



LEGAL SOLUTIONS
ACROSS BORDERS

N° 09

CONSUMER PROTECTION REGULATIONS



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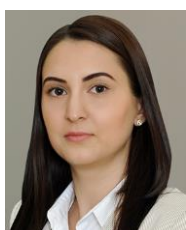
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EXECUTIVE SUMMARY

Welcome to the 9th Report of the ABL's Young Lawyers Group ("the Group").

The Group was formed in 2015 to enable young lawyers working in ABL member firms to develop and work alongside the senior members of ABL and to contribute towards the continued success of ABL. As such, the Group aims to enable young lawyers to build up their own network of contacts within ABL and to develop their own legal education through the publication of reports on topical issues chosen by the Group's members on ABL's website, members' own firm websites and the ABL Insider.

Consumer Protection is important because consumers often experience a significant imbalance of bargaining power as compared to producers and sellers of products and services. The Report provides an overview of the Consumer Protection Regulations in each country mentioned in this Report.

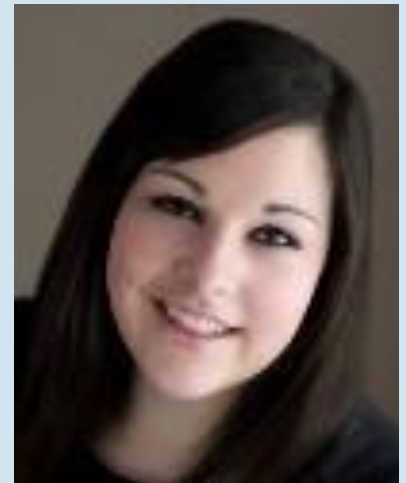
Please note that this document is intended as general guidance only and does not constitute or replace legal advice.

This Report was prepared with contributions from six members of the Group from Brazil, India, Italy, Portugal, Romania and UK. A link to the individuals' biographies can be found on the "List of Contributors" page.

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Brazil

Consumer protection in Brazil had a great boost with the promulgation of Brazil's current constitution in 1988, which, pursuant its 5th article – that concerns to fundamental rights and warranties – precisely on its item XXXII, established that “the State shall provide, as set forth by law, for the defense of consumers”.

After that, in September 11th, 1990 was enacted the Law 8.078/90, i.e., the Brazilian Code of Consumer Defense and Protection – CDC, inserting in the Brazilian legal system a national policy about consumer protection and other related issues, which aims to tend to consumers' needs, impose respect for the consumer's dignity, health, and safety, protect consumer's interests and ensure transparency and harmony in consumer relations.

As per its 1st article, the Brazilian Code of Consumer Defense and Protection, the CDC sets forth norms for consumer protection and defense which are public order and social interest rules. This means that, under a consumer relationship, the Brazilian Code of Consumer Defense and Protection surpass private interests.

It is worth to mention, however, that not all commercial and contractual relationships in Brazil are subject to the rules of the Code of Consumer Defense and Protection. These rules shall apply only to consumer relationships.

The CDC itself establishes, within its 2nd and 3rd articles, the characters who must participate in a relationship in order for it to be considered as a consumer relationship: the consumer and the supplier.

If the conditions established within the aforementioned 2nd and 3rd articles are not met, there is no consumer relationship and the rules of the Code of Consumer Defense and Protection will not apply. In this case, such other trade and contractual relationships shall be, in general, subject to Brazilian Civil Code.

The basic consumer rights, in accordance with Brazilian Code of Consumer Defense and Protection are:

- (i) the protection of the consumer's life, health, and safety;
- (ii) education and information about the adequate level of consumption for products and services, ensuring freedom of choice and equality in hiring processes;
- (iii) adequate and clear information about different products and services;
- (iv) protection against misleading and abusive publicity;

- (v) modification of contractual clauses in case of disproportionate installments or supervening facts that leads to an excessive burden;
- (vi) effective prevention and reparation for damage;
- (vii) access to judiciary and administrative entities so as to prevent or provide compensation for damages;
- (viii) reversal of the burden of proof on behalf of consumers; and
- (ix) provision of adequately and effectively general public services.

Moreover, the Brazilian Code of Consumer Defense and Protection also established the National Consumer Defense System (SNDC) which is composed by Federal, State, Municipal, and Federal District agencies, as well as private consumer defense entities and aims to implement and execute consumer protection through such public agencies and private entities.

Thus, it is quite clear that Brazil has a sturdy legal protection system for consumers, however, the difficulties faced in practice by consumers in Brazil, such as lines everywhere and for everything, high prices (especially due to Brazil's heavy tributary load), inflation and many others issues are outside of Brazilian Code of Consumer Defense and Protection's framework.



India

The Consumer Protection Act, 1986 ("Act") in India was enacted to provide a simpler and quicker redressal to consumer grievances. The Act seeks to promote and protect the interest of consumers against deficiencies and defects in goods or services. It also seeks to secure the rights of a consumer against unfair trade practices, which may be practiced by manufacturers and traders.

The Act applies to all goods and services unless specifically exempted by the Union Government and covers all sectors, whether private, public or cooperative.

The Department of Consumer Affairs (DCA)

Department of Consumer Affairs (DCA) is one of the two Departments under the Ministry of Consumer Affairs, Food & Public Distribution. It was constituted in June 1997 as it was designated website for the same which is: <https://consumeraffairs.nic.in/Forms/contentpage.aspx?lid=37>

Basic rights of consumers include:

1. Right to safety is to be protected against the marketing of goods and services, which are hazardous to life and property;
2. Right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices;
3. Right to choose is to be assured, wherever possible of access to variety of goods and services at competitive price;
4. Right to be heard means that consumer's interests will receive due consideration at appropriate forums. It also includes right to be represented in various forums formed to consider the consumer's welfare;
5. Right to Seek redressal is to seek redressal against unfair trade practices or unscrupulous exploitation of consumers. It also includes right to fair settlement of the genuine grievances of the consumer; and
6. Right to Consumer Education is to have the right to acquire the knowledge and skill to be an informed consumer throughout life.

Consumer Redressal Forum

Under the Act, every district has at least one consumer redressal forum, also known as a Consumer Court. Here, consumers can get their grievances heard. Above the district forums are the State Commissions. At the top is the National Consumer Disputes Redressal Commission in New Delhi, India. A written complaint to the company is taken as proof that it has been informed. The complaint must be backed by copies of bills, prescriptions, and/or other relevant documents, and should have a deadline. Consumers can also lodge a complaint through any consumer organisation.

How to file the complaint:

- The complaint should be filed within two years of buying the product or using the service;
- It needs to be in writing. Letters should be sent by registered post acknowledgement due, hand-delivered, email, or fax;
- The complaint should mention the name and address of the complainant and the person/entity against whom the complaint is being filed. Copies of relevant documents must be enclosed;
- The consumer must mention details of the problem and the demand on the company for redressal. This could be a replacement of the product, removal of defect(s), refund, or compensation for expenses incurred, and for physical/mental torture. The claims, however, need to be reasonable;
- The consumer should preserve all bills, receipts, and proof of correspondence related to the case;
- The complaint can be in any Indian language; and
- The Consumer shall maintain a complete record of the emails and documents sent and received;

Appeal

An appeal is a legal instrument which enables persons dissatisfied with the findings of a consumer court to approach a higher court to present his case and seek justice. In the context of consumer forums:

1. An appeal can be made with the state commission against the order of the district forum within 30 days of the order, which is extendable for further 15 days;
2. An appeal can be made with the National Commission against the order of the state commission within 30 days of the order or within such time as the National Commission allows; and
3. An appeal can be made with the Supreme Court against the order of the National Commission within 30 days of the order or within such time as the Supreme Court allows.

Penalties

The consumer courts (District Court, State Commission, and National Commission) are given vast powers to enforce their orders. If a defaulter does not appear in court despite notices and reminders, the court may decide the matter in his absence. Forums can issue warrants to produce defaulters in Court. They can use the police and revenue departments to enforce orders. Consumer rights need to be protected since services are availed based on trust and faith, and thus, it's a necessity to keep a check on the service providers for the sake of service recipient.

Conclusion

This Act has provided a machinery whereby consumers can file their complaints. The consumer, under this law, is not required to deposit huge court fees, which earlier used to deter consumers from approaching the courts. The rigors of court procedures have been replaced with simple procedures as compared to the normal courts, which helps in quicker redressal of grievances. The provisions of the Act are compensatory in nature.



Italy

The most important consumer protection legislation in Italy is the Legislative Decree n. 206 in force from October 23, 2005, the so-called "Codice del Consumo" (Consumer Code).

The Consumer Code coordinates all existing consumer protection provisions into 146 articles.

The approval of the Consumer Code can be considered a milestone in the consumer protection field in Italy, especially considering that consumer issues were previously covered by specific regulations that were adopted from time to time, without coordination, mostly to implement EU Directives.

Therefore, the Consumer Code is currently the single set of provisions, which covers and consolidates the laws of purchase and consumption in order to ensure a high level of protection to consumers and users in accordance with the principles of the European Union's legislation. The Consumer Code, in conjunction with general law (such as the Italian Civil Code), which is still applicable also to consumers, provides rules designed to protect consumers, such as those on transparency in banking and consumer credit agreements; regulation of contracts and liability of financial brokers; insurance contracts; and regulation of the retail trade.

With respect to product liability, the Consumer Code:

- Recognizes to users and consumers some "fundamental" rights (such as health, safety, information, correctness in advertising, consumer awareness and education, and propriety and fairness in contracts);
- Regulates some aspects of consumer contracts, including warranties applicable to the sale of consumer goods and post-sale duties;
- Regulates product safety and product liability;
- Addresses consumer access to justice and the form of collective actions;
- Introduces a strict product liability regime: the injured party must prove the damage, the defect in the product, and the related causation, but not the manufacturer's fault.

Liabilities for sales of goods: applicable warranties

Italian law distinguishes between warranty rules for the sale of goods to: i) an entrepreneur ("B2B Sales") and ii) a consumer ("B2C Sales").

The Consumer Code applies to all sale agreements concerning consumer goods (movable goods, even if they are component parts or shall be assembled, except for, inter alia, water, gas, and electricity) and between an entrepreneur and a consumer.

The Consumer Code requires two kinds of warranties to accompany the sale of consumer goods: legal mandatory warranty and voluntary additional warranty. The seller may decide (but is not obliged) to provide to the buyer a voluntary additional warranty along with the legal warranty.

Pre-contractual information requirements

According to the Consumer Code, the seller needs to fulfill some pre-contractual information requirements, such as the ones on:

the existence, the conditions and procedures for exercising the right of withdrawal (as well as a model withdrawal form);

the existence of a legal guarantee of conformity for goods and, where applicable, the existence of commercial guarantees.

Sanctions and enforcement

Since 1992, the Italian Competition Authority (ICA) has been granted the power to repress misleading advertising spread out by any means: TV, newspapers, leaflets, posters, telemarketing.

From 2007 ICA's competences in the consumer protection field include also the power to repress unfair commercial practices made by undertakings which are detrimental to consumers.

Moreover, ICA is in charge of the enforcement of the rules regarding unfair contractual terms with reference to contractual forms or general contractual conditions drafted by sellers.

In this respect, ICA can either start an inquiry aimed at evaluating the unfair nature of contractual terms (ex officio or following to a complaint) or it can make an assessment under a specific request by a seller/supplier (the so-called "interpello").



Portugal

A consumer is a person who acquires goods or services, or to whom are transmitted rights, which are intended for non-professional (private) use.

Nowadays the relations between private consumer and a service OR goods provider are part of the daily routines of each of us, and the private consumer is in a position that needs protection.

In Portugal, the protection of the weakest link in consumer relations is reflected in several regulations, namely Law 24/96 of 31 July, also known as the Consumer Protection Law, as well as in the Constitution of the Portuguese Republic itself.

Consumer Rights

Some of the consumer rights provided for under the Consumer Protection Law are:

- Right to the quality of goods and services
- Right to protection of health and physical safety
- Right to education for consumption
- Right to protection of economic interests

It is important for consumers to be informed of their rights and it is up to the State to ensure that consumer protection requirements are fulfilled.

The evolution of consumer relations and E-Commerce

With the advancement of technology the whole relationship of consumption has changed and it has become necessary to caution a greater number of consumer rights.

The emergence of e-commerce, while facilitating access to goods and services, has also increased the risk of fraud and deception to which consumers are exposed.

For the final consumer, e-commerce brings a number of advantages, namely, easy access to products, convenience, diversity of choice and payment security.

To set up an online store, it is very important to understand and be in compliance with the laws of the country.

Online transactions in Portugal are covered by the distance contracts law. The big difference of the E-Commerce for a physical store is that there is an obligation to return the payment to the customer in case of complaint.

Data Protection

With the escalation of consumer relations and the entry into the digital age, data protection has become a central theme that without regulation can smear new forms of commerce, unprotecting the consumer.

The subject of data protection is regulated in Portugal by Law n.º 67/98 of 26 October, which is currently insufficient regarding the progress of consumer relations.

It was therefore fundamental to discuss this issue at a Community level, covering new fields taking into account the current trade relations.

On 25th of May 2018, the General Data Protection Regulation (RGPD) came into force, focusing on the treatment of personal data and the free movement of such data, always with a view to protecting individual consumers.

In addition to strengthening the legal protection of the rights of data subjects, the RGPD requires new rules and procedures from the technological point of view.

The relationship between technology and law is mirrored in the protection of data from its beginning, in the appropriate measures to guarantee the security of the treatment, in the notification of violations of personal data to the control authorities, in the communication of violation of personal data to the owners of the data and impact assessment on data protection.

In Portugal, however, and although the RGPD is already in force, it has not yet been approved the proposal for a national law that transposes the regulation into the national legal system, making it difficult to implement in some cases.

As an example, for companies that practice e-commerce, the fines imposed for breach of the regulation prove to be inadequate to the reality of Portuguese companies, which are, for the most part, small and medium-sized enterprises.

Nonetheless, and being the future of consumer relations drawn through electronic commerce, a path of regulation and greater consumer protection is laid out in various fields in which the consumer presents himself as the weakest link in the relationship.



Romania

According to Ecommerce Europe report on the 2016 B2C e-commerce turnover and growth rate, the share of e-commerce in retail is only 3.1%. In 2016, the e-commerce growth reached €1.8bn. The same report mentions that only 11% of the Romanian population shop online. Amongst the popular products purchased online, clothes occupy the first place, followed by information technology and media & entertainment. In respect to services, Romanian people usually buy online flight tickets and accommodation, package travel and insurance.

Main consumer rights

The Romanian main legal enactment in consumer protection area, namely Government Ordinance no. 21/1992, provides the most important consumer rights, applicable both in retail and e-commerce, such as the right:

- To be protected against the risk of purchasing a product or service that could harm the life, health or safety of consumers;
- To be fully, accurately and precisely informed about the essential characteristics of the purchased products and services;
- To have access to markets that provide the consumers with a wide range of quality products and services;
- To be compensated for the damage caused by the inappropriate quality of the products and services; and
- To organize themselves in consumer associations for the purpose of defending their interests.

The authority with regulatory, control and sanctioning jurisdiction at national level is the National Authority for Consumer Protection, specialized body of the central public administration, under the authority of the Government.

E-commerce requirements

The provision of electronic services may be carried out by any individual or legal entity and shall not be subject to any prior authorization in this regard.

However, the provider shall make available on the website under which it provides the services, at all times and free of charge, at least the following information: its name, address, phone, e-mail or any other contact details, the registration number with the Trade Register Office or other similar register, or any identification information, fiscal code, any professional title under which it provides the services, the prices/fees, whether they include or not the applicable VAT, the VAT rate, any delivery costs and if they are included or not in the price, the right of withdrawal.

Special requirements in case of financial services

The consumer protection requirements in the case of provision of financial services by electronic means are strictly regulated, as the inequality positions of the provider (i.e. financial and credit institutions) versus the consumer are even more obvious.

During the pre-contractual phase, the consumer has the right to be properly informed about all terms and conditions, to be provided with a reimbursement schedule or other document containing the total cost of the financial service, as well as with a draft of the proposed agreement.

Any advertising to credit agreements shall contain at least the following information: the interest rate, whether it is capped or variable, the total cost of the credit, the annual percentage rate of charge, the term of the agreement and the credit total value as payable by the consumer. If for the conclusion of the credit agreement, the provider requires an insurance, this should be also specified in the advertising.

In case of financial services agreements, the providers have the obligation to make available easy to read agreements, with a font size of at least 10, on paper or other support. All interests, fees, taxes, costs and bank charges applicable during the execution of the agreement, shall be clearly stated. Also, the applicable legislation expressly prohibits increases of the aforementioned costs, as well as charges of new such costs if they were not mentioned in the agreement.

Moreover, contractual clauses which entitle the financial services provider to unilaterally amend the contractual clauses without the conclusion of an addendum accepted by the consumer are prohibited. In case of any amendment to the agreement, the provider must submit to the consumer a written notice with at least 30 days prior to such amendment come into force. The consumer has 15 days to respond. If it does not respond to this notice, this should not be deemed as an acceptance by the consumer of the proposed amendment.

Remedies in case of improper products or services

Other consumer rights require the seller/provider to repair or replace improper products or services, free of charge, within 15 days after the seller/provider has acknowledged the deficiencies and to compensate the consumer for any losses incurred as a result of these deficiencies found within the warranty or validity period.

Right of withdrawal

Probably the most important right granted to the consumers is the withdrawal right. This right refers to the consumer's possibility to unilaterally terminate an agreement concluded for the online purchase of products and services, without justifying its decision. The withdrawal right shall be exercised within 14 days from the execution date of the agreement, in case of services, or from the date the consumer receives the product.

In such case, the seller/provider must refund to the consumer, within 14 days from the latter's decision to withdraw, the price of the products/services, as well as any costs incurred by the consumer, including the delivery costs, as the case may be, using the same payment methods initially used by the consumer.

When returning the product, the consumer shall pay the costs incurred in this regard, and must ensure it returns the product within 14 days from the decision to withdraw.

However, the right of withdrawal is not applicable in cases like:

- supply of products or services which price depends on fluctuations of the financial market that are out of the control of the seller/supplier;
- custom made products;
- products that are likely to deteriorate or expire rapidly;
- supply of sealed products which cannot be returned for reasons of health or hygiene and which have been unsealed by the consumer;
- provision of accommodation services, freight transport, car rental, catering or recreational activities;
- contracts concluded during a tender.

Unfair terms

The applicable legislation provides that the agreements concluded between a consumer and a seller/supplier must include clear, unambiguous contractual clauses for the understanding of which no specialized knowledge is required. All clauses must be negotiated directly with the consumer.

A clause in respect of which the consumer has not had the opportunity to negotiate it with the seller/supplier shall be considered an unfair clause. Therefore, certain types of contractual clauses are considered by their nature to be unfair, such as:

- the right of the seller/supplier to unilaterally amend the agreement, without valid ground;
- the right of the seller/supplier to automatically extend the agreement, initially concluded for a determined period of time;
- clauses which restrict or cancel the consumer's right to unilaterally terminate the agreement, if the seller/supplier requests the consumer the payment of a fixed amount of money for exercising this termination right;
- clauses which exclude the consumer's right to take legal action or to exercise other legal remedy;
- clauses which restrict or cancel the consumer's right to claim damages in case the seller/supplier does not execute its contractual obligations.

The authorized personnel of the National Authority for Consumer Protection is entitled to verify the contractual clauses of the agreements concluded with consumers. In case they observe that such contracts include unfair terms, they will request a court of law to compel the seller/supplier to amend all agreements under execution, by removing the unfair terms.



UNITED KINGDOM

Introduction

The most relevant UK consumer protection legislation to legal firms are the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) ("CCRs"). The CCRs define the different types of contracts to which the regulations apply and also prescribe certain rights for consumers, such as the right to pre-contract information and the right to a cancellation period.

Scope

In order for a contract to fall within the scope of the CCRs, it must be between a trader and a consumer and not be wholly exempt. A client retainer is an example of a contract for services which falls within the scope of the CCRs, provided the retainer is classified as an off-premises contract or a distance contract.

Classification of Contracts

Under Regulation 5 of the CCRs, an off-premises contract is a contract between a trader and a consumer which is any of the following:

- A contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader.
- A contract where the offer was made by the consumer in the simultaneous presence of the trader and the consumer, in a place which is not the business premises of the trader.
- A contract concluded either on the business premises of the trader or through any means of distance communication, provided that the consumer was personally and individually addressed, in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer and the contract was concluded immediately afterward.
- A contract concluded during an excursion organised by the trader, with the aim or effect of promoting and selling goods or services to the consumer (for example, a client golf day).

A distance contract however is 'a contract which is concluded under an organised distance sales or service provision scheme without the simultaneous presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'. Firms which frequently use distance communication to conclude retainers with are considered to be operating under an organised service provision scheme for the purpose of the CCRs. Distance communication encompasses such methods as emails, telephone and letters.

Rules Governing Each Type of Contract

For both distance and off-premises contracts, the CCRs provide that a consumer has a 14-day cancellation period. The CCRs require traders to provide the consumer with certain pre-contract information, for example the main characteristics of the goods or services to be provided, the geographical address of the trader and their contact details, information relating to pricing and

where applicable, the trader's complaint handling policy. Where a right to cancel exists, the consumer must also be provided with the instructions for cancellation and the model cancellation form.

The CCRs also provide when a consumer requests the supply of services during the cancellation period, their express consent to carry out any work during the cancellation period should be obtained by the trader. Should the consumer cancel within the cancellation period, the trader may only charge pro-rata for the work that the trader has done so far. The effect of cancellation is that the parties' obligations to perform the contract end, and unless the consumer expressly asked the trader to carry out work during the cancellation period, all payments made to the trader must be reimbursed to the consumer.

In any case, the CCRs state that the trader must also obtain the consumer's express prior consent for any additional payments and the trader must send the consumer a copy or confirmation of the contract once concluded.

Traders should be wary to ensure compliance with the CCRs. Any failure to comply has the effect of extending the consumer's cancellation period by 12 months. A failure in relation to an off-premises contract has the added penalty of the trader being punishable on summary conviction to a fine of up to £5,000.

Future Developments

Much of the consumer legislation in the UK derives from European Union Directives and it remains to be seen what effect the UK's decision to leave the European Union will have on UK consumer protection laws. In theory, the UK would be free to repeal all EU derived consumer protection laws but due to the fact that most of the laws relating to consumers are established and accepted, this is unlikely.

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