the preceding legislation, the prohibition on deploying the qualification or any typology related to the tourist development particular stands out within this scope[27]. This furthermore extends to any means of advertising, commercial documentation or merchandising encapsulating any of the tourist resort types set out in the current wording of Decree-Law 39/2008, of 7 March[28]. Additionally, should any provision of accommodation services correspond to any natural or legal person exercising short-term rental activities, such exercise shall be presumed to have taken place[29]. However, this presumption may be rebutted in general terms, notably through the presentation of a rental contract [30]. Therefore, besides the separation between tourism companies and businesses and short-term rentals, there is another precept that contributes towards separating the short-term rental from the lease regime[31].

When a person is liable for running a particular establishment, that person, whether naturally or legally endowed, will be liable, irrespective of fault, for damages caused whether to service recipients or to third parties[32]. In keeping with the exercising of any other economic activity, there are taxation obligations, in particular VAT and personal or corporate income tax. Furthermore, unless otherwise stipulated by law or contract, short-term rental establishments are to establish the duration of their opening hours. Details of this period must be publicly displayed whenever the establishment is not permanently open[33]. In addition, operating rules and instructions, as well as noise related stipulations, must also be publicly displayed by the service provider[34].

It is also worth consideration of the other constraints placed on the free exercise of accommodation. These do not only result from legal obligations, aimed at promoting service quality, but also from generic restrictions, specifically of an urban nature, to combat the advance of tourist overcrowding in historic city districts[35]. Thus, in order to preserve the social reality of neighbourhoods and places, the municipality, by applying its territorial competences, may approve regulations stipulating reasoned grounds the existence of containment areas with limitations on the installation of new short-term rentals[36]. Municipalities may even impose caps on the number of establishments existing within a particular territory, which may take into account a percentage limit in proportion to the properties available for housing. These containment areas require reassessment at least every two years. In addition, each property owner may only operate a maximum of seven short-term rental establishments[37].

While restrictive measures might pose problems in terms of the freedom of establishment, free movement and provision of services, we believe those doubts have now been dispelled following the decision issued by the Court of Justice of the European Union (CJEU), in September 2020. In fact, following allegations from Cali Apartments and HX, owners of flats located in Paris, which did not agree with several restrictions enacted into French law, for example, prior authorisation for any change in use of

[23] Cf. Article 3(2) and (3).
[24] Cf. Article 3(7).
[25] Cf. Article 3(4).
[26] Cf. Article 3(6).
[27] Cf. Article 17(1).
[28] Cf. Article 17(2).
[29] Cf. Article 4(2).
[30] Cf. Article 4(3).
[31] In fact, Fernanda Paula Oliveira and Dulce Lopes propose the existence of an unbridgeable dichotomy between short-term rentals and leases. They furthermore describe how it is very different to enter into a lease contract in which the lessor provides the lessee with usage of the property for a more or less prolonged period. Cf. *Alojamento Local*, Coimbra, 2020, p. 25.
[32] Cf. Article 16(1).
[33] Cf. Article 19(1).
[34] Cf. Article 20(1).
[35] In this sense, Fernanda Paula Oliveira and Dulce Lopes, *Alojamento Local*, op cit., p. 123.
[36] Cf. Article 15-A(1).
[37] Cf. Article 15-A(5) and (7).

residential properties, the CJEU was asked to rule on whether such restrictions were compatible with European law, specifically Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Accordingly, although the CJEU considered that directive applied to the provision of short-term rental services, after considering the admissibility of the rules placing certain letting activities, those intended for the accommodation of only transient customers, subject to a system of prior authorisation, it accepted that such Member State rules were justified on the grounds of public interest in accordance with the scarcity of long-term rental accommodation[38]. Therefore, should this decision be generating broad repercussions in national legal systems, as could only be the case, as regards the conformity of local administrative provisions[39], we would accept that national restrictions appear compatible with European law as they do not even appear to be either excessive or any infringement on the principle of proportionality.

**4. Autonomy of Short-term Rentals**

In view of these structural features of the regime applicable to short-term rentals, considering the scope for autonomy holds clear importance. In short, this requires assessing its legal nature. However, bearing in mind the multiple impositions with their origins in public law, we cannot follow the guidelines which only highlight aspects of a privatist nature. This specifically shapes the approximation, even the re-conductibility, of short-term rentals to renting or lodging services. In fact, although the short-term rental of premises as an alternative to hotel accommodation reflects a longstanding practice, it is no less true that service provision in a short-term rental establishment displays another level of complexity, which extends beyond the autonomy of the parties in the terms of the strict usage and enjoyment of any apartment or other housing unit that may be made available. As we have highlighted, there is clearly an inherent and highly significant set of injunctive rules of an administrative and fiscal nature, the undeniable importance of which can be neither disregarded, discarded nor silenced.

Without being exhaustive, we shall here recall some of those aspects. In particular, there are the circumstances in which the registration of short-term rental establishments implies prior communication to the territorially competent municipality. The latter may oppose this due to procedural failures, lack of authorisation for this utilisation of the building or violation of restrictions on the installation of this type of establishment as already determined by the municipality under the terms of article 15 A. Therefore, the appropriateness of the characteristics related to a specific short-term rental property is not in itself sufficient. It is also interesting to note the generic restrictions aimed at combating mass tourism related phenomenon, for example, contention areas. Therefore, the autonomy of the parties' wishes may well encounter severe restrictions where not curtailment. For instance, should a short-term rental contract be entered into as regards a particular apartment but which fails to take into account the respective administrative guidelines, particularly as far as licensing is concerned, the contract will naturally be deemed null and void due to its lack of object.

In summary, provisions for short-term rentals bring about a radical departure from renting both as regards renting itself[40] and the practice of short-term renting[41]. Although the legislator applies the term lessor inappropriately, within the scope of characterising the holders of short-term rentals, as is the case in Article 3 paragraph 7, the distinctive features actually far outweigh these sporadic opposing aspects. In fact, should the ratio legis be to reconcile several of the situations applicable to short-term rentals to the detriment of short-term or holiday rentals, as even those defending a proximity between these two concepts[42] acknowledge, it does not actually appear that any of the similar or common features bring about any relevant implications of a legal nature and thereby leading both to this concept losing autonomy and to the consequent re-contextualisation of the modalities spanning leasing, renting and lodging. On the contrary, as just demonstrated, this particularly applies through the presumptive mechanism identified above.

Indeed, we are not here dealing with two figures, standing whether in antinomy or confrontation: thus, the short-term rental and the lease. Instead, we are rather faced by four distinct figures. We actually thus have to consider the tourist resort, the short-term rental, the lease and the lodging. Furthermore, as we will detail, there is a greater proximity between tourist resorts and short-

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[38] CJEU judgment of 22 September 2020.

[39] On the impact of the CJEU ruling on Spanish law, in particular in the Basque Country, Alberto Carro, "Derecho a la Vivienda y Ordenacioón del Mercado del Alquiler Turístico en la Unión Europea: Comentarios a Raíz de La Sentencia Cali Apartments y su Recepción en España" in *Revista de Estúdios Europeos*, Vol. 79, 2022, pp. 679 et seq..

[40] Cláudia Madaleno states that the provision of accommodation services departs from the obligation to provide others with the enjoyment of an asset as derives from leases. Cf. "A Relação entre o Proprietário e o Titular da Plataforma Informática" in *I Congresso de Alojamento Local*, Coimbra, 2020, p. 53.

[41] According to Maria Olinda Garcia, those who rent out their usual place of residence during an absence for professional reasons, as well as those who seasonally rent or sublet their summer holiday accommodation, should not be treated as owners of a local accommodation establishment. Cf. "Arrendamento de Curta Duração a Turistas: Um Impropriamente Denominado Contrato de Alojamento Local" in *Revista Electrónica de Direito* no. 3, 2017," in op. cit., p. 9.

[42] In this regard, Januário da Costa Gomes, after describing various situations or situations, particularly renting, sub-letting and lodging contracts, characterises local accommodation as a bicephalous figure. In his opinion, it would, in concrete terms, take on the nature of a lease or of accommodation. However, when analysing the local accommodation regime, he recognises the legislature's clear preference for the autonomy of local accommodation to the detriment of the classic holiday let lease. Cf. "Notas Soltas sobre a Relação entre o "Proprietário" e o "Hóspede" no Alojamento Local" in *I Congresso de Alojamento Local*, Coimbra, 2020, pp. 87 et seq..

term rentals than between the latter and renting or lodging. Clearly, tourist resorts also contain temporary accommodation catering for vacationers. As seen above, the regime applicable to tourist resorts refers to short-term rental as a category for tourist activities. It is only because short-term rentals do not meet the requirements of tourist developments that they do not fall within this classification, nor can such services deploy the terms tourism or tourist by virtue of legal determination. However, the specific economic activities resemble each other very closely and differ only in tourism developments containing functional characteristics of a differentiated quality and complexity.

While the provision of services distinguishes accommodation contracts from leases and subleases as the main purpose, we would point out that tourist resorts may also practice accommodation services or, at the least, there may be atypical contracts in effect providing for a preponderance of accommodation services. In fact, according to some case law, accommodation in tourist or hotel establishments takes on the nature of a hosting contract or atypical mixed contract through the integration of leasing and service provision services whereby the hosting unit is obliged to grant the use of a certain space, for a certain period of time and to provide a series of services against payment of a particular retribution[43]. Thus, there are undeniable similarities to the case of short-term rentals, particularly as regards the effective provision of services. Furthermore, although this provision is of less variety and quality, it nevertheless exists and takes centre stage. The accommodation includes complementary services such as cleaning and tidying up, Internet and television supply, linen care and light meals, such as breakfast. In sum, in the short-term rental sector, the simple cession of space is insufficient and a circumstance that separates this from the rental market.

However, despite this existence of complementary services, we cannot qualify short-term rentals as civil lodging contracts. In this regard, we may recall the distinction made by Cunha Gonçalves with civil lodging involving services rendered by the host while in commercial lodging, services are rendered by organisations based on a singular or collective company[44]. In the same vein comes Pinto Furtado's recent position emphasising the commercial nature of short-term rental services[45].

The systematic recourse of short-term rental contracts to digital platforms is another aspect that reflects the close proximity between tourist establishments and short-term rentals. Indeed, just as tourism establishment services are frequently contracted through digital platforms designed to compare prices and quality, this is commonly also the case with short-term rentals. However, if such a means of contracting raises different problems for these establishment types[46], it obviously strips the intuitu personae characteristic from rental contracts. In addition, and according to Menezes Cordeiro, the legal position of the lessee is of an intuitu personae nature as the transfer of the enjoyment of the property to a person takes place in accordance with the qualities of that person[47]. This is clearly not the case when in contracting when the vast set of local accommodation available on digital platforms is for choosing from.

In addition, while there are slight similarities to short-term leases, the differences remain striking. With urban lease contracts designed for typically long term relations[48], short-term or holiday let contracts[49] have now gained importance as a means intended to fulfil an exceptional purpose of a transitory, touristic or recreational nature. We would recall that the original version of the Portuguese Civil Code (CC) exempted from the general regime, under the terms of Article 1083, paragraph 2, sub-paragraph b), leases for housing, for short periods, whether near beaches, spas or other places of vacation. Subsequently, through Decree-Law no. 321-B/90 of October 15th, which approved the Urban Lease Regime (RAU) and revoked the aforementioned provision, in Article 5, paragraph 2, sub-paragraph b), maintained the provision of short-term or holiday leases, excluding them from the binding regime as regards the minimum period of duration. Furthermore, Law 6/2006 of 7 June (NRAU), in its original version, allowed contracts for non-permanent housing or for special transitory purposes, particularly for professional, educational and training or touristic reasons. Nevertheless, the 2012 reform of the Lease Code, via Decree-Law no. 31/2012 of 14 August, then revoked paragraph 3 of Article 1095 of the Civil Code and removed the explicit legal reference to leases for tourism or holiday purposes.

However, this does not mean this contractual modality became prohibited in keeping with the general provisions for urban leases, Articles 1064 to 1091 of the Civil Code, and the special rules for residential leases, Articles 1092 to 1107 of the Civil Code.

[43] Cf. Judgment of the Coimbra Court of Appeal on 21 March 2006, at www.dgsi.pt

[44] Cf. Cunha Gonçalves, *Tratado de Direito Civil*, Vol. VII, Coimbra, 1933, p. 732.

[45] According to Pinto Furtado, by virtue of the existence of a business and an establishment, local accommodation stands out from civil lodging by virtue of the corresponding activity of a commercial nature. Cf. “Do Alojamento Local, na sua Relação com a Propriedade Horizontal” in *Revista de Direito Civil*, no. 3, Year II, 2017, pp. 548-9.

[46] On the various problems raised by accommodation contracts concluded through digital platforms, including issues related to civil liability, see Purificación García, “Contrato de Mediación y Plataformas Digitales de Alojamento Turístico”, in *El Alojamiento Colaborativo. Problemática Jurídica Actual de las Viviendas de Uso Turístico*, Madrid, 2021, pp. 244 et seq..

[47] Cf. Menezes Cordeiro, *Tratado de Direito Civil*, Vol. XI, Coimbra, 2019, p. 763.

[48] Cf. Maria Olinda Garcia, “Contrato de Arrendamento Urbano: Caracterização do Seu Regime e Reflexão Crítica” in *Scientia Juridica*, no. 335, 2014, p. 299.

[49] Cf. According to Galvão Telles, holiday lets are something of a short or relatively limited duration. They imply the idea of leaving, for a particular period of time, one’s own place of residence, in order to change environment and obtain recreation of the spirit and move to another place for a not especially long period of time and always with a recreational purpose. Cf. “Arrendamento para Vilegiatura: Acórdão do Tribunal da Relação de Évora de 28 de Maio de 1987” in *O Direito*, Ano 120, 1988, Vol. I-II, p. 166.

## Short-Term Rental and the Condominium

Nevertheless, as short-term rentals subsist, in view of the scope of the short-term rental regime, in particular of the presumption of article 4(2) of Decree-Law no. 128/2014, it is nonetheless true that the provision of lodgings for tourists, of temporary accommodation, to the general public must be reconducted to short-term rentals. This remains so even when, due to the absence of those requirements, particularly the absence of registration or duly authorised establishment, they marginally continue to subsist as short-term rentals.

In addition to the legal presumption above, fulfilment of the legal requirements for exercising short-term rental activities, as well as compliance with administrative restrictions, specifically restricted areas, consolidates the particular nature and autonomy of the law on this type of accommodation. Thus, in highlighting the importance of tourism[50], we accept the emergence of tourism law[51] and the unavoidable relevance of the object[52]. In conclusion, we may qualify short-term rental services as a tourism-related contract. We correspondingly encounter characteristics that differ from those of privatised types, such as rentals and accommodation, in which the parties' will, the usage of the property and certain services rendered are at stake. However, in short-term rentals, the centrality results, not so much from the will of the parties, but rather from the specific characteristics of the object in conjunction with any administrative restrictions structuring the activity, ranging from prior registration to restricted areas. However, this does not prevent but rather recommends their inclusion in a broad category of tourism contracts[53] or of tourist accommodation,[54] which, as can be seen, do not only cover short-term rentals but rather at the very least include hotels and tourist developments.

### 5. Property and Condominium Law

In view of the autonomy of short-term rentals and the dissimilarities between this service, leases and lodgings, at this point it becomes important to ascertain the former's compatibility with the rights of condominiums, also still referred to by many as horizontal property. However, before proceeding towards this desideratum, we must first establish the true nature of condominium rights and understand whether we are dealing with a complex property, a special property or another type of right in rem. That is to say, should the rights of condominiums as a rule originate from the right to property, we then need to ascertain whether the recorded evolution allows us to identify how the condominium is still assumed to be property or, alternatively, whether there has only been an adaptation of property rights to a building subject to a special or complex legal regime. Or, again alternatively but also conversely, whether condominium rights have evolved in such a way that they have since taken on such unavoidable dissimilarities that they may no longer be integrated within the scope of property rights. Thus, this would then recognise their autonomy as a new in-rem type.

There is one orientation which draws property and condominium or horizontal property rights closer together. This approach thereby defends a unitary perspective of property although with variations. At the most, it allows for the existence of special or complex regimes of this type of ownership and, in these terms, adopts various readings and interpretations. On the one hand, this approximates the condominium closer towards co-ownership, to the organic structure of the corporate body and emphasises individual ownership to the detriment of the ownership of common areas and facilities. Whether through speciality or even by admitting a level of complexity, which does not however distance this from ownership. On the other hand, there is the proposal, with a growing level of adhesion, to accept the disconnection and autonomy of the condominium in relations to the right to property. Accordingly, this then establishes a new type, similar to other minor rights in rem, such as the surface right or the right in rem of periodic occupation.

Before taking any decision, we should appreciate some of the doctrinal positions around this issue. Thus, as regards the approach leading to co-ownership, the contribution of Cunha Gonçalves stands out when he refers to horizontal co-ownership[55], to a pro indiviso co-ownership, with inherent restrictiveness on the freehold regime, applicable to the habitable space on each floor [56].

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[50] According to Manuela Patrício, the legal framework of tourism, the foundations of public policies for tourism, Decree-Law no. 191/2009, displays several structuring features. Among them, she highlights the temporary nature, the different destination to the usual place of residence, leisure or business motivation, and economic activities. Cf. *Direito do Turismo e Alojamento Turístico*, 2nd ed., Coimbra, 2020, pp. 14 et seq..

[51] Manuela Patrício characterises tourism law as a true autonomous law, emerging from the legal system. Cf. *Direito do Turismo*…op. cit., pp. 29 et seq..

[52] When including in the contractual object various services such as accommodation, travel and catering, among others, it is important not to forget the tourist facilities or resources. In other words, those goods which, by virtue of their intrinsic characteristics, are capable of motivating the enjoyment of tourism. Cf. Manuela Patrício, *Direito do Turismo*…op. cit., p. 23.

[53] Cf. Manuela Patrício, *Direito do Turismo*…op. cit., pp. 162 et seq.. Cristina López Sánchez, "Reflexiones en Torno al Arrendamiento de las Viviendas Turísticas: La Cesión de la Vivienda en su Totalidad o por Habitaciones y el Subarriendo" in *El Alojamiento Colaborativo. Problemática Jurídica Actual de las Viviendas de Uso Turístico*, Madrid, 2021, p. 129.

[54] Manuela Patrício applies the term tourist accommodation in order to include both tourist development projects and short-term rentals. Cf. *Direito do Turismo*…op. cit., pp. 52 et seq..

[55] Cf. Cunha Gonçalves, *Tratado de Direito Civil,* Vol XI, Coimbra, 1930, pp. 283 et seq..

[56] Cf. Cunha Gonçalves, *Tratado*…Vol XI, op. cit., p. 287.

Later, in a monograph specifically dedicated to the subject, he insists on this proximity, taking into account the impossibility that the owners of each unit cannot transform them without the expressed consent of the other condominium members[57].

In turn, Henrique de Mesquita underscores the proximity between the functioning of horizontal property systems and that existing in legal persons, including companies[58]. In a similar vein, Rui Pinto Duarte emphasises the attribution of legal personality and the organic nature of condominiums, configuring them as an autonomous centre for the attribution of certain legal effects under particular circumstances[59].

In another perspective advocating the proximity between individual property and co-ownership, Oliveira Ascensão emphasises the importance of the former to the detriment of the latter, which would play an instrumental role given the purpose of horizontal property does not here foster communion but, on the contrary, enables the existence of separate properties in collectively owned buildings[60]. Hence, we arrive at a special property or specialised property, covering one facet of the object and communion extending to other parts of the building[61].

Adopting yet another slant, José Alberto Vieira, after accepting the specificities of horizontal property, while still deeming them as insufficient to bring about any alteration in its legal nature, characterises this as special ownership[62]. Also insisting on a unitary approach, Ribeiro Mendes, after stressing how the set of rights seems inseparable, that the autonomous units and the common sections should not be qualified as a legal object but rather as components of an object, then depicts condominiums or horizontal properties as a complex right in rem[63]. Furthermore, Menezes Cordeiro, although starting out from different assumptions at an earlier moment, coincided in this characterisation of horizontal properties as complex rights in rem[64].

As regards the autonomy of the condominium's legal framework, and in assuming this does constitute a new type of right in rem, we may also indicate some of the leading contributions. Thus, Carvalho Fernandes highlights the most significant differences between the co-ownership and the joint ownership of common areas regimes, on the one hand, and the ownership and owning autonomous units, on the other hand[65]. In a similar vein, Menezes Leitão, following criticism of condominium theory positing them as collective persons, co-ownership theory, dualist theory as well as complex right theory, declares his support for the typical right of enjoyment theory[66]. Sandra Passinhas also adheres to this perspective in underlining how the status of property and co-ownership are subject to deviations within the condominium context and that the combination of the two rights leads to something different and representative of a new reality[67]. Menezes Cordeiro has also recently emphasised not only the proximity between surface area and horizontal property but also the scope for building surface areas across successive floors burdened by rights of way[68]. Accordingly, he agrees there is no equivalence between ownership and horizontal property and maintains the latter corresponds to an autonomous right in rem as typified in law[69].

On our behalf, we would maintain the legal nature of the condominium does not equate to co-ownership or even to ownership. Unlike the position adopted by José Alberto Vieira, we therefore concur that the explanation of the condominium or horizontal property is certainly possible outside the canons of ownership[70]. In truth, condominiums only become explicit, in all of their potentialities, following such autonomy and the radical separation or disconnection from property rights that condition, distort and pervert their effects. In practice, the contents of the property right to a house situated somewhere in the countryside and the ownership of a unit in an urban building, under a condominium regime, differ very sharply. While the house allows for usage and fruition corresponding to the contents of the right to property, the apartment does not allow for equivalent enjoyment. It should also be noted, as demonstrated above, that the powers of meetings convened by the joint owners do not only relate to the common areas but also extend to the separate units[71]. Therefore, the legal nature of condominiums cannot be reconducted to any partial or special

[57] Cf. Cunha Gonçalves, *Da Propriedade Horizontal ou por Andares,* Lisbon, 1956, pp. 15-6.
[58] Cf. Henrique de Mesquita, "A Propriedade Horizontal no Código Civil Português" in *Revista de Direito e de Estudos Sociais*, no. 23, 1976, p. 148.
[59] Cf. Rui Pinto Duarte, *Curso de Direitos Reais*, 4th ed., Parede, 2020, pp. 192 et seq..
[60] Cf. Oliveira Ascensão, *Direito Civil: Reais*, 5th ed., Coimbra, 1993, p. 464.
[61] Cf. Oliveira Ascensão, *Direito Civil: Reais*…op. cit., p. 464.
[62] Cf. José Alberto Vieira, *Direitos Reais*, 3rd ed., Coimbra, 2020, pp. 711-2.
[63] Cf. Armindo Ribeiro Mendes, "A Propriedade Horizontal no Código Civil Português" in *Revista da Ordem dos Advogados*, no. 30, 1970, p. 63.
[64] Cf. Menezes Cordeiro, *Direitos Reais*, Vol. II, Lisbon, 1979, p. 910.
[65] Cf. Carvalho Fernandes, *Lições de Direitos Reais*, 6th ed., Lisbon, 2009, pp. 399 et seq..
[66] Cf. Menezes Leitão, *Direitos Reais*, Coimbra, 9th ed., Coimbra, 2021, pp. 343-4.
[67] Cf. Sandra Passinhas, *A Assembleia de Condóminos e o Administrador na Propriedade Horizontal*, 2nd ed., Coimbra, 2002, pp. 160 et seq..
[68] Cf. Menezes Cordeiro, *Tratado de Direito Civil*, Vol. XIV, *Direitos Reais*, Coimbra, 2022, p. 629.
[69] Cf. Menezes Cordeiro, *Tratado*…Vol. XIV, op. cit., p. 631.
[70] José Alberto Vieira maintains that the very frameworks for property cannot be exceeded. Cf. *Direitos Reais*…op. cit., p. 711.
[71] Cf. our *Manual de Direitos Reais*, 3rd ed., Lisbon, 2022, p. 531.

ownership. The dissimilarities in terms of restrictions on the content of the right of the unit owner are simply unavoidable and incompatible with any degree of specialisation or supposed complexity.

In addition to the restrictions on exercising the ownership of such units, the regime applicable to the common areas accentuates the distance between condominium rights and property rights. However, this does not allow for any reduction to co-ownership and cannot even be mixed or confused with greater or lesser levels of speciality or complexity of ownership. Logically, we must reach further and characterise the condominium as an autonomous and real typical right. As a matter of fact, and in coherence with affirming this new type, we have decided to alter the name of this type and, accordingly, to adopt the term Condominium Right in Rem instead of the unfortunate, misleading and outdated expression horizontal property[72] not only to ensuring greater clarity but also contributing towards a more appropriate systematic insertion. Therefore, we not only autonomise the condominium and adopt this new terminology but also intend to frame the study of its legal regime, in the wake of surface rights[73] to instead establish the right in rem to periodic occupation. Indeed, we believe there is greater proximity between condominium rights and those other two rights of enjoyment than retaining the condominium linkage in some inert fashion or embedded in the atavisms of past times, immediately subsequent to ownership or co-ownership.

**6. Condominiums versus Short-Term Rentals**

Having demonstrated the autonomy of the in-rem type of condominium rights, we may now proceed, and now applying more analytical tools, with a clarification of the compatibility of exercising short-term rental activities in buildings subject to condominium rights. For such purpose, the most relevant doctrinal contributions require analysis as well as some of the landmark positions of the higher courts, in particular those of the Supreme Court of Justice (STJ).

Even before the stabilisation of the legal framework in 2018, Fernanda Oliveira, Sandra Passinhas and Dulce Lopes defended that the normative permission for the usage of an apartment located in a building subject to horizontal property law for residential purposes does not cover short-term rental activities[74]. Thus, while the applicable legal framework, in promoting public compatibility between usages, neither intends to interfere in private relations nor restrict the contents of horizontal property rights[75], when the accommodation unit derives from an autonomous unit in a horizontal property owned building, the exercising of short-term rental activities requires an incorporation deed to legitimate such utilisation[76].

Pinto Furtado, after emphasising the commercial nature of short-term rentals, recalls that recent changes in the horizontal property law have attributed the condominium assembly with a series of competences over their autonomous units[77]. Therefore, condominium members as such would no longer be the exclusive owners of their units[78]. This author then highlights the restrictions, by virtue of unavoidable neighbourly relations, contained in the law and the prescriptions stipulated in the regulations of condominiums[79]. Therefore, it becomes unacceptable to install a short-term rental establishment in such residential properties[80]. Remaining in accordance with Pinto Furtado, the deed stipulated declaration that the unit is intended for residential purposes, in addition to the contents of the utilisation permit, does not allow for any condominium member to deploy their units for any purpose other than residential usage[81]. In fact, in his opinion, short-term rentals account for one of the activities most strongly contrasting with the residential purposes as this service includes an act of commerce that differentiates it from civilian housing[82]. Therefore, any breach by a unit-holder offends the rights of the other unit-holders[83] Therefore, any such breach by a unit-holder offends the rights of the others and correspondingly justifies natural reconstitution as well as compulsory financial penalties[84].

Rodrigues de Almeida, after having characterised short-term rentals as service provision and hence a commercial activity, then posits that the legislator, through internalising an exclusion between renting and short-term rentals, deprives users of the enjoyment of their properties as they are only granted the right of usage to their accommodation units[85]. As regards the

[72] Cf. our *Manual*…op. cit., pp. 531-2.
[73] Cf. our *Manua*l, op. cit, pp. 505 et seq..
[74] Cf. Fernanda Paula Oliveira, Sandra Passinhas and Dulce Lopes, *Alojamento Local e Uso de Fração Autónoma*, Coimbra, 2017, p. 65.
[75] Cf. Fernanda Paula Oliveira, Sandra Passinhas and Dulce Lopes, *Alojamento*… op. cit., pp. 65-6.
[76] Cf. Fernanda Paula Oliveira, Sandra Passinhas and Dulce Lopes, *Alojamento*… op. cit., p. 66.
[77] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 551.
[78] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 551.
[79] Included among these restrictions are issues relating to the quietness, safety and aesthetics of the building. Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 552.
[80] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 552.
[81] According to Pinto Furtado, even a residential lease would not be compatible with the purpose of housing. Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 553.
[82] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 556.
[83] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 558.
[84] Cf. Pinto Furtado, "Do Alojamento Local…" in op. cit., p. 561.
[85] Cf. Aristides Rodrigues de Almeida, "A Actividade de Exploração de Estabelecimento de Alojamento Local" *in Revista Electrónica de Direito*, no. 3, 2017, pp. 11-2.

condominium, he claims the main issue stems from whether or not short-term rentals constitute a usage differing to the purpose for which the unit is intended in accordance with the provisions of article 1422, paragraph 2, sub-paragraph c) of the Portuguese Civil Code (CC)[86]. In his opinion, as the purpose of short-term rentals is the provision of services for remuneration, it would not be possible to carry out short-term rentals in such locations[87]. Thus, in covering the usage for housing separately to the usage for lodging, the law limits the exercising of domestic industries to the strict terms of CC articles 1092 and 1093[88]. Therefore, this excludes activity, with any degree of organisation and level of allocation of means that fall within the framework of a business logic as the case of converting the unit into a space for hosting tourists, with opening hours and the provision of services, clearly represents[89].

In turn, Rui Pinto Duarte later emphasises the circumstance that the amendment to Decree-Law 128/2014, which took place in 2018, to introduce the rule that any installation and operation of hostels in buildings where housing coexists under horizontal property regimes, requires a resolution by the condominium's assembly[90]. According to the author, this amendment aimed at hostels, one of the four types of short-term rental, would allow the inference to be drawn, to the contrary, that the operation of short-term rentals, in the other three types, did not depend on authorisation by the other unit holders[91]. This would dismiss, or at least weaken, the position of each condominium member by subjecting to majority rule that subtracted from them[92]. Moreover, taking into account requests for registration cancellation, in accordance with the provisions of Article 9 (2) and (3), this position puts this forward as the only means of defence for condominium members.[93] However, this author still accepts that accommodation is distinct from the idea of a place to live and that the desirable tranquillity of a residential building can be jeopardised by the turnover inherent in short-term rental activities[94].

Fernanda Oliveira and Dulce Lopes, as regards the short-term rentals operating in autonomous units, highlight the information stipulated on usage permits, within the scope of prior notification, accompanied by a term of responsibility, signed by the operating owner and the appropriateness of the autonomous unit for the provision of accommodation services[95]. This comes in addition to those circumstance in which the legislator has expressly qualified short-term rentals as a service provision activity[96]. However, while, from the urbanism point of view, they do not rule the installation of short-term rentals to be incompatible with buildings intended for residential purposes, they nevertheless sustain that, as we are facing organised housing supply activities, any defence of short-term rentals as housing clearly falls short[97]. Moreover, the authors are not even impressed by the alleged contrary argument, of the need for the deliberation of condominium members over installation of hostels. In fact, according to these authors, the legislator did not clarify the doubts relating to the scope for operating short-term rentals in buildings subject to horizontal property regimes because the prior authorisation was waived, in accepting the correlating successive reaction, under the terms of article 9, number 2, taking into account the decisive and unavoidable nature of neighbourly relations[98].

Sandra Passinhas, in a study published on the occasion of the I Short-term Rentals Congress, posits the temporary accommodation of tourists as not differing from any residential usage of properties before arguing that short-term rentals do not essentially differ from hotel units[99]. In her opinion, short-term rentals comprise a logistical and organisational infrastructure that cannot be confused with the mere and punctual cession of property[100]. This author furthermore remarks on how bringing together property and co-ownership under a condominium regime establishes something different through the imposition of mutual constraints and intertwining fields of power[101]. Therefore, while the status of the condominium is both heteronomous and autonomous[102], whenever any joint owners wish to install any short-term rental establishments in autonomous units intended as

[86] Cf. Aristides Rodrigues de Almeida, "A Actividade…" in op. cit., p. 21.
[87] Cf. Aristides Rodrigues de Almeida, "A Actividade…" in op. cit., pp. 23-4.
[88] Cf. Aristides Rodrigues de Almeida, "A Actividade…" in op. cit., p. 27.
[89] Cf. Aristides Rodrigues de Almeida, "A Actividade…" in op. cit., p. 27.
[90] Cf. Rui Pinto Duarte, *Curso*…op. cit., p. 163.
[91] Cf. Rui Pinto Duarte, *Curso*…op. cit., pp. 163-4.
[92] Cf. Rui Pinto Duarte, *Curso*…op. cit., p. 163.
[93] Cf. Rui Pinto Duarte, *Curso*…op. cit., pp. 164.
[94] Cf. Rui Pinto Duarte, *Curso*…op. cit., pp. 165.
[95] Cf. Fernanda Paula Oliveira and Dulce Lopes, *Alojamento Local,* op. cit., p. 57.
[96] Cf. Fernanda Paula Oliveira and Dulce Lopes, *Alojamento Local,* op. cit., p. 65.
[97] Cf. Fernanda Paula Oliveira and Dulce Lopes, *Alojamento Local,* op. cit., pp. 72 et seq..
[98] Cf. Fernanda Paula Oliveira and Dulce Lopes, *Alojamento Local,* op. cit., pp. 78-9.
[99] Cf. Sandra Passinhas, "O Alojamento Local e o Uso das Frações Autónomas" in *I Congresso do Alojamento Local*, Coimbra, 2020, pp. 135-6.
[100] Cf. Sandra Passinhas, "O Alojamento Local…" in op. cit., p. 137.
[101] Cf. Sandra Passinhas, "O Alojamento Local…" op. cit., p. 138.
[102] Cf. Sandra Passinhas, "O Alojamento Local…" op. cit., p. 139.

residences, they will first have to secure the corresponding amendment to the deed of incorporation and, accordingly, obtain the consent of all the condominium members under the terms and effects of CC article 1419[103].

Vítor Palmela Fidalgo, also under the auspices of the aforementioned Congress, shares the idea that condominium or horizontal property rights are distinct from singular property or co-ownership[104]. He also accepts the incompatibility between short-term rentals and units intended for residential purposes. Hence, when assessing the content of CC Article 1422(2)(c) in relation to the circumstances under which condominium members are forbidden from using their apartments for any other purposes than those stipulated in the deed of incorporation, the author, after alluding to the decisive importance of CC Article 1422(2)(c), which specifically prohibits the utilisation of apartments for any other purpose than those set out in the deed of incorporation, concludes that the residential purpose is incompatible with short-term rentals[105]. Furthermore, while concurring with the idea that the 2018 reforms brought about a strengthening of the condominium's scope of intervention, he then clarifies that the prescription relating to hostels does not allow for any inference that this represents the only situation requiring the condominium to intervene[106]. He additionally stresses that Article 9(2) also does not provide for any inference that this precept is applicable only to activities undertaken by hostels[107]. Moreover, even if he disagrees with the legal stipulation, as the public authorities should not be resolving conflicts between private individuals, he proposes that the precept does contemplate the scope for a special cancellation under the terms of a decision taken by the condominium assembly, accounting for over half of the building's perimeter and in accordance with the grounds defined by detailed evidence of a proven and documented event[108].

Pedro Teixeira de Sousa, after emphasising the restrictions existing under public law in terms of operating short-term rental establishments[109] located in condominiums, in addition to noise levels and the acts of local accommodation users that may impact on the peace and quiet of residents, accepts, albeit in a somewhat dubious tone, the operation of short-term rentals in buildings otherwise intended for housing[110]. This arises from short-term rental activities neither precluding any residential usage of properties nor restricting or impeding the rights of the owners of other units to request action by the municipal authorities and the cancellation of the registration of any establishment that jeopardises the peace and quiet of the residents[111].

Nevertheless, the jurisprudential controversy persisted even after the legislative changes of 2018 and we shall only reference the most relevant decisions here. Thus, in terms of the incompatibility between short-term rentals and condominiums, there were two notable decisions handed by the Oporto Court of Appeal (TRP). In one instance, after assessing the factuality of a unit intended for dwelling purposes and finding that the dwelling refers to a place where the condominium member lies at the centre of domestic life, in 2017 the TRP concluded that the short-term rental practice does not fall within the domain of the habitat, a physical space designed for purposes of living and human development[112]. Furthermore, the same court ruled in 2018 that the operation of short-term rentals in units intended for residential purposes violates not only the purpose registered in the horizontal property deed but also that such operations do not correspond to living, residing or owning a home[113]. In turn, in 2019[114], the STJ decided that short-term rentals unquestionably constitute the provision of services and, as the regulations of condominiums established for residential purposes stipulate a prohibition on the usage of building units for any commercial activity or the provision of services, the installation of a short-term rental establishment in a building unit of that condominium represents an unlawful act pursuant to article 1422(2)(d) of the Civil Code.

Taking a different tack, the Évora Court of Appeal (TRE) ruled that the legislator did not seek to raise obstacles to the exercising of short-term rental activities in autonomous units of building owned under a horizontal property regime and intended for residential purposes[115]. In a similar sense, the STJ, on considering the allegation that exercising commercial activities violated the deed of horizontal property incorporation, ruled that rentals intended for tourists, for short periods, did not consist of a commercial act[116]. Logically, ceding for a particular consideration a furnished unit to tourists fell within the scope of housing and

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[103] Cf. Sandra Passinhas, "O Alojamento Local…" op. cit., p. 148.

[104] Cf. Vitor Palmela Fidalgo, "Intervenção do Condomínio na Regulação do Alojamento Local" in *I Congresso do Alojamento Local*, Coimbra, 2020, p. 120.

[105] Cf. Vitor Palmela Fidalgo, "Intervenção… " in op. cit., pp. 122-3.

[106] Cf. Vitor Palmela Fidalgo, "Intervenção…" in op. cit., p. 123.

[107] Cf. Vitor Palmela Fidalgo, "Intervenção…" in op. cit., p. 127.

[108] Cf. Vitor Palmela Fidalgo, "Intervenção…" in op. cit., p. 123.

[109] Cf. Pedro Teixeira de Sousa, *Restrições de Direito Público e de Direito Privado à Exploração de Estabelecimentos de Alojamento Local*, Coimbra, 2020, pp. 81 et seq..

[110] Cf. Pedro Teixeira de Sousa, *Restrições de Direito Público*…op. cit., pp. 102 et seq..

[111] Cf. Pedro Teixeira de Sousa, *Restrições de Direito Público*…op. cit., pp. 107-8.

[112] Cf. TRP judgment of 27 April 2017, at www.dgsi.pt.

[113] Cf. TRP judgment of 11 April 2018, at www.dgsi.pt.

[114] Cf. STJ judgment of 7 November 2019, at www.dgsi.pt.

[115] Cf. TRE judgment of 26 September 2019, at www.dgsi.pt.

[116] Cf. STJ judgment of 28 March 2017 at www.dgsi.pt..

did not amount to exercising a commercial activity, and therefore did not account for any violation of the deed of horizontal property incorporation of a particular building[117].

**7. The Standardising Jurisprudence**

Due to the manifestly contradictory nature of the STJ decisions, an appeal was lodged covering the entire civil section, under the terms and for the purposes of Article 688 of the CPC. Accordingly, a standardising jurisprudence (AUJ) was published in March 2022[118], with the grounding judgment dated 28 September 2017, and the appealed judgment dated 23 January 2020. In the latter, the STJ had considered that short-term rental activities did not fall under the concept of housing as included in the deed of horizontal property incorporation of any given building. This came about even though short-term rental activities, as regulated by Decree-Law 128/2014, were commercial by nature.

Having verified the contradictory nature of these judgments, as the 2018 legislative amendment had neither changed the legal provisions relevant to any resolution of this dispute nor had it added new factors, the AUJ firstly sought to emphasise the dogmatic autonomy of horizontal property in relation to the ownership of autonomous units and the co-ownership of common parts. In addition, according to AUJ, short-term rentals do not amount to a simple act of housing given that the housing experience essentially differs from term-defined usage by third parties, without any degree of permanence or stability. The AUJ also justifies the inclusion of the short-term rental within the scope of acts of commerce in order to distinguish usage of apartments for residential purposes from other uses. Accordingly, the full Civil Division of the STJ decided by an overwhelming majority, with only one vote against, to unify the jurisprudence as follows: under the horizontal property regime, the stipulation in the deed of incorporation that a certain unit is to serve only for residential purposes should be interpreted as meaning that short-term rentals are prohibited.

**8. Comments on the Standardising Jurisprudence**

Due to this very recent and highly important decision, there is the need to analyse some of the subsequent doctrinal comments. Thus, adopting a discordant approach, Pedro Albuquerque, after broadly emphasising an impressive passage by the only contrary vote, that cast by judge Rijo Ferreira, he states that the exploration of a short-term rental establishment, in an autonomous unit of a building constituted as horizontal property, defined in the deed of incorporation as a residential property, does not constitute a usage other than its intended purpose[119]. This author continues that the residential purpose, perceived as stable usage, as someone's house or residence, is not supported by any norm but rather by a pre-understanding[120]. Subsequently, he highlights some alleged advantages of the exponential increase in short-term rentals, for example the renovation of properties[121], even while omitting opinions dealing with the disadvantages, for example the consequences of gentrification and touristification. Such global phenomena, as we have previously underlined, are in no way limited to Portuguese or European cities. Moreover, as regards Article 9(2) of Decree-Law 128/2014, the author above accepts that the prescription interferes with and modifies the horizontal property regime[122]. However, he does not seem to recognise that this alteration constitutes part of a broader movement which emphasises the increasing restrictions on the powers of condominium owners over the apartments they respectively own. Indeed, he also does not accept that short-term rentals reflect a distinct figure to renting and lodging or he adheres to some differentiated legal nature existing between individual property ownership and condominium or horizontal property right as he ingloriously seeks to interlink CC articles 1305 and 1422[123].

In a still discordant but less critical sense, Menezes Cordeiro warns of the likely increase in litigiousness in the wake of the AUJ's publication. He also highlights the implicit derogation of Article 9(2), the devaluation of the horizontal property regime, the existence of a personal right of enjoyment, the proximity of short-term leases and the violation of the principle of trust[124]. He additionally rejects the commercial nature of short-term rentals and maintains that the term housing covers this practice. Menezes Cordeiro then also warns that the deed of incorporation may lawfully and legitimately prohibit short-term rentals[125] while also

commenting on the lack of economic and sociological studies and the negative impact on both tourism and the real estate investments made in the meantime[126].

On our own account, since 2017, we have consistently argued that residential usage of an autonomous building unit, under the condominium or horizontal property regimes, is not compatible with the commercial activities inherent to short-term rentals[127]. This understanding was reiterated in 2020 when considering the resolution prohibiting short-term rentals in buildings under

[117] Ibidem.
[118] Cf. AUJ no. 4/2022 of 22 March, Official Gazette (DR), 10 May 2022.
[119] Cf. Pedro Albuquerque, *Alojamento Local e Propriedade Horizontal*, Coimbra, 2022, p. 56.
[120] Cf. Pedro Albuquerque, *Alojamento Local*…op. cit., p. 78.
[121] Cf. Pedro Albuquerque, *Alojamento Local*…op. cit., pp. 102-3.
[122] Cf. Pedro Albuquerque, *Alojamento Local*…op. cit., p. 108.
[123] Cf. Pedro Albuquerque, *Alojamento Local*…op. cit., p. 178.
[124] Cf. Menezes Cordeiro, *Tratado*…Vol. XIV, op. cit., pp. 673 et seq..
[125] Cf. Menezes Cordeiro, *Tratado*…Vol. XIV, op. cit., pp. 675.
[126] Cf. Menezes Cordeiro, *Tratado*…Vol. XIV, op. cit., pp. 674-5.
[127] Vide nosso *Manual de Direitos Reais*, 1st Edition, Lisbon, 2017, p 395.

condominium or horizontal property regimes to be untouchable as well as reinforcing the competences attributed to the condominium's assembly in keeping with the radical dissimilarities prevailing between housing and short-term rental[128]. Therefore, not only have we not changed our understanding, contrary to what Pedro de Albuquerque claims[129], but we also firmly reiterated this once again in 2022 when highlighting the antinomy between those two figures and underlining that the provision in the deed of incorporation stating that units are intended for residential purposes should be interpreted as meaning that short-term rentals are not allowed[130].

We would hereby express our agreement with the unreserved position of the Full Bench of the Civil Sections, handed down in AUJ no. 4/2022. This important decision, voted through by an overwhelming majority of the advisory judges, clarifies the integration of short-term rentals into acts of commerce and excludes those units intended for residential usage from utilisation for clearly distinct and differentiated other uses. Furthermore, there can be no acceptance of the decay in the mechanism enshrined in Article 9(2) as an alternative mechanism for administrative protection as this ruling clearly explains. Nevertheless, it does not solve the existing antinomy between short-term rental and housing, nor even, with all due respect for opinions to the contrary, does it lead to any hollowing out of the law. On the contrary, it encourages subsequent control while also affirming the pertinence of the decisions taken under the auspices of the condominium assemblies, allowing for short-term rental activities in a certain apartment and even, should this be so necessary, correspondingly amending the deed of incorporation. On the contrary, it makes no sense to persist with this idea that a unit intended to serve as a residence can, without further notice and without the authorisation from the condominium, or even against its explicit resolution, be deployed for touristic and commercial short-term rental activities. Indeed, as derives from the most simple etymology and not from any elaborate hermeneutics, housing emerges as the place where one lives, where one inhabits, resides or is domiciled. Something that, as can easily be inferred, is inherently incompatible with usage by a person, normally a tourist, of a particular short-term rental establishment for a matter of days or weeks.

In addition, the deed of incorporation is of unquestionable importance to rights in rem, above all, to minor rights of enjoyment. Thus, should a deed of incorporation be meaningless in the highest right in rem, that is, property, the law attaches decisive importance to the deed, for example, in the usufruct or surface right. Accordingly, it is under the usufruct right that we may ascertain whether there is a right of trespass as set out in CC Article 1444. This will also result from the surface deed of incorporation whenever this stipulates the payment of a surface charge as set out in CC Article 1530. Therefore, as the condominium right is a minor right in rem, with the law attributing ample emphasis to its deed of incorporation, see CC articles 1418 and 1419, the legislator determines that the purpose, use and fruition of each autonomous unit are therein registered. Therefore, whenever a deed states that a certain unit is intended for residential usage, while someone may maintain their residence or domicile there, short-term rental activities cannot take place in that unit. In fact, following the AUJ, this strange and wide-ranging interpretation is not even allowed.

As regards the protection of trust, it suffices to say that at least since 2016, some higher courts have ruled that housing and short-term rentals were incompatible. Therefore, it was to be expected that the STJ would issue a uniform jurisprudence ruling in the short term. In terms of the economic impacts, we believe the restriction on gentrification is praiseworthy and will naturally bring about several positive consequences. Furthermore, in the case of investments going into the tourism sector, there remains nothing to prevent investors, in addition to continuing to open still more hotels, from acquiring all of the units in a particular building and licensing multiple and varied shot-term rental accommodations. This also in no way infringes on the alternative course of action, thus convincing the other condominium members to change the deed of incorporation and, after receiving the corresponding administrative authorisations, installing a short-term rental operation in a specific unit. What is more, neither the content of the AUJ ruling nor our understanding precludes this legitimate economic and financial option within the scope of proven profitable tourist activities.

## 9. CONCLUSIONS

Although short-term rentals trace their origins primarily to leases for especially short periods, they constitute a distinct and autonomous concept which, due to exponential growth, has generated gentrification and touristification phenomena through contemporary, collaborative-based economies. Therefore, administrative restrictions, likely to curtail the autonomy of parties, their freedom of establishment, movement and provision of services, were determined by the Court of Justice of the European Union (CJEU) in September 2020. In fact, the CJEU concluded that the restrictive regulations enacted by the city of Paris were duly justified on the grounds of the general interest, in particular, the shortage of long-term rental accommodation.

Therefore, taking into account these public interest restrictions, we cannot go along with those who, in the case of short-term rentals, insist on privatistic or contractual based approaches, including the unsuccessful re-conductibility to leasing or accommodation contracts. This also does not apply to summer or holiday lets opted for as alternatives to accommodation in hotel complexes. As a matter of fact, while the provision of holiday accommodation reflects a longstanding practice, the supply of short-term rental services displays another level of complexity differing from the simple agreement reached in order to make available an

[128] Vide nosso *Manual de Direitos Reais*, 2nd Edition, Lisbon, 2020, p. 497-8.
[129] Cf. Pedro Albuquerque, Alojamento Local…op. cit., pp. 124-5.
[130] Vide nosso *Manual de Direitos Reais*, 3rd Edition, Lisbon, 2022, pp. 525-6.

apartment or other residential unit for usage and enjoyment. This does not even amount to a residential contract as the short-term rental regime sets out a very significant set of binding rules, mainly of an administrative and fiscal nature, whose structural relevance can be neither avoided, discarded nor silenced.

Short-term rentals result in a radical departure from leasing both as regards renting in itself and short-term renting. Systematic recourse to contracting through digital platforms, setting aside the intuitu personae character, provides another dimension which distances short-term rentals from leases and approximates them more closely to hotel or other tourist establishments. In addition, there is their commercial, and not civil, nature on account of the presence of an establishment, a natural person and/or a legal company. Added to this comes the sheer importance of tourism, the emergence of tourism law and the unavoidable relevance of interrelated issues. For all such reasons, we perceive short-term rental provision as a contract for the supply of tourism-related services.

Furthermore, given the dichotomy between short-term rentals and the condominium, there is every importance in assessing the legal nature of this real right of enjoyment even if many have remained silent on this issue. We would therefore note a disconnection, and the autonomy of horizontal properties, of condominiums, vis-à-vis the right to property. The legal nature of horizontal properties, of condominiums, is not equivalent to co-ownership or to sole ownership. The condominium only takes explicit effect following the total separation from the right of ownership which, in the past, conditioned, distorted and perverted it. In effect, the content of the right to property in the case of rural, detached homes in the countryside becomes very different to the rights of ownership of an apartment in a building constituted under the condominium regime. While the house allows for usage and enjoyment corresponding to the content of property rights, the apartment does not provide equivalent enjoyment. In the study of condominiums, it is clearly worth remembering that the powers of the general meeting do not relate only to the common parts of the condominium but also, and obviously, to the separate units. Therefore, the very legal nature of the condominium cannot be reduced to some partial or special ownership.

On ascertaining the autonomy of the short-term rental on the one hand and the condominium on the other hand, the antinomy between housing and short-term rentals becomes clear. Furthermore, a residence is the place where one lives, where one inhabits, resides or has a domicile. This is not compatible with the usage of a short-term rental establishment whether for days or weeks. Therefore, the STJ appropriately determined, in its AUJ, that any indication in the deed of incorporation that a certain unit is to be used as a residence must be interpreted as meaning that short-term rentals are not allowed. Furthermore, as regards tourism sector investments, there is nothing preventing investors, in addition to opening hotels, from acquiring units in given buildings and licensing multiple and varied short-term rental accommodations. This also does not infringe on the opportunity to convince the other condominium members to change the deed of incorporation and, after receiving the corresponding administrative authorisations, install short-term rentals in specific units.

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