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Corporate Law

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I. Legislation on Distance and Off-Premises Contracts

The legislation applicable to distance and off-premises contracts was revised in 2014 with the publication of Decree-Law No. 24/2014[1], of February 14, which transposed into Portuguese law Directive No. 2011/83/EU of the European Parliament and of the Council of October 25, 2011.

This Directive was amended in 2015 by Directive (EU) No. 2015/2302 of the European Parliament and of the Council, of November 25, on package travel and linked travel arrangements.

Given this amendment, Decree-Law No. 78/2018 was published on October 15, which introduced alterations to the Portuguese legislation of 2014, applying, *mutatis mutandis*, to travel, with regard to travellers, language requirements regarding the contractual information in distance and off-premises contracts and certain formal requirements applicable to distance contracts, telephone communication and additional payments.

A distance contract can be defined as a contract between the consumer and the supplier of goods or service provider without the simultaneous physical presence of both, and forms part of a system of sale or provision of services organised for distance selling, through the exclusive use of one or more distance-communication techniques up to the conclusion of the contract, including the conclusion itself. In turn, a contract concluded off premises is a contract that is concluded with the simultaneous physical presence of the supplier of goods or the provider of services and the consumer at a place other than the premises of the former, including cases where it is the consumer who makes a contractual offer.

Besides enacting the legislation applicable to distance and off-premises contracts, Decree-Law No. 24/2014, of February 14, also regulates other selling arrangements, such as automatic sales (placement of a good or service at the disposal of the consumer for the latter to acquire it by the use of any type of mechanism, with payment of its price in advance) and special occasional sales (off-premises sales made on an occasional basis at private facilities or private spaces specially hired or made available for such purpose).

However, several contracts are excluded from the scope of the said law, of which contracts relating to financial services, betting and gaming, social services and health services are underscored, as are contracts related with organised travel[2].

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[1] Later amended by Law No. 47/2014 of July 28.

[2] As defined in article 2(1)(p) of Decree-Law No. 17/2018, of March 8: *"Combination of at least two different types of travel services for the purpose of the same journey or vacation (...)".*

Notwithstanding this exclusion of contracts related with package travel from the scope of Decree-Law No. 24/2014, of February 14, Decree-Law No. 78/2018, of October 15, extended the application of certain provisions of consumer law to such contracts, with regard to travellers[3], which also includes application of the provisions on the right to information in general (albeit limited to the mandatory provision of information in Portuguese), to additional payments, to the delivery of goods, to the transfer of the risk and to promotion services, information or contact with consumers as provided in the consumer protection law (Law No. 24/96, of July 31).

Indeed, as from January 1, 2019, when concluding package travel contracts, travel agencies became obliged, under penalty of the consumer not being bound to the contract, to observe procedural requirements in distance contracts, such as the provision of certain pre-contractual information in a clear and visible way, in the event that the order entails a payment obligation, the implementation of mechanisms to ensure that the consumer, on concluding the order, expressly and consciously confirms that the order entails the payment obligation and the indication that placing the order entails such an obligation, for example by stating *"order with payment obligation"* or something similar.

It should be noted that, in the case of contracts concluded by telephone, the consumer is only bound to the contract after signing the offer or sending his or her written consent to the supplier or service provider, except in cases where the first telephone contact is made by the consumer.

The said Decree-Law added to the list of pre-contractual information already required under Decree-Law No. 24/2014, of February 14, that the supplier or service provider must provide the consumer, before the latter binds him or herself to a distance or off-premises contract, or by a corresponding proposal, the physical address of the professional's commercial address if different from the one previously communicated and, if applicable, the address of the party on whose behalf it operates (under penalty of committal of an administrative offence punishable by a fine between €400.00 and €2,000.00 in the case of an individual, and between €2,500.00 and €25,000.00 in the case of legal person), so that the consumer may, at his or her discretion, submit a complaint directly.

In turn, confirmation of the conclusion of the distance contract, by the supplier of goods or provider of services, within five days of that conclusion and, at the latest, at the time of delivery of the good or before the start of the provision of the service, shall be made on a durable medium (e.g., paper, memory stick, CD-ROM, DVD, memory card or hard disk of a computer).

[3] Any person who seeks to enter into a contract or is entitled to travel on the basis of a travel contract, in particular consumers, individuals travelling on business, liberal professionals, self-employed and other individuals, provided they do not do so on the basis of a general agreement for the organization of the business travel (article 2(1)(q) of Decree-Law No. 17/2018, of March 8).

The consumer continues to have a period of 14 (fourteen) days to terminate the contract without payment of compensation and without giving any reason, the rules for calculation of the time limits and for the exercise of their right of termination being set out in the various subparagraphs of article 10(1) of Decree-Law No. 24/2014, of February 14, depending on the particular type of contract concluded.

However, with the entry into force of Decree-Law No. 78/2018, of October 15, in distance contracts for the provision of services or the supply of water, gas or electricity, in case they are not offered for sale in a limited volume or quantity, or of district heating, in the event that the consumer wishes that the provision or supply of these services start during the termination period, i.e., during the said period of 14 (fourteen) days, the trader shall require the consumer to present an express request to that effect.

The prohibition of certain commercial practices remains, such as the supply of goods not solicited by the consumer, though article 27 of Decree-Law No. 24/2014, of February 14, regarding tied sales was revoked (prohibition of subjecting the sale of goods or the provision of a service to the purchase by the consumer of another good or service from the supplier or its designee).

Clauses that directly or indirectly exclude or restrict the rights of consumers continue to be absolutely prohibited, any clauses establishing the waiver of such rights being considered unwritten, as are those stipulating compensation or penalty of any kind, in the event that the consumer exercises those rights.

Unchanged are the minimum and maximum limits of the applicable fines, which, for individuals, vary between €250.00 and €3,700.00, and for legal persons between €1,500.00 and €35,000.00, in both cases depending on the administrative offence in question, the oversight of business practices and the fact-finding of the respective administrative-offence procedures continuing to be entrusted to the Authority for Economic and Food Safety ("ASAE"().

Not infrequently, distance and off-premises contracts are connected with different legal systems, particularly in the light of the habitual residence or registered office of the parties, which raises the question of determining the applicable law.

Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17 ("Rome I Regulation") is applicable to contractual obligations in civil and commercial matters involving a conflict of laws, i.e., that involves more than one Member State.

Article 2 of the Rome I Regulation determines that it is of universal application, i.e., the designated law applies even if it is not the law of a Member State.

As a rule, in light of the Rome I Regulation, the contract shall be governed by the law chosen by the parties, which may designate the law applicable to all or only part of the contract.

In the absence of choice, the Rome I Regulation lists the criteria for determining the applicable law, stating that the purchase and sale of goods contract is governed by the law of the country where the seller has his habitual residence, the same criterion applying to provision of services contracts. Nonetheless, should be clear from the circumstances of the case as a whole that the contract is manifestly more closely connected with a different country, it will be the law of this country that will be applicable (the so-called "general connection clause").

However, in contracts concluded by consumers – i.e., individuals who enter into contracts for a purpose that can be regarded as being outside their business activity – as professionals – i.e., people who act within the framework of their business or professional activities – the consumer is typically considered the party that is economically weaker and less experienced in business matters, which led the European legislator to impose limits on the choice of law by the parties.

Indeed, the parties remain free to choose the law applicable to the contract, but that choice may not, however, have the result of depriving the consumer of the protection that would be given by the provisions that cannot be derogated by agreement by the law of the country of their habitual residence. Thus, the mandatory rules shall apply of the law of habitual residence that are more favourable to the consumer than the rules of the chosen law.

In the absence of choice, contracts concluded by consumers with a professional are, in principle, governed by the law of the country where the consumers have their habitual residence, provided that the professional (i) pursues his commercial or professional activities in the country where the consumers have their habitual residence or (ii) by any means, addresses such activities[4] to this or several countries, including that country, and the contract falls within the scope of such activities.

If such conditions are not met, the law applicable to the contract concluded between a consumer and a professional shall be determined in accordance with Articles 3 and 4 of the Rome I Regulation, i.e., it shall be determined by general rules applicable to all contracts (as mentioned above: the law of the habitual residence of the seller/service provider).

[4] As can be read in Recital 24 of the Rome I Regulation, "Consistency with Regulation (EC) No. 44/2001 requires both that there be a reference to the concept of 'directed activity' as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No. 44/2001 and in this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No. 44/2001 states that for Article 15(1)(c) to be applicable, "it is not sufficient for an undertaking to direct its activities at the Member State of the consumer's residence, or at a number of States including that Member State. It is also necessary that a contract shall have been concluded within the scope of those activities". The said declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, it will also be necessary that that Internet site solicit the conclusion of distance contracts and that a distance contract shall actually have been concluded by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor'".

The Rome I Regulation also provides that consumers may benefit from the application of certain mandatory provisions of a law other than the one called upon to govern the contract, whether or not that of the habitual residence, when what is at issue are rules that claim application in that they are rules of public policy, no matter what the law that governs the contract ("necessary implementation rules").

The law applicable to the contract under the provisions of the Rome I Regulation shall apply not only to the formation and validity of the contract itself, but also to the formation and validity of the consent as to the choice of law, whence it follows that if the very choice of law constitutes a general contractual term, its validity will as a rule be appraised by the law designated by agreement of the parties, though consumers may invoke the law of their habitual residence to demonstrate that they did not give their consent if the circumstances show that it is unreasonable that the value of their conduct be determined by the contractually chosen law.

Article 1 of Decree-Law No. 446/85, of October 25 (General Contractual Clauses ("GCC") legislation), determines that the rules contained in articles 20 ff. thereof are applicable regardless of the law that the parties have chosen to govern the contract, when it has a close connection with Portuguese territory.

Thus, cyber-consumers habitually resident in Portugal may invoke the protection afforded by the GCC legislation, which, *inter alia*, excludes from individual contracts, among others, general contractual terms that have not been communicated in full, that have been communicated in violation of the duty to inform or that, for their context/formatting, might be overlooked.

Also with regard to the GCC legislation, in relations with consumers, it should be noted that the rules contained therein will override both the law of the third State designated by the parties and also the law objectively applicable under the Rome I Regulation, provided that there is a close connection with Portuguese territory, if the former is more favourable to the consumer than the rules resulting from the chosen/objectively competent law, under the terms of article 23 of Decree-Law No. 446/85.

The Rome I Regulation does not prejudice application of international conventions to which one or more Member States are parties at the time of its enactment and that establish rules on conflict of laws relating to contractual obligations, but, between Member States, take precedence over conventions concluded exclusively between two or more Member States, insofar as the latter concern matters governed by the Rome I Regulation.

II. National legislation

Decree-Law No. 116/2018. D.R. No. 246, Series I of 2018-12-21
Amending the Lawyers and Solicitors Sickness Insurance Institution Regulation

Decree-law No. 111/2018. D.R. No. 238, Series I of 2018-12-11
Creates and regulates the Programme to Attract Investment for the Interior (PC2II)

Decree-Law No. 110/2018. D.R. No. 237/2018, Series I of 2018-12-10
Enacts the new Industrial Property Code, transposing Directives (EU) 2015/2436 and (EU) 2016/943

Ordinance No. 310/2018. D.R. No. 233/2018, Series I of 2018-12-04
Regulates the provisions of Article 45 of Law No. 83/2017, of August 18 (establishes measures to combat money laundering and terrorist financing)

Regulation No. 798/2018. D.R. No. 231, Series II of 2018-11-30
National Data Protection Commission
List of personal-data processing subject to impact assessment on data protection

Decree-Law No. 98/2018. D.R. No. 228, Series I of 2018-11-27
Establishes the framework for the transfer of powers to municipal authorities in the field of authorisation of games of chance and other forms of gambling

Decree-Law No. 91/2018. D.R. No. 217, Series I of 2018-11-12
Enacts the new Legislation on Payment Services and Electronic Money, transposing Directive (EU) 2015/2366

Law No. 64.2018. D.R. No. 208, Series I of 2018-10-29
Guarantees the right of preference for tenants (amending the Civil Code, enacted by Decree-Law No. 47344 of November 25, 1966)

Ordinance No. 284/2018 D.R. No. 284, Series I of 2018-10-23
Finance, Health and Economy
Establishes an authorisation procedure for the marketing of new tobacco products and fixes the respective charge.

Decree-Law No. 77/2018. D.R. No. 197, Series I of 2018-10-12
Amending the Retirement Statute, allowing access to early retirement by former subscribers

Decree-Law No. 69/2018. D.R. No. 69, Series I of 2018-08-27
Restructures Entidade Nacional para o Mercado de Combustíveis, EPE, the Directorate General of Energy and Geology and Laboratório Nacional de Energia e Geologia, IP

III. National and International case law

Judgment of the Court of Appeal of Lisbon, of 5 July 2018, (Case No. 875/14.6TVLSB-8)

On the grounds of alleged lack of just cause for dismissal, the Court of Appeal of Lisbon ("TRL") was asked to rule in a declarative action filed against the company by a former director who had been dismissed.

The plaintiff claimed that he had been appointed to the position of chair of the Board of Directors for the period between 2012 and 2015, having been removed from office by the General Meeting of shareholders resolution passed on 22.11.2013, on the grounds of just cause.

The Court held that, in a list of examples, article 403(4) of the Companies Code prescribes that serious violation of the duties of directors and their unfitness for the normal performance of their duties constitute due cause for dismissal.

Article 64 establishes a number of fundamental duties of the director: duties of care and diligence, revealing technical willingness and knowledge of the business appropriate to the post, and employing in that connection the diligence of a careful and orderly manager, duties of loyalty in the interest of the company, taking into account the long-term interests of the shareholders and considering the interests of other subjects relevant to the sustainability of the company, such as its employees and creditors.

It further added that the said list of examples shows that it is not just any violation of the duties of directors that constitutes just cause for dismissal, but only serious breach rendering unenforceable on the company respect for the interest of stability of the relationship by the director. It must be a situation that would make virtually impossible the subsistence of the relationship, regardless of the director's fault, rendering unenforceable his or her continuation in office.

In short, the Court concluded that the important thing is that, *concretely and objectively, it be determined whether the alleged fact or situation damages the corporate interest to an extent such that it imposes the rupture of the relationship; whether they affront the actions of a careful and orderly manager for the benefit of the corporate interest and taking into account the interests of the shareholders; the company being charged with invoking and proving the facts constituting the grounds for the compulsory removal of* the director.

Judgement of the Court of Justice of the European Union, Judgement of 4 October 2018, Case C-105/2017

The Court of Justice of the European Union ("CJEU") was called upon to rule following a reference for a preliminary ruling from the Administrative Court of Varna in Bulgaria.

The reference was presented within the context of a dispute against a seller who operated on an online purchase and sale platform and the Consumer Defence Commission of Bulgaria, after the latter had applied several fines for the seller having failed to provide information to consumers in adverts for the sale of goods on a website.

In the case under appraisal, a consumer purchased an article on the OLX website, under a distance purchase and sale contract. Considering that the article did not correspond to the characteristics stated in the advert published on the said website, the buyer filed a complaint with the Consumer Protection Commission after the seller refused to accept the return of the article against reimbursement of the amount paid.

Having carried out inspections, the said Commission concluded that the seller had published, on the aforesaid website, a total of eight adverts selling various products, including that in respect of the article in question.

The Commission also concluded that the seller had committed an administrative offence for breach of information duties, and applied several fines. According to the Commission, the seller omitted in each of these adverts, the name, postal address and email address of the professional, the total price of the product offered for sale, including all duties and taxes, the terms of payment, delivery and execution, the consumer's right to terminate the distance purchase and sale contract entered into, the conditions, the time limit and procedures for the exercise of that right, as well as the indication of the existence of a legal guarantee of compliance of the products with the purchase and sale contract.

Given the above, CJEU, considered for the purposes of article 2, paragraphs b) and d) of Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005, concerning unfair commercial practices with consumers on the domestic market, that a natural person who publishes at the same time a number of adverts for the sale of new and used goods on a website can only be described as a 'professional', and that activity can only constitute a 'commercial practice' if that person acts within the scope of his or her commercial, industrial, craft or professional activity, otherwise it will not be covered by the duties that apply to 'professionals'.

Contact

Cuatrecasas, Gonçalves Pereira & Associados,
Sociedade de Advogados, SP, RL
Sociedade profissional de responsabilidade limitada

Lisboa
Praça Marquês de Pombal, 2 (e 1-8º)
1250-160 Lisboa I Portugal
Tel. (351) 21 355 3800 I Fax (351) 21 353 2362
cuatrecasasportugal@cuatrecasas.com I www.cuatrecasas.com

Porto
Avenida da Boavista, 3265 - 5.1
4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com I www.cuatrecasas.com

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