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NEWSLETTER | CORPORATE LAW

CORPORATE LAW NEWSLETTER | August 2015

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CORPORATE LAW NEWSLETTER

I DECREE-LAW NO. 155/2015 OF 10 AUGUST: LEGAL FRAMEWORK FOR THE AUCTION TRADE

Decree-Law 155/2015 was published on 10 August 2015. This creates the legal framework for the auction trade, which shall enter into force on 10 September 2015. This legal regime shall not affect any special regimes that are in effect, namely the legal framework for gold and silver working and assayers, when this involves the sale by auction of articles with precious metals.

Natural or legal persons currently engaged in the auction trade shall have a period of 180 days to comply with the provisions stipulated in the new legal framework.

The new law contains definitions of various concepts, namely what is understood by the auction trade, in other words, "the activity of selling movable and immovable property, both tangible and intangible, by means of a mandate granted by the owner of the property or resulting from a judicial decision, at an auction, through a bidding process directed by an auctioneer to buyers appearing in person or taking part by means of distance communication, in which the property is sold to the best bid, the successful bidder being required to acquire the property".

THE AUCTION TRADE

- **Authorisation system**

The auction trade can only be engaged in within national territory by natural or legal persons duly licensed by the Directorate-General of Economic Activities (DGAE).

The authorisation application is submitted to the *Balcão do Empreendedor* service, accompanied by various documents, including a written solemn affirmation of the absence of any of the circumstances that may determine the unfitness of the applicant. With regard to this point, the auction trade may only be engaged in by natural or legal persons considered to have good standing, under the terms of the law, which states that causes of lack of good standing include some of the following circumstances: (i) having been declared insolvent by a judicial decision in the last five years, being liquidated, wound up or having its business suspended, being subject to any ban against the sale of assets or being in any similar situation, or having its case in progress, unless it is covered by a special business recovery plan, company recovery system through an extrajudicial agreement or extrajudicial reconciliation procedure; (ii) having been condemned for crimes listed in the law, provided they are punishable by prison term of more than six months; (iii) having been condemned for unlawful or unfair competition; or (iv) being prevented from engaging in commercial activity. In the case of a legal person, these circumstances concern its representatives.

In the event of a favourable decision, it is accompanied by a notification of the applicant to submit proof of compulsory insurance, a financial guarantee or equivalent instrument, without which it may not start the activity. If the DGAE receives proof of the compulsory insurance, the applicant is issued a document authorising it to engage in the activity.

- **Obligations of auction companies**

Among other obligations, to engage in the auction trade a company must have civil liability insurance, a financial guarantee or equivalent instrument, of a mandatory minimum value of €200,000.00, intended to be cover any non-pecuniary losses caused to third parties resulting from the activity, due to its own actions or omissions or those of its operators, representatives or employees, for whom it may be held liable under civil law, under the terms defined in the law.

AUCTIONS

The contract for the provision of auction services must be set down in writing, in digital format with electronic signatures, or in two copies, signed by both parties, and must contain elements as defined in the law. In addition, and without prejudice to the obligations arising out the law applicable to auctions, electronic auctions shall be subject to additional regulations.

With regard to duties to clients and buyers, auction companies are expressly forbidden from acting as a party in any transaction that relates to the properties included in the auction contract to which it is a party or from selling on credit without the written consent of the clients.

With regard to buyers, an auction company may require their prior registration when they are interested in bidding for items, as well as the payment of a deposit, the rules provided for in the Portuguese Civil Code applying in this case for the deposit agreement, without prejudice to it being free as required by the new legal framework.

The remuneration of the auction company is payable on the completion of the auction transaction. This right to remuneration, to be paid by the client owner of the items auctioned, is not affected by the legal right of preference, nor by the annulment or declaration of invalidity of the sale, when the company did not contribute to the resulting fault, nor could reasonably have been aware of it.

Temporary provisions: natural or legal persons currently engaged in the auction trade have a period of 180 days to comply with the provisions of the law, from the date it comes into effect.

II DECREE-LAW NO. 160/2015 OF 11 AUGUST: LEGAL FRAMEWORK FOR PAWNBROKING

Decree-Law 160/2015 was published on 11 August 2015. This law create the legal framework for pawnbroking, in other words, the activity of loans secured by personal property. Decree-Law 365/99, of 17 September, which established the legal framework for access to, the exercise of and supervision of pawnbroking. Nevertheless, the new legal framework will only enter into force 60 days after its publication.

PAWNBROKING

- **Licensing**

Pawnbroking may only be engaged in by natural or legal persons duly licensed by the Directorate-General of Economic Activities (DGAE) that are based or have permanent establishment in Portugal, that are of good standing and have an appraiser of articles with precious metals and gemstone materials, under the terms provided for in the legal framework for gold and silver working and assayers.

Application for authorisation: the application must be submitted to the Balcão do Empreendedor service, using a specific form and accompanied by the following elements: (i) identification of the applicant; (ii) address; (iii) online certificate code or start-up declaration; (iv) extract from the judicial record (of the applicant or, in the case of a legal person, of its representatives); (v) Economic Activity Code corresponding to the activity (64923); (vi) address of the establishment(s) where the applicant intends to engage in the activity; (vii) identification, for each establishment, of the appraiser of articles with precious metals and gemstone materials and submission of that person's professional qualification certificate, under the terms of the legal framework for gold and silver working and assayers; and (viii) written solemn affirmation of the absence of any of the circumstances that may determine the unfitness of the applicant. However, the elements referred to are not necessary in the case of a credit institution.

In the event of a favourable decision, the DGAE shall notify the interested party to submit proof of compulsory insurance, without which it may not start the activity.

Good standing: pawnbroking may only can engaged in by natural or legal persons deemed to have good standing. Pursuant to this law, the following circumstances are causes of lack of good standing: (i) having been declared insolvent by a judicial decision in the last five years, being liquidated, wound up or having its business suspended, being subject to any ban against the sale of assets or being in any similar situation, or having its case in progress, unless it is covered by a special business recovery plan, under the legislation in force; (ii) having been condemned, in Portugal or abroad, for various crimes referred to in the law, provided they are punishable by a prison term of six months or more; (iii) having

been condemned for unlawful or unfair competition; (iv) having been condemned for infringements of the legal or regulatory rules that govern the activities of credit institutions; or (v) being prevented from engaging in commercial activity, irrespective of the cause. In the case of a legal person, these circumstances concern its representatives.

Each appraiser of articles with precious metals and gemstone materials may work for up to three establishments, located in the same district, provided he/she guarantees the appraisal of all the items of this nature pledged.

- **Obligations of pawnbrokers**

Compulsory insurance: pawnbrokers must prove to the DGAE, each year, through the Balcão do Empreendedor service, the renewal of the insurance contract that transfers liability to an insurance company in the event of loss, misplacement, theft, robbery or fire of items pledged. With regard to value of the insurance: during the first year of activity the minimum value is €100,000.00, per annual period; in subsequent years, the value of the insurance is the average of the appraisals made in the previous calendar year, when this average exceeds €100,000.00.

Compulsory notices to be displayed: apart from the duty of pawnbrokers to have a book of complaints, each establishment where they engage in their activity must display the following in a clearly visible location: (i) copy of the document of authorisation to pursue the activity; (ii) details of the appraisal fees and interest; (iii) proof that the weighing instruments comply with compulsory requirements; (iv) proof of validity of the compulsory insurance; (v) daily prices of gold and of other precious metals, according to the *London Bullion Market Association* (LBMA); and (vi) table of legal marks, printed by the Contrataria Nacional (National Assayer's Office).

Sales to the public: pawnbrokers that display or sell to the public articles with used precious metal acquired in auctions for the sale of pledged items must comply with the provisions of the legal framework for gold and silver working and assayers and corresponding complementary legislation.

LOAN AGREEMENT

Object: all freely tradable movable items may be pledged, with the exception of the following: (i) military articles or uniforms of the armed forces or security forces; (ii) arms and munitions (the previous rules did not mention munitions); (iii) flammable, explosive or toxic materials; (iv) objects especially intended for public worship; and (v) movables subject to registration. It should be noted that the new legal framework, unlike the previous framework, no longer mentions "objects which offend against decency" as tradable movables that cannot be pledged.

Agreement: the loan agreement secured by the pledge must be set down in writing, done in two copies and signed by both parties, one remaining in the possession of the lender, entitled "pawn document", while the other copy, entitled "pawn ticket" is for the borrower. In addition to the identification of the parties, the contract must contain the following details: (i) the appraisal value; (ii) the appraisal fee and the amount collected in this respect; (iii) the amount loaned; (iv) the interest rate; (v) the start and end dates of the agreement; (vi) the indemnity in the event of loss, misplacement, theft, robbery or fire of the items pledged; (vii) the terms of payment of the loan; (viii) information on the possibility of sale of the object by auction in case of arrears for a period of more than three months; (ix) the terms and conditions for redemption of the items pledged; (x) the rules for the allocation of the balance from the sale of the item pledged; and (xi) information to the borrower that the pawn ticket may only be transferred to third parties after prior notification of the lender of the identification of the new owner.

Appraisal of the items pledged: the appraisal must take into account age, artistic value, rarity, state of repair, as well as the type of item, with a view to its resale value. In the event of appraisal of articles with used precious metals, the following must also be taken into account: (i) the daily price of gold and of other precious metals; (ii) the weight of the items; and (iii) the purity of the precious metals in accordance with the legal framework for gold and silver working and assayers. In addition, in these situations the appraisal must be carried out by an appraiser of articles with precious metals and gemstone materials.

Assessment fee: at the time of conclusion of the agreement, the pawnbroker may charge, for the appraisal of the item, an amount deriving from the application of a single fee not greater than 1% of the amount loaned and the lender must inform the borrower of this fee before the appraisal of the item. If this duty is not complied with, as well as the duty to indicate the appraisal fees and interest, such appraisal fee cannot be charged.

Interest rate: the interest rate may not exceed, in each calendar year, 85% of the maximum annual percentage rate (APR) applicable to credit cards to be in effect in the 1st quarter of each calendar year, in accordance with the information published by Banco de Portugal. The law contains more detailed rules on other conditions of the interest rate.

Redemption: the redemption of items pledged requires the prior payment of the amount owed, the accrued interest and, when the redemption of the item takes place during the sale stage, the corresponding sale charge. However, the redemption may be conditional upon advance notice of 5 business days by the borrower, when provided for in the agreement.

With regard to the loan agreement, the new legal framework also contains other aspects, such as the time limits and renewal of the agreement, the maturity of interest, situations of arrears, conditions for payment of the loan and cases of loss, misplacement, theft, robbery or fire of the items pledged.

SALE OF THE ITEMS PLEDGED

Sale of the items pledged: in case of arrears for a period of more than three months, the item pledged may be sold through an auction or directly to entities that, by law, have the right to acquire certain items. Sales by auction must be announced in the forms and with the details set out in the law. The law also provides for rules with regard to the entities which must be informed of the auction, and other procedures.

Balance: once the amounts owed have been deducted, if there is a remaining balance, it shall be given to the borrower, within six months from the date of the sale. If the borrower does not claim the balance within that time limit, 60% shall revert to the State and 40% to the lender.

With regard to the sale of the items pledged, the law provides detailed rules on auctions, as well as the obligations of the pawnbroker after the sales procedure.

- **Administrative offences**

Notwithstanding any civil or criminal liability, namely for false representations or counterfeiting of the documents supporting the submission of communications, or other documents provided for in the law, the new legal framework sets out a large number of infringements and their fines, as well as additional penalties.

- **Transitional arrangement**

The licences issued under Decree-Law 365/99, of 17 September remain valid until cessation of business or until any of the requirements for engaging in the activity set forth in the new legal framework has not been met. However, pawnbrokers licensed under that law must, within 180 days from the date of entry into force of the new legal framework for gold and silver working and assayers, inform the DGAE of the identity of the appraisers of articles with precious metals and gemstone materials, at each establishment, and submit their corresponding certified of professional qualification.

III LAW NO. 98/2015, OF 18 AUGUST: LEGAL FRAMEWORK FOR JEWELLERY AND ASSAYERS

Decree-Law 98/2015 was published on 18 August 2015. The law sets out the new legal framework for jewellery and assayers and repeals Decree-Laws 391/79, of 20 September, 57/98, of 16 March and 171/99, of 19 May. The new legal framework regulates the sector of trade in articles with precious metals and the provision of services by Assayer's Offices, as well as the professional activities of technical supervisor of assaying-casting precious metals and appraiser of articles with precious metals and gemstone materials.

Despite its importance, due to its complementarity with the two laws discussed above, it will merely be noted that the new legal framework for jewellery and assayers extensively regulates various issues, namely the rules on the placing on the market and selling of articles with precious metals, the legal purities of precious metals and assayer's marks, economic agents and their commercial activities, the technical requirements of precious metals and the import and export of articles with precious metals.

It must also be noted that economic agents in whose premises articles with used precious metals are displayed, bought and sold must adopt the mandatory security systems set out in the law, which must be implemented within 180 days from the publication of the new legal framework, including a video surveillance system for effective control of entries into and departures from such premises.

In addition, the new legal framework requires the existence of civil liability insurance for the technical supervisor of assaying-casting precious metals and appraiser of articles with precious metals and gemstone materials, with a mandatory minimum insured amount of €100,000.00, without prejudice to the ordinance to be published within 90 days from the date of publication of this decree-law which shall establish the minimum requirements of the insurance.

IV NATIONAL LEGISLATION

Decree-Law no. 156/2015 – D.R. no. 154/2015, Series I of 2015-08-10

Sets out the rules governing rent subsidies for tenants with residential lease agreements, entered into before 18 November 1990 whose rents are being updated, and rules governing the calculation of corrected gross annual earnings.

Order no. 8809/2015 – D.R. no. 154/2015, Series II of 2015-08-10

Approves the Action Plan for Electric Mobility.

Order no. 8810/2015 – D.R. no. 154/2015, Series II of 2015-08-10

Rules and procedures necessary to establish the regulations for interruption of generation under the special regime, in particular the order and sequence of the reduction in power to be followed by special regime generators, connected to the RNT or RND.

Law no. 92/2015 – D.R. no. 156/2015, Series I of 2015-08-12

First amendment to Law no. 86/95, of 1 September, which approves the basic law on agricultural development.

Decree-Law no. 165/2015 – D.R. no. 159/2015, Series I of 2015-08-17

Regulates the Common Land Law, approved by Law no. 68/93, of 4 September.

Ministerial Order no. 250/2015 – D.R. no. 160/2015, Series I of 2015-08-18

Sets out the specific requirements for the construction and operation of race courses licensed to hold horse races on which horserace bets may be made.

V CASE LAW

Judgment of the Court of Appeal of Évora of 09-07-2015

FINANCIAL LEASING – invalidity of contract clause

In the context of a property leasing agreement, some of its clauses, under the title “compensation”, stated that “the termination or expiry of the agreement for reasons not attributable to the lessor requires the lessee to pay the lessor, in addition to the lease payments outstanding and not paid (...) compensation of 20% of the amount of the lease payments due”. This establishes a penalty clause, in other words, the agreed amount of the compensation due, provided for in Art. 810.1 of the Portuguese Civil Code. In addition, Art. 19(c) of the Law on Standard Business Terms provides that “depending on the standard negotiating framework, in particular, general contract clauses that (...) establish penalty clauses disproportionate to the losses to be made good are prohibited”.

As noted by the Court of Appeal, the percentage of 20% of the lease payments due has been accepted since the emergence of this type of contract, both by virtue of the intervention of Banco de Portugal and by case law, which has considered it a “percentage appropriate to the type of contract in question, not being disproportionate”.

Quoting Prof. Calvão da Silva, the Court mentioned that “judicial control of the penalty clause is required, but limited merely to the correction of infringements; it is merely required to protect the debtor from the iniquities of creditors, but not to deprive creditors of their rightful interests, which include that of the penalty clause as a form of pressure over debtors in order to encourage them to comply with the payment due, which means that in fact it has a moralising effect of ensuring respect for to word given and agreements». It concludes, therefore, that “there is no doubt that this is a situation in which the lessor receives a considerable amount as *superprofit*, which, together with the other contractual circumstances, must be sufficient to hold the clause blatantly excessive, not demonstrating just a *penalty greater than the damage* but revealing a *clear, patent, substantial and extraordinary disparity between the damage caused and the penalty stipulated*”.

After thorough analysis, the Court noted that the “validity of this penalty clause will have to be determined in the specific and global context of this type of agreement, bearing in mind the nature of the proposer’s activity, the specific characteristics of the transaction, the amount of the penalty envisaged therein against the foreseeable losses due to the other party’s failure to comply with the agreement”. The Court therefore decided that the Plaintiff did not suffer losses from the non-compliance of the Defendant and, as such, the

penalty clause established was blatantly excessive, for which reason it must be reduced to 50% of its value.

Judgment of the Court of Appeal of Lisbon of 02-07-2015

Bank – Interest rate swap contract – Duty of information – Invalidity of contract – Termination of contract

The Client (Plaintiff) and the Bank (Defendant) entered into an “Interest Rate Swap Contract”, under which “the Bank pays the Client at the end of each quarterly period between the Start Date and the Maturity Date, the 3-month Euribor rate (determined on the 2nd working day before the start of the corresponding quarter), calculated on the Nominal amount” and, in return, “the Client pays the Bank at the end of each quarterly period between the Start Date and the Maturity Date, the following interest rate (calculated on the Nominal amount): (i) 4.53% if 3-Month Euribor (determined on the 2nd working day before the start of the corresponding quarter) is equal to or less than 5.35%; or (ii) the 3-month Euribor rate (determined on the 2nd working day before the start of the corresponding quarter) less a bonus of 0.20% otherwise”.

In other words, as the stated in the contract itself, “its purpose is the management of the interest rate risk, in which the client pays a fixed interest rate, if 3-Month Euribor falls, remains the same or rises moderately during the term of the contract and provided it does not pass the Barrier in each quarter. If 3-Month Euribor rises sharply, passing the Barrier in any quarter, the Client shall have a gain in the contract in that quarter, corresponding to the bonus. If 3-Month Euribor falls or remain stable, the client will have, in principle, a financial loss in that quarter, given that the interest rate payable by the Bank to the Client is lower than the interest rate payable by the Client to the Bank”.

On the basis of the established facts, the Court concluded that, on the one hand, the Bank complied with its duty of information and, on the other hand, that the Client’s intent was not affected by any error concerning the reasons determining its intent or the circumstances that constituted the basis for the transaction. This therefore excludes compensation for the so-called *culpa in contrahendo*, as well as the claim for annulment of the contract based on an error by the Client, the Client having alleged that the Bank breached its duties to provide the necessary information for it to take an informed decision.

With regard to the classification of the contract, the Tribunal concluded that interest rate swaps are separate contractual concepts and not necessarily complementary to a loan or other type of financing agreement. Despite it being a random contract, the Court understood that the contract should not be classified or treated as a gambling contract.

The random and reciprocal payments of the interest rate swap are determined by facts outside the contract and the intentions of the parties (in the case examined by the Court this was the fluctuations of Euribor), which, at the time when the contract is entered into, made it impossible to know whether the advantage envisaged in the contract would be confirmed and which party would benefit from it.

With regard to the termination of the contract due to an abnormal change in circumstances, the Court understood that the sharp fall in interest rates was covered by the risks inherent to the contract, since it is a random business arrangement in the context of which the parties are exposed to the risk of rising or falling interest rates.

In short, the Lisbon Appeal Court rejected the client's appeal, in which it asked for the contract to be declared null and void due to defect of intent or, if it did not interpret in this way, that it be terminated by virtue of an abnormal change in circumstances.

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