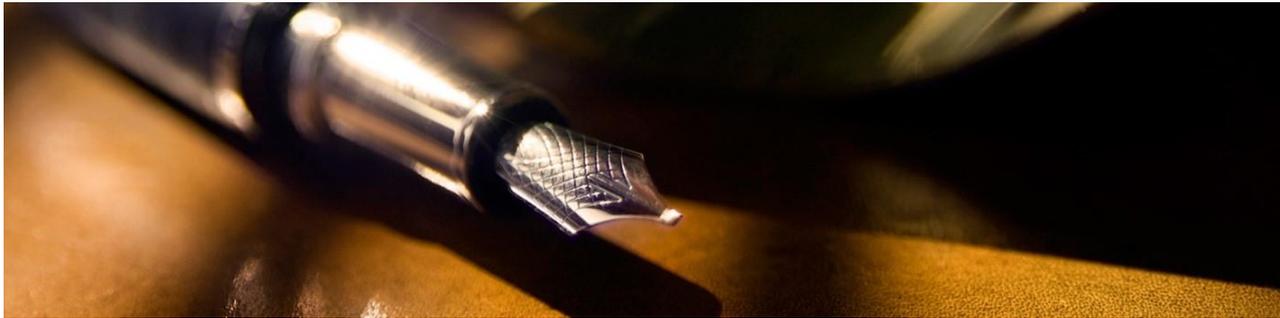




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NEWSLETTER | CORPORATE

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CORPORATE LAW NEWSLETTER | JANUARY, 2017

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CORPORATE LAW NEWSLETTER

I THE COMMERCIAL PURCHASE AND SALE AGREEMENT ON SAMPLE AND THE CLAIM UPON DEFECTS

The purchase and sale is the agreement through which the property over an asset or right is transferred, possibly having civil law or commercial law nature. The legal framework of the civil law and commercial law purchase and sale are similar but they are not absolutely coincident so, in practice, it is important to take into account the differences of the commercial purchase and sale. We will focus, in particular, on the commercial purchase and sale on sample.

Overall, it can be stated that the commercial law purchase and sale is usually a speculative business where the trader typically assumes the risk of winning or losing, as opposed to what happens in the civil law purchase and sale, where generally prevails an equivalence principle between the price and the asset or right transferred.

In what concerns the commercial law purchase and sale on sample, it can be deemed as two different types of agreements. The individual sample, where the asset must correspond to the general characteristics of the sample presented, or the sample-type, in which the asset must correspond exactly to the sample presented. As a result, it is of high importance to clarify the type of commercial law purchase and sale on sample that is the object of the agreement.

However, in order to qualify the agreement as a commercial purchase and sale on sample, it is not enough that the purchaser has been presented, in advance, with a part, a copy or a prototype of the asset object of the agreement. By contrary, the seller shall undertake to deliver an asset of the same type as the one presented, as he will be subject to the confrontation that the purchaser, either directly or through experts, may carry out.

When the asset does not present to the contractually agreed characteristics, according to the civil law framework (articles 919 and 925 of the Civil Code), the transaction is still effective but is subject to the applicable rules of the purchase and sale of defective assets, as established in articles 913 et seq. of the Civil Code. Differently, in the commercial law purchase and sale on sample, the agreement is one of a conditional nature. In other words, as the effectiveness of the agreement is subject to a condition precedent regarding the compliance between the asset delivered and the sample presented or the quality described, the lack of compliance results in the agreement not being effective.

It is also important to mention the applicable rules on the claim upon defects. In accordance with articles 916 and 919 of the Civil Code, the purchaser shall report to the seller the defect or lack of quality of the asset within 30 days after having knowledge of



the defect and within six months after its delivery. However, pursuant to Article 471 of the Commercial Code, that period is substantially reduced to 8 days if the purchaser did not examine the asset at the time of delivery, otherwise the contract would be deemed perfect with the consequent expiry of the right to complain.

The substantial reduction of the period for claiming upon defects, imposing on the purchaser a prompt analysis of the qualities of the asset, is understandable and consistent with the promptness and the need for legal certainty that characterize commercial law.

Nevertheless, it must be noted that the legal rule has been interpreted as being of a suppletive nature, entailing that the parties may conventionally extend the period to report defects.

The legal solution has also been nuanced due to the interpretation that considers that the period for claiming the defects does not necessarily starts counting as from the delivery date of the asset but only as from the date on which the defects have become known or knowable by the purchaser, naturally in accordance with the standards required in the legal trading (the provisions of the Civil Code are applied by reference to article 3 of the Commercial Code).

In this case, the purchaser shall be responsible for providing evidence (i) of the demonstrative facts on the impossibility to examine the asset (at the time of delivery or after), (ii) of the moment where such impossibility ceased and the defect has become visible, (iii) of the date on which the defect was actually identified and (iv) of the date of the termination. On the other hand, the seller will be responsible for the claim and the evidence of the facts that would deem the claim ungrounded or amended.

In addition, it has also been argued that such a short period has no reason to be applicable in case there is fraud from the seller.

Finally, it should also be highlighted that the legal trade practice has also significantly mitigated the rigors of the law by establishing the provision of guarantees on the asset sold with periods substantially longer than the legal period. Thus, in cases where the commercial law purchase and sale on a sample is subject to a warranty period of, for example, one or two years or even a longer period, the purchaser may take advantage of that period to claim upon the defects, and the seller will not be exempted from contractual liability.

II NATIONAL LEGISLATION

Decree-Law nr. 12/2017 - Diário da República nr. 14/2017, Series I, 2017-01-19

Reviews the National Registry of Drivers, including the driver's signature and photograph



Ordinance nr. 47/2017 - Diário da República nr. 22/2017, Series I, 2017-01-31

Approves the regulation of the specific training course to perform the functions of president of the court, of magistrate of the Public Prosecutor's Office and of judicial administrator in accordance with articles 97, 102 and 107 of the Law nr. 62/2013, of August 26, executed by the Centre for Judicial Studies

Regulation nr. 16/2017 - Diário da República nr. 5/2017, Series II, 2017-01-06
Statutory Auditors Association

Electoral Regulation approved by the Extraordinary General Meeting of the Statutory Auditors Association, on June 30, 2016

Regulation nr. 17/2017 - Diário da República nr. 5/2017, Series II, 2017-01-06
Statutory Auditors Association

Professional Training Regulation approved by the Extraordinary General Meeting of the Statutory Auditors Association, on 30 June 2016

Regulation nr. 18/2017 - Diário da República nr. 5/2017, Series II, 2017-01-06
Statutory Auditors Association

Disciplinary Regulation approved by the Extraordinary General Meeting of the Statutory Auditors Association, on June 30, 2016

Regulation nr. 19/2017 - Diário da República nr. 5/2017, Series II, 2017-01-06
Statutory Auditors Association

Internship Regulation approved by the Extraordinary General Meeting of the Statutory Auditors Association, on June 30, 2016 and confirmed pursuant to paragraph 2 of article 154 of the Statutory Auditors Association By-laws, approved by Law nr. 140/2015 of 7 September

III EUROPEAN LEGISLATION

Regulation No 138 of the Economic Commission for Europe of the United Nations (UNECE)

Uniform provisions concerning the approval of Quiet Road Transport Vehicles with regard to their reduced audibility [2017/71]

Corrigendum to Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011, concerning mergers of public limited liability companies (OJ L 110, 29.4.2011)



IV NATIONAL CASE LAW

Judgment of the Court of Appeal of Guimarães, 2016-12-15

Limited liability Company – Expulsion of a partner

In the above mentioned decision, the Court of Appeal of Guimarães has considered that the expulsion of a partner (of a limited company) based on the alleged non-compliance with the initial capital contribution can be executed by a resolution, without the need of a Court intervention, even if it is a company with only two partners. In this light, the resolution that was approved shall not be considered null.

In the present case, on June 17, 2014, a limited liability company was incorporated with a share capital of € 5,000.00 (five thousand euros), to be fully paid in cash and represented by two quotas, with a nominal value of € 2,500.00 (two thousand and five hundred euros), of which A and B were, respectively, holders. After the incorporation of the company, A and B, as partners of the company have committed to deliver the value of the share capital to the company, until the end of the first financial year.

However, on 14 September 2015 the company, as the Defendant, has challenged the Plaintiff, the partner A, so that he, within 30 (thirty) days counted as from of receipt of that letter, would proceed with the deposit of € 2,500.00 (two thousand and five hundred euros), in the company, correspondent to the initial capital contribution not yet completed. The company has again demanded B, on 22 October 2015, informing that unless he would deposit the referred amount, the company would promote its expulsion and consequent loss of the quota.

On January 28, 2016, the partner A received a notice signed by the partner B, as Second Defendant and partner manager of the Defendant (the company), to undertake an extraordinary general meeting with the sole item on the agenda "the resolution to approve the expulsion of the partner", in accordance with article 204, paragraph 1 of the Commercial Company Act. Once the general meeting was held, the partner A was prevented from voting and, consequently, his expulsion was approved by the vote of partner B, based on the non-compliance of the initial capital contribution.

In the case under analysis, it was for the Court to ascertain whether the expulsion of the partner A could be based on the resolution, when it is only approved by the other partner of the Defendant, meaning the non-excluding partner, being the excluding partner prevented from voting.

Concerning this matter, there have been developed two opposed case-law trends. On the one hand, some argue that, in these situations, the Court must intervene necessarily in order to protect the interests of the excluding partner, as it happens, for example, in the situation of articles 186, paragraph 3 and 257, paragraph 5, and is expressly referred the



need of intervention of the Court to exclude a partner from a company with only two partners.

On the other hand, the Court, adopting the opposed trend, has considered that the expulsion of partner A could be approved by resolution, without the Court's intervention, even if the company had only two partners, since this situation was covered by article 204, paragraph 1 of the Commercial Company Act, legally expressly set forth, from which it follows that if a partner does not pay the instalment due within the period specified in the judicial summons, the company shall notify the partner by registered mail informing them that, as of the 30th day following the date on which notice is received, the partner shall be subject to expulsion and to the loss of all or part of its quota.

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