

# Introduction to Contract Law

Mandatory clauses, abuse clauses, arbitration and parties to a contract. Common contracts

ISCAP

Legal Systems and the Evolution of the Profession:  
Translating and interpreting in diversity

José Pedro Teixeira Fernandes

28/01/2020



P.PORTO

INSTITUTO  
SUPERIOR  
DE CONTABILIDADE  
E ADMINISTRAÇÃO  
DO PORTO



Co-funded by the  
Erasmus+ Programme  
of the European Union

# Before the contract law in Portugal... (1)

[SOURCE: Michael Skapinker / FT, 3/12/2019]

Opinion **Work & Careers**

## How native English speakers can stop confusing everyone else

Do not beat about the bush with idioms when it comes to making your meaning clear

MICHAEL SKAPINKER



A character played by Doon Mackichan signs up to English as a foreign language classes in Channel 4's 'Smack the Pony' © Channel 4

Michael Skapinker DECEMBER 3 2019

# Before the contract law in Portugal... (2)

[SOURCE: Michael Skapinker / FT, 3/12/2019]

From 1999 until 2003, the UK's Channel 4 screened an Emmy award-winning female-led comedy series called *Smack the Pony*. In one sketch a woman called Jackie O'Farrell (played by Doon Mackichan) marches into an adult education centre somewhere in England, sits down and tries to register for a course in speaking English as a foreign language.

But you already speak English, the puzzled course organiser (played by Sally Phillips) says. "I only speak English English," Jackie replies. "I don't know how to speak it as a foreign language." She travels a lot, she says. "Foreign people can't understand a word I'm saying."

Hilarious, except that Jackie was ahead of her time. It is now widely recognised that many people don't understand what native English speakers are saying. Widely recognised by non-native English speakers that is. The Brits, Americans, Australians and others who have been speaking English all their lives are largely oblivious to the incomprehension they leave behind at conferences, business meetings and on conference calls.

# Contract law in Portugal

## Introduction

1. Concept of contract and some general principles
2. Form and formation
3. Unfair terms
4. Some commonly used contracts
5. Arbitration

0

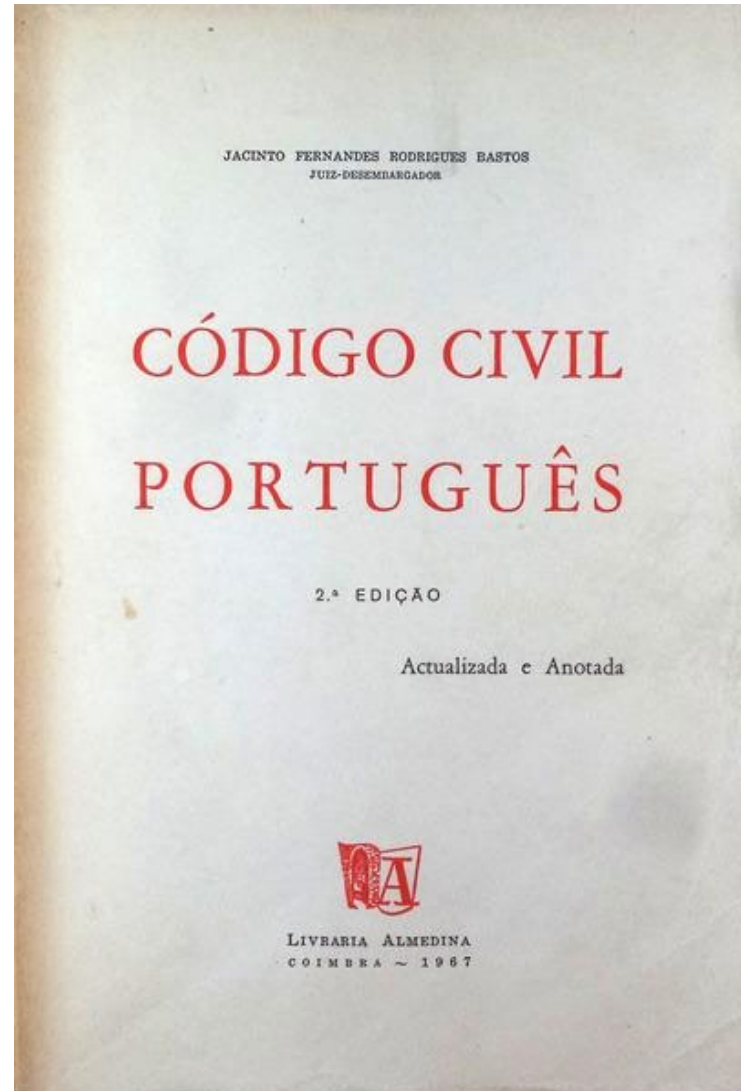
# Introduction

# Introduction (1)

- The most important legislative source of general contract law in Portugal is the Civil Code of 1966 (replaced the older Civil Code of the XIX Century, 1867).
- The current Portuguese Civil Code was modeled upon the German Civil Code – *Bürgerliche Gesetzbuch (BGB)*. The structure is quite similar.
- Not all contracts are in the Civil Code.
- Indeed, with the exception of a relatively short section of the Code, only those rules regulating the most common contract types are wholly contained within the boundaries of the law of contract.

# Introduction (2)

[SOURCE: Portuguese Civil Code, 1966 (Almedina, 1967 edition)]



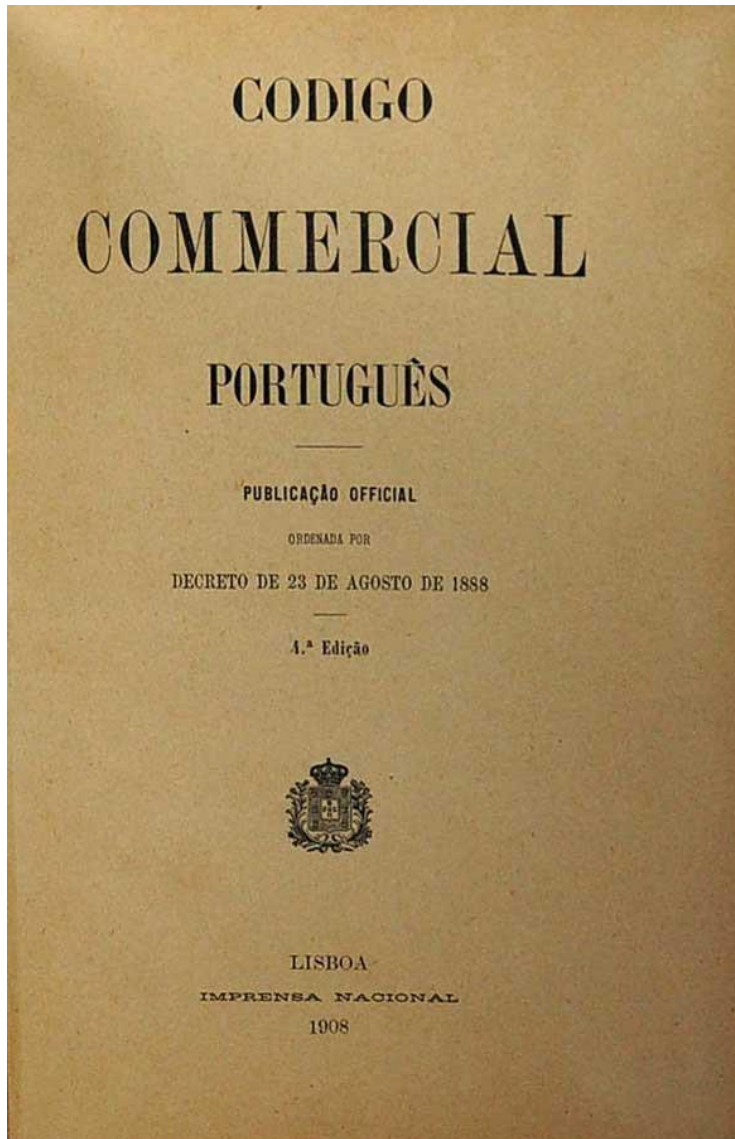
# Introduction (3)

- Some commercial contracts are regulated in the Commercial Code, dating from late XIX century, and the labour contract is now regulated in the Labour Code of 2009.
- Significant rules of general contract law can also be found in non-codified statutes.
- The most important being those on standard terms and contracts of adhesion and on the sale of consumer goods.
- Usages are also relevant in a number of aspects of contract law.



# Introduction (4)

[SOURCE: Portuguese Commercial Code, 1888 / Faculdade de Direito / Universidade Nova de Lisboa]



## CODIGO COMMERCIAL PORTUGUÊZ

### PARTE PRIMEIRA

#### DO COMMERCIO TERRESTRE

#### LIVRO I

##### DAS PESSOAS DO COMMERCIO

##### Disposições geraes

##### ARTIGO I

1. O direito civil, não sendo ~~contrario~~ ou especialmente derogado pelo presente Codigo, é applicavel aos negocios e materias commerciaes.

2. Toda a pessoa tem direito a exercer commercio em qualquer parte d'estes reinos e dominios, salvas as excepções do presente Codigo, *além da Mesa do B. Com. e promissões e letes*

##### ART. III

3. O exercicio d'este direito é regulado e garantido por disposições particulares.

##### ART. IV

4. Todavia, para que as operações, actos e *obrigações activas e passivas do que exerce commercio* sejam reguladas e protegidas pela lei commercial, é necessario que aquelle que intenta ser commerciante se matricule no Tribunal do commercio de seu domicilio *4. 10. 11. 14. 208. 211*

##### ART. V

5. O menor de ~~dezoito~~ *cinco* annos não pôde obter matricula, salvo depois de emancipado. E só poderá emancipar-se tendo dezoito annos completos.

# Introduction: a curiosity (5)

[SOURCE: Portuguese Civil Code, 1867 / English Translation, Goa, India, 2018]

**CODIGO CIVIL**  
**PORTUGUEZ**

APPROVADO POR CARTA DE LEI DE 1 DE JULHO DE 1867

---

Segunda edição oficial



**PORTUGUESE CIVIL CODE, 1867**

**Official Translation with notes**

**First Edition**

**August, 2018**

**© Government of Goa**

# Introduction: a curiosity (6)

[SOURCE: Portuguese Civil Code, 1867 / English Translation, Goa, India, 2018]

## GENERAL CONTENTS

<i>Contents</i>	<i>Page No.</i>
1. Introductory Note	v
2. Charter of Law of 1 <sup>st</sup> of July 1867	vii
3. Law dated 18/11/1869 extending the Civil Code to the overseas provinces	xi
4. Chronology of legislation affecting the Code	xv
5. Internal Organization of the Civil Code	xvii
6. Table of contents	xix
7. Detailed index of articles	xxv
8. Civil Code	1 - 540

**1**

**Concept  
and general  
principles**

# 1. Concept and general principles (1)

## **Concept of Contract**

We may define a contract as an (i) agreement, formed by two or more parties: (ii) whose declarations to one another are able to generate for such parties legal effects of any nature – obligational or otherwise (iii) that accord with the meaning of that agreement.

# 1. Concept and general principles (2)

## The Principle of Freedom of Contract

The most basic principle contract law is that of freedom of contract. The notion that, within the limits set forth in the law, parties may freely shape the contents of a contract is expressly contained in the Portuguese Civil Code (**article 405°**).

# 1. Concept and general principles (3)

## The Principle of Good Faith (*bona fide*)

- Another basic principle in contract law is that of good faith.
- According to this principle, when making a contract, and later on, when performing that contract, the parties must comply with it.
- This principle is generally laid down in the Civil Code.
- The principle of good faith has also played an important role in the shaping of the rules that regulate the consequences of a **change of circumstances**, and of the rules applicable to the **abuse of rights**.

**2**

**Form and  
formation**



# 2. Form and formation (1)

## Freedom of form

- Freedom of form is the default rule that is applicable to the making of a contract (**article 219 Civil Code**).
- Certain types of contract, such as the insurance contract, are required to be drawn up in writing.
- Others must be executed by way of a **public deed**, as is the case with contracts for the buying or selling real estate property.
- A contract that **lacks the required form will be null and void**.
- Form is thus more than the prescribed way of a contract – is a **precondition to a contract's validity**.

## 2. Form and formation (2)

### **Formation**

Traditionally, a contract is said to have been concluded when (i) a clear, sufficiently defined and firm or unequivocal offer is matched (ii) by a firm or unequivocal acceptance thereof.

## 2. Form and formation (3)

### Transfer of property

- For instance, in a contract for the sale of goods, unless the parties determine otherwise, the transfer of property will take place immediately upon conclusion (**article 408 n°1 of the Civil Code**).
- Should such transfer be subject to **registration**, however, it will only be enforceable to third parties once the transfer is registered.
- The parties may determine that property over the goods sold will be transferred only at a specified later date.
- Some contracts will only become effective once the respective object has physically, or symbolically, exchanged hands. (e.g. loan contracts).

## 2. Form and formation (3)

### Transfer of property

- For instance, in a **contract for the sale of goods**, unless the parties determine otherwise, the transfer of property will take place immediately upon conclusion.
- Should such transfer be subject to **registration**, however, it will only be enforceable to third parties once the transfer is registered.
- The parties may determine that property over the goods sold will be transferred only at a specified later date.
- Some contracts will **only become effective once the respective object has physically, or symbolically, exchanged hands**. (e.g. loan contracts).

## 2. Form and formation (3)

### **Preliminary contract (*contrato-promessa*)**

- The parts may choose to conclude a preliminary contract (*contrato-promessa*, **article 410 of the Civil Code**) whereby they exchange promises to enter into a contract for the sale of goods.
- This latter type of contract is most commonly employed when the promised contract is subject to a heavy requirement of form – such as real estate property.
- The preliminary contract is a general feature of Portuguese contract law: contracting parties may use it in other type of contract.

## 2. Form and formation (3)

### **Pre-contractual liability (*culpa in contrahendo*)**

The negotiating parties may be subject to pre-contractual liability prior to conclusion of the contract. This will be the case if they do not comply with the requirements of **good faith** in the process of their negotiations or when breaking off such negotiations (**article 227, n° 1 of the Civil Code**).

**3**

**Unfair terms**

# 3. Unfair terms (1)

## Unfair terms

- The problem of unfair terms is mainly part of the Portuguese legislation about standard terms and contracts of adhesion – the **Decree-Law n° 446/85** of 25 October with subsequent amendments.
- The European legislation, the **Council Directive 93/13/EEC** on unfair terms in consumer contracts, was transposed to the Portuguese legislation. (The Decree-Law n° 446/85 was adapted to this purpose).



# 3. Unfair terms (2)

[SOURCE: EUR-Lex / Council Directive 93/13/EEC]

## **COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts**

### *Article 1*

1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

# 3. Unfair terms (3)

[SOURCE: EUR-Lex / Council Directive 93/13/EEC]

## *Article 3*

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

# 3. Unfair terms (4)

The notion of “**good faith**” introduced by the Directive on unfair terms in was already known by the Portuguese legislation. In the Portuguese, **Decree-Law n° 446/85**, we can find, for example, “Terms excluded from individual contracts” (art. 8º):

“The following shall be considered to be excluded from individual contracts:

- a) Terms which have not been the subject of communication [...];
- b) Terms which have been communicated but where the duty to inform has been violated, such that effective knowledge of them is not to be expected; [...]
- c) Terms included in forms, after the signature of one of the contracting parties.”

**4**

**Some commonly  
used contracts**

# 4. Some commonly used contracts (1)

## Buying and selling

“The purchase and sale is (i) an agreement through (ii) which an asset or a right of an owner is transferred to another (ii) against payment” (**article 874 of the Civil Code**).

The purchase and sale process and includes the following obligations (**article 879 of the Civil Code**):

- The **transmission of property** or of the usufruct rights;
- The obligation to **deliver the property**;
- The obligation to **pay the price**.

# 4. Some commonly used contracts (2)

## Buying and selling Properties

- In Portugal, buying and selling properties involves a **public deed** (or **private document, authenticated by a lawyer or a solicitor**). It is also necessary to register the acquisition at the Land Registry Office.
- The purchase and sale of properties is a **real contract** given that the constitution or the transfer of the rights through a contract (**article 408 n° 1 of the Civil Code**).

# 4. Some commonly used contracts (3)

## Buying and selling Properties

- Before any agreement signature all the documentation of the property must be verified which can be done in the **Land Register Office** (Conservatória do Registo Predial / Registo predial online) and the **Portuguese Tax Office** (Autoridade Tributária e Aduaneira).
- In specific cases, other elements can be involved, such as **representatives of credit institutions**, prosecutors representing the purchaser or the seller, **spouses who should give their express consent for the sale**, etc.

# 4. Some commonly used contracts (4)

## **Employment contract (Law 7/2009, 12 February)**

### **Legal definition (Art. 11º, Law 7/2009):**

- “A contract of employment is (i) a contract whereby a natural person agrees to work for another person, or persons, as part of their organisations (ii) and under their direction and control, (iii) in exchange for payment.”
- Sixteen is the minimum age at which an employee can make an employment contract. (Currently, the statutory age for retirement is 66 years and is due to reach 67 years in 2029).



# 4. Some commonly used contracts (4)

## Employment contract (Law 7/2009, 12 February)

- Employment contracts are not subject to any specific formalities except when the law provides otherwise (Art. 110º, Law 7/2009).
- **The general rule is that employment contracts must be made for an indefinite period.**
- Employment contracts made for a term – which can be either be (i) **fixed** or (ii) **conditional** – are only permitted in the specific circumstances expressly provided in the law. (e.g. in order to satisfy temporary working needs, such as the replacement of other employees or exceptional workforce demands, etc.).

# 4. Some commonly used contracts (5)

## **Employment contract**

### **Dismissal by an initiative of the employer**

**(articles 340°, 351° and following, Law 7/2009)**

### **Dismissal for Cause Attributable to the Employee**

A worker's **willful and guilty conduct is just cause for dismissal** when, due to its seriousness and consequences, it becomes immediately impossible to continue the employment relationship.

# 4. Some commonly used contracts (6)

## **Dismissal by an initiative of the employer**

**(articles 340°, 351° and following, Law 7/2009)**

- **Collective dismissal**

- a) Market reasons: a slowdown in business activity [...];

- b) Structural reasons: financial imbalance, changing business [...];

- **Dismissal due to Elimination of Job Position**

Due to economic, structural or technological reasons related to the business.

- **Dismissal for Inability to Adapt**

When an employee is unable to adapt to the job.

**5**

**Arbitration**

# 5. Arbitration (1)

- Under the **Constitution of the Portuguese Republic (CPR)** “**arbitration tribunals**” are considered jurisdictional bodies (art. 209, n°2).
- The legal system of Portugal is composed of the "norms and principles of general or common international law," which "form an integral part of Portuguese law" (art. 8, n°1).
- Under the **Constitution and the Civil Code of Procedure (CCP)**, awards rendered in a foreign country must be recognized by the Portuguese courts before they can be enforced in Portugal.
- Portugal is also a party to the **International Centre for Settlement of Investment Disputes (ICSID)** – established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

# 5. Arbitration (2)

## **The Portuguese Voluntary Arbitration Law, Law 63/2011**

The main source of Arbitration law is the new Portuguese Voluntary Arbitration Law, Law 63/2011, entered into force on 2012.

The legislation was inspired by:

- The provisions and principles of the **United Nations Commission on International Trade Law (UNCITRAL)**, Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law).
- The **New York Convention on the Recognition and Enforcement of Arbitral Awards 1958** (New York Convention).
- Legal solutions of other European arbitration laws such as the arbitration laws of Germany, Switzerland and France.

# 5. Arbitration (3)

## Some general principles of Portuguese Voluntary Arbitration Law

- Article 1, n° 1 of Law 63/2011 provides that **negotiable patrimonial rights can be arbitrated**.
- If disputes do not involve patrimonial interests, "the arbitration agreement is also valid provided that the parties are entitled to conclude a settlement on the right in dispute" (art. 1, n° 2).
- Disputes related to **copyright and related rights may also be submitted to arbitration if they are "disposable" or "alienable" rights** (Portuguese Code on Copyright and Related Rights, 1995).

# 5. Arbitration (4)

Some kinds of disputes are subject to **mandatory arbitration**, **whether or not they involve patrimonial interests** (examples):

- **Industrial property rights** related to reference **medicines and generic medicines** (Law n° 62/2011 of 14 December 2011).
- Particular issues of **collective bargaining** (Portuguese Labour Code).
- Particular issues related to copyright and intellectual property.



# 5. Arbitration (5)

## The role of the courts

- **Courts assist the arbitration process** for both domestic and international disputes.
- Where the parties have not specified a procedure for the appointment of the tribunal, or if a dispute arises preventing the appointment of one or more arbitrators, the matter may be referred to the *juge d'appui* (**article 10, n° 4 of the Law 63/2011**).
- Courts also exercise a 'last resort' control power over the arbitration in issues such as appointment and challenge of arbitrators, correction of decisions on arbitrators' fees etc. (**article 59 of the Law 63/2011**).

...Thank you for your attention!... and I hope you are not “lost in translation”...

[SOURCE: IMDB, Lost in Translation, Sofia Coppola (director), 2003]



# Bibliography

- AICEP Portugal Global (s/d), *Labour System*,  
<http://www.portugalglobal.pt/EN/InvestInPortugal/laboursystem/Paginas/EmploymentContract.aspx>
- Henriques, Duarte Gorjão (2105), “Arbitration in Portugal” in *Practical Law*, Thomson Reuters, Acessível em  
[http://www.bch.pt/Arbitration%20in%20Portugal%20\(w-000-4039\).pdf](http://www.bch.pt/Arbitration%20in%20Portugal%20(w-000-4039).pdf)
- Monteiro, António Pinto (1995), “The Impact of the Directive on Unfair Terms in Consumer Contracts on Portuguese Law” in *European Review of Private Law* (3), pp. 231-240.

# Bibliography

- Rego, Margarida Lima and Almeida Carlos Ferreira de (2007), “Contract Law” in *Carlos Ferreira de Almeida, Assunção Cristas e Nuno Piçarra (coord.) (eds), Portuguese Law: an overview*, Faculdade de Direito da Universidade Nova de Lisboa / Almedina, pp. 183-196, [http://www.academia.edu/6842517/Contract\\_Law](http://www.academia.edu/6842517/Contract_Law)
- Stanford University (s/d), “Portugal Legislation / Decree-Law 446/85 of 25 October, with subsequent amendments” in *The Global Class Actions Exchange / Stanford Law School*, [http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal\\_Legislation.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_Legislation.pdf)