

II. Contract performance

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Glossary

Decree-Law 178/86

Decree-Law 178/86 of 3 July, which regulates the agency or commercial representation contract

Decree-Law 349/86

Decree-Law 349/86 of 17 October, which establishes rules about contracts for transport of passengers by sea

Decree-Law 352/86

Decree-Law 352/86 of 21 October, which sets forth provisions regarding the reformulation of maritime law

Decree-Law 251/98

Decree-Law 251/98 of 11 August, which regulates taxi licensing and market access

Decree-Law 239/2003

Decree-Law 239/2003 of 4 October, which establishes the legal regime for domestic road transport of goods

Decree-Law 58/2008

Decree-Law 58/2008 of 16 March, which establishes the legal regime applicable to contracts for rail transport of passengers and luggage, portable packages, pets, bicycles and other goods

Decree-Law 41-A/2010

Decree-Law 41-A/2010 of 29 April, which regulates land transport, both road and rail, of dangerous goods. It transposes Directive 2006/90/EC, of the Commission, of 3 November, and Directive 2008/68/EC, of the European Parliament and of the Council, of 24 September into Portuguese law

Decree-Law 62/2013

Decree-Law 62/2013 of 10 May, regarding measures against payment delays in commercial transactions

Decree-Law 24/2014

Decree-Law 24/2014 of 14 February, which transposes Directive 2011/83/EU of European Parliament and of the Council, of 25 October 2011, on consumer rights

Law 45/2018

Law 45/2018 of 10 August, which establishes the legal regime for individual and paid passenger transport in unmarked vehicles through digital platforms

Decree 2-B/2020

Decree 2-B/2020, which regulates the extension of the state of emergency declared by Presidential Decree 14-A/2020 of 18 March

Decree-Law 10-J/2020

Decree-Law 10-J/2020 of 26 March, which sets forth exceptional measures to protect the credits of families, companies, private social solidarity institutions and other entities involved in the social economy, as well as a special regime of personal guarantees of the State, in the context of the COVID-19 disease pandemic

II. CONTRACT PERFORMANCE

II.A. Background

1. One area for which the new coronavirus has raised challenges is the performance of commercial contracts. There are several problems that may arise and, although each one requires an analysis of the specific case and the respective legal consequences, we shall list some of the commonest:

- a) Late payment;
- b) Difficulties with or suspension of production of goods due to lack of supply or transport;
- c) Labour shortage;
- d) Decrease in income expected from the performance of the contract;
- e) Impossibility to deliver goods;
- f) Impossibility to access the place to deliver goods, provide services or fulfil other obligations;
- g) Closure of facilities by legal requirement;
- h) Closure of facilities by administrative requirement;
- i) Difficulty or impossibility to achieve the commercial objectives envisaged under the contract;
- j) Disappearance or reduction in customers;
- k) Uselessness of the contract;
- l) Frustration of the purpose of the contract;
- m) Disappearance or modification of circumstances implied or represented by the parties on formation of the contract;
- n) Impossibility of obtaining licences or permits;
- o) Anticipatory breach of contract;
- p) Insolvency of the other party, among others.

2. Companies are faced with several questions, of which we shall offer some examples.

- Are both performances suspended during the quarantine? For how long? What if the wait is fatal to one of the parties? What if one of the parties incurs additional costs due to the wait?
- What if the circumstances or purpose of the contract are frustrated? Is there impossibility or must the contract be changed? And, in this case, how so? Is there a duty to renegotiate?
- And, likewise, in which cases can the contract be terminated? Is a declaration sufficient? What if this termination lacks grounds?
- Who bears the risk of the greatest costs to overcome the difficulties caused by the pandemic? The client or the supplier? The contractor or the owner?
- What are the consequences if one of the parties purely and simply fails to perform? Can there be a duty to compensate, or is fault not required for this purpose?
- And does all this depend on the type of contract? Are the remedies different if the contract is extended for a time?
- If the contract concerned is a cooperation contract, is there a duty to reach a joint solution?
- What about after the quarantine and the end of the transitional exception regime? Can the economic impact of the pandemic affect contracts? In what way?

Various other questions can be raised: there are numerous pressure points in view of the legal regime applicable to contract performance.

3. If one of the circumstances described in point 1, or an analogous situation, occurs, the first step is to analyse and interpret the clauses of the contract in question. It is particularly important to examine the clauses relating to force majeure and hardship or material adverse change, but also those which govern both parties' obligations, default, material breach or termination of contract, as well as sole remedy clauses, among

others, without prejudice of the analysis of the contract as a whole.

4. Then decisions will have to be made: combine the contractual clauses with the applicable legal regime, if applicable, *or* apply only the contractual clauses *or* apply only the legal regime. The choice for one of these three options depends on the content of the contract and the subject-matter regulated: contracts are a field of private autonomy, but there are legal provisions that may have to be applied.

5. In what regards the legal regime, one may consider those norms within the scope of the recently approved crisis legislation (for example, the decision to close the business premises⁽¹⁾) and/or already existing legislation, whether special (*e.g.*, commercial legislation) and/or general (Civil Code) in nature. In most cases, combining several aspects will be necessary.

6. The panoply of reactions, or defences, is extensive and comprises diverse possible combinations. There are cases which require the joint or successive application of several institutes: for example, a temporary impossibility becoming permanent due to unenforceability of performance or loss of interest, a culpable delay by one of the parties, followed by definitive impossibility due to overrunning the deadline or frustration of purpose, an increase in costs associated with creditor's delay.

There are also borderline cases that may raise doubts. For example, situations in which the claimed purpose of the contract can no longer be achieved. Are they cases of impossibility? Are they cases of change in circumstances? Who bears the risk?

Or, another example, situations where the debtor has more costs than they had forecast. Is there a

no-fault breach? Can other remedies be invoked? Which?

Or cases in which the performance is reduced because not all the services or activities are possible. Does this correspond to partial impossibility with a reduction in price, renegotiation or a new performance?

7. It will also be important not to classify everything that happens in the “post-Covid 19 world” as “force majeure”, nor to consider that everything boils down to merely finding out whether it is possible to deliver the goods or to finish the work. Besides impossibility, the law offers various regimes which may be applicable: debtor's delay, creditor's delay, change in circumstances, culpable breach, no-fault breach, abuse of rights, the disproportion between the debtor's costs and the creditor's benefit, among others. Moreover, certain contracts offer special solutions.

8. Among the matters at hand, the regimes for impossibility of performance (articles 790 *et seq.* of the Civil Code) and change in circumstances (articles 437 *et seq.* of the Civil Code) certainly merit closer attention.

9. The change in circumstances regime allows various contracts (not all) to be modified or terminated, but its application depends on several cumulative requirements, with at least two of them, without prejudice to the others, being subject to particularly careful analysis. Firstly, the circumstance at issue cannot be explicitly or implicitly covered by the contract risk plan. Secondly, the circumstances at issue must, due to their magnitude, give rise to the application of good faith in its corrective function. The first requirement demands a careful interpretation of the contract and a detailed analysis of its context and negotiating basis. The second appeals in particular to considering the perspectives consolidated in case law in the courts over the last decades, in particular “the 2009-2014 crisis” case law.

⁽¹⁾ See the closure of establishments and facilities referred to in Annex I of Decree 2-B/2020, according to article 9 of this Decree.

10. If the parties have agreed a hardship or material adverse change clause, it will also have to be considered whether and to what extent such excludes the change in circumstances regime set forth in article 437 of the Civil Code. There are hardship clauses that provide for circumstances not contained in article 437 and others that cover circumstances analogous to the law but in different terms. All of this must be considered.

11. There may be defects which prevent recourse to change in circumstances, especially but not only default by the party that intends to argue it.

12. If it is a case of change in circumstances, the consequences must be properly considered. The law provides for termination and modification, and both operate extrajudicially; however, an improper termination may lead to rather negative outcomes and it must be applied cautiously. For its part, modification requires that the possibility of prior renegotiation between the parties be considered, although not all contracts include, in conjunction with good faith, a duty to renegotiate.

13. Regarding supervening impossibility of performance, the regime in the Civil Code is extensive and is divided into various categories (articles 790 *et seq.* of the Civil Code), which cannot be examined in detail in this Note. We shall only highlight a few aspects.

An important classification is the distinction between temporary and definitive impossibility. Diverse cases already recorded in the course of the pandemic can be classified as temporary impossibilities, many of which are not imputable to either party (article 792 of the Civil Code). The truth is that if the contractual deadline is of the essence, this may immediately correspond to a definitive impossibility (articles 790 and 795 of the Civil Code).

14. It should be noted, however, that impossibility of performance, whether temporary or permanent, according to the dominant views, is absolute and, according to this position, only applies to an impediment which cannot be overcome, even with additional effort and expense. As such, in other cases, there may be default or breach, with or without fault, but not necessarily impossibility.

15. With particular relevance to permanent impossibility, it may be admitted in certain cases that the impossibility occurs not only when the action of performance cannot be carried out but also when the intended result of the performance cannot be achieved. These, however, are complex situations that depend on a rigorous analysis of the specific case.

16. The impossibility may also be total or partial (articles 793(1) and 802(1) of the Civil Code), which leads to distinct consequences regarding the payment of the price, rents, etc.

17. Impossibility relating to the debtor itself (subjective impossibility) may, for certain types of performance, determine the debtor to be replaced by a third party in the performance of the obligation. As such, impossibility regarding only the debtor itself may not be sufficient for the performance being deemed impossible (articles 767 (1) and (2), 768 (1) and 791 of the Civil Code).

18. The consequences of impossibility also depend on it being imputable to one of the parties, to both or to neither (article 795 of the Civil Code). The law's criteria for allocation are varied and the spheres of allocation of risk in a contract may not be the same for each of the parties. Special rules on risk allocation are set forth for certain contracts, as in article 1040 of the Civil Code with regard to lease and rental.

II.B. Contracts of sale and purchase

1. The sale and purchase corresponds to one of the most relevant and core acts of commerce. Indeed, the acquisition of goods and services by economic agents, whether companies or consumers, for the purposes of resale, use in productive processes, processing or non-professional use, constitutes a fundamental element for the normal exercise of commerce, economic and financial activities.

In situations of crisis or economic recession, the purchase of goods and services is expected to undergo disturbances, affecting the regular functioning of the economy. These disturbances may affect both the seller, in particular through the interruption or suspension of productive processes, scarcity of resources, difficulties in making the products available or delivering them to the purchasers, and the buyer, in particular regarding prompt payment of the agreed price in exchange for the goods and services purchased, among other circumstances.

2. The contract of sale and purchase also constitutes the basic structure supporting a series of different transactions with diverse configurations and various types, applying a range of different regimes that are established for each type of contract. Among the variations that the sale and purchase may assume, those which deal with the parties that enter into the contract (*e.g.*, between consumers and businesses or business to business), the goods acquired (*e.g.*, generic or specific goods, perishable or long-lasting; furniture and real property), or the terms of sale (*e.g.*, sale of future goods, by sample, by account, weight and measurement; distance sales and doorstep sales)⁽²⁾ stand out. Moreover, this transaction may be considered within the scope of other, more complex contractual frameworks, such as a long-term supply contract.

Consequently, it is not possible to present a framework of solutions indistinctly applicable to all contracts. The differentiation between instant or episodic sales and extended sales or supplies, on the one hand, and between immediate sales and deferred sales, on the other hand, can be especially important. It is also necessary to check whether a promissory agreement was executed.

3. In any case, given the scenario of a pandemic crisis caused by the new coronavirus, we shall list some of the general disturbances, without prejudice to the specific analysis of each case. For example, the obligation to deliver the goods or product acquired by the buyer may be particularly affected by the circumstances described. Among the issues that may arise for the obligation in question, suspension of the production of goods, difficulties of access to places of delivery, disruption of the distribution channels and increase in the delivery costs must be considered. The seller may also refuse to deliver the acquired good due to the buyer's failure to pay the price. In this framework, the following approaches, among others, should be considered:

- Consider the employment of the mechanisms contractually agreed by the parties, in isolation or in combination with legal remedies;
- The relevant legal regime may be impossibility of performance, modification or termination of the contract due to a change in circumstances or breach, but this trilogy does not exhaust all possibilities;
- Indeed, if the good sold is defective, especially if it lacks the qualities represented by the seller, the buyer may consider exercising his right to a reduction in price;
- If the delivery is impossible because the other party cannot receive it, there may be creditor's delay;
- In the event of failure to perform the obligation to pay the price or to deliver the

⁽²⁾ See also the modality for contracts entered into at a distance and outside commercial establishments, regulated by Decree-Law 24/2014 of 14 February.

acquired goods, it is possible to consider refusing to deliver the acquired goods or products or to pay the price (excuse by virtue of non-performance);

- For commercial sales, it may be possible to deposit the goods or resell them.

4. It is important to know the type of obligation at issue: was it the sale of cubic metres of natural gas? Or was it the sale of a certain property at Avenida da Liberdade? In the first case, in certain situations, where supply chains are disrupted, the seller may have to bear the costs of a new source of distribution. The same applies to analogous cases.

5. The payment of the price by the buyer will be also be treated separately, by reference to the legal regime of compliance with monetary obligations in commercial transactions.

II.C. Supply Contract

The Supply Contract heading covers several contracts under which, in general terms, one of the parties undertakes to transfer or deliver a particular non-monetary good (*e.g.*, goods, products, gas, electricity). These contracts are especially relevant in the distribution of wholesale and retail goods, or in production chains, where the productive process of a company depends on the delivery of raw materials by a supplier.

For this purpose, the supply agreed by the parties may take on diverse structures and configurations, of which we highlight the following:

- The supplier provides its product continuously, either for a determined period or otherwise;
- The supplier will deliver certain products and quantities, with a certain frequency, over the period of time;

- The parties forecast the future execution of contracts between them, such as contracts of sale and purchase and provision of services agreements, and may lay down a period for this purpose and provide for the regulation of such future contracts.

The law does not establish a general regime applicable to supply contracts. Nevertheless, one can find legislation specifically applicable to certain types of supply, such as the supply of natural gas, water or electricity. Given the lack of express regulation, it may be necessary to consider applying the legal regime established for sale and purchase contracts and the considerations that we have listed in this regard, without prejudice to what will be said below.

The Covid-19 pandemic may cause various disturbances to supply chains with supply contracts as their contractual basis. Indeed, it is expected that the restrictions on the circulation of goods and services will become an obstacle to performance of these contracts, causing delays or suspensions in supplies. Moreover, the interruption of supplies may cause non-performance in the chains of other contracts, taking into account the effects caused to companies whose productive process and subsequent distribution of products depends on the prior delivery of raw materials by suppliers.

Topic	Risks	Background / Recommendations
Delays in product delivery by the supplier	<ul style="list-style-type: none"> The supplier may be obliged to pay a penalty for the delay in supplying and may fear being subject to the consequences of default. 	<ul style="list-style-type: none"> It must be confirmed whether adjustment, rebalancing or renegotiation mechanisms were set out and how they may be applied; The possibility of the supplier obtaining the products to be delivered from a third party should be considered; If the performance cannot be fulfilled by a third party, it will be necessary to assess whether it is a case of temporary impossibility, not imputable to the parties, which suspends the duty to deliver; If there is no impossibility, the acquirer of the products may consider not paying for the products (exemption of non-performance).
Interruption of supplies	<ul style="list-style-type: none"> The supply of products by the supplier is interrupted. 	<ul style="list-style-type: none"> If the interruption is definitive, (i) it may be a case of impossibility, and as such it is necessary to determine who bears the risks or (ii) otherwise, the parties should examine the rules established for the termination of the contract (if it is a long-term contract, maintaining it might not be enforceable, depending on the circumstances of the case).
Interruption of orders placed by the buyer of products	<ul style="list-style-type: none"> The supplied entity stops ordering from the supplier; The supplier is unable to dispose of the products that it planned to deliver to the supplied entity. 	<ul style="list-style-type: none"> The contract may provide for orders to be made by reference to periods or to quantities, for which reason it is necessary to assess the extent to which the supplied entity is required to place orders during this period; It must be confirmed whether adjustment, rebalancing or renegotiation mechanisms were set out and how they may be applied; If the interruption is permanent, the parties should examine the rules established for termination of contract, unless it is a case of frustration of the purpose of the contract.
Breach of the obligation to pay for supplies	See Chapter II.G. below.	

II.D. Acquisition of Companies

1. The negotiation procedures leading to the acquisition of companies may present a more or less complex, phased and successive structure involving the performance of a series of acts prior to the conclusion of the transfer of the company, subject to a dense and complex contractual regulation. Without intending to be exhaustive, the acquisition process can be grouped into three phases *(i)* a preparatory phase involving the execution of preliminary agreements or formal declarations between the parties, announcing the intention to start negotiations, namely through a memorandum of understanding or letters of intent, confidentiality agreements, among others; *(ii)* the execution of the company's transfer agreement (business purchase agreement or share purchase agreement), sometimes setting out and regulating the obligations of the parties in great detail (*e.g.*, payment of the price, duties of information, non-compete obligation, confidentiality), accompanied by representations and warranties clauses; *(iii)* a closing phase, when the price is paid and the necessary acts for the transfer of the company are carried out (*e.g.*, public deeds, company registration acts, notifications of the transfer, consignment in the company books). Between each of these phases a long or short period of time may exist, particularly due to the complexity of the negotiations, collection, analysis and processing of information and in order to ensure the necessary conditions to conclude the transaction (*e.g.*, authorisation from regulators).

2. The effects caused by the pandemic on companies and on the economy may disrupt negotiation procedures underway for the acquisition of companies, or be reflected in an already completed acquisition process, clashing with the expectations of the buyers regarding the company's value, liquidity, turnover or operational capacity. In fact, despite the due diligence procedures in the several important areas for analysing the company's activity, namely legal, technical and financial, that accompany

complex negotiation procedures for the acquisition of companies, it is not always possible to foresee or prevent all the risks which occurring end up making a significant impact on the company's value. In this way, one should analyse whether a change to the company's purpose or reality is covered by the contract, without prejudice of recurring to the general mechanisms of impossibility of performance of obligations or termination or modification of contract due to a change in circumstances, among others.

3. In this framework, and aside breaches of "representations and warranties", we would like to draw attention to certain clauses, without prejudice to the analysis of the contract as a whole:

- **Conditions precedent:** are conditions for completing the transaction which, if not met, may lead to the non-execution of the definitive transfer.
- **Material adverse change clauses:** correspond to mechanisms to share risk between the parties, taking into account the potential changes relating to the acquired company or the circumstances of the deal which may take place between signing and closing, allowing, in particular, an adjustment of the price or termination of the contract. Among the changes typically established in these clauses, we highlight changes that affect *(i)* the target company; *(ii)* the markets in which the target company and the buyer operate; and *(iii)* the market and financial conditions necessary to proceed with the company's operation.

These clauses may take on distinct configurations, notably through a more or less generic prediction of a material adverse effect or a specific prediction, indicating the elements which constitute a material adverse effect (inclusions) and those which should not be considered as such (carve-outs). The difficulty in interpreting these clauses arises from the

specific nature of an event deemed material for this purpose. In this framework, the parties are dependent on the interpretation of the contract and the distribution of risks between them, in particular, if the level of materiality required in said clauses is set at the impossibility of maintaining the transaction or at a less demanding level, albeit damaging to one of the parties, considering the initial circumstances underlying the decision to enter into the transaction. An important aspect to consider in the specific case is finding out whether the general regime of change in circumstances can be applied to unforeseen situations.

- **Price:** the acquisition price for a company is typically determined (i) by reference to a fixed figure, taking into account the results obtained by virtue of company valuation methods; or (ii) indirectly, subject to future implementation. In the latter case, this price may be determined but be subject to adjustment, especially through stabilisation clauses or price adjustment clauses, which allow correction factors to be introduced to the initially determined price or the adjustment or reduction of the price. We should also highlight the forecast of a price subject to both a fixed and contingent value, being the final value subject to a condition subsequent such as, for example, the profits made by the company (earn-out clauses).

However, the parties may have agreed a fixed price (locked box) as consideration for the acquisition of the company. In this context, after closing, the buyer may have to assume the business risk including its subsequent devaluation, if no other contractual mechanisms have been established or if recourse to the modification or termination of the contract due to a change in circumstances is not applicable to the case.

II.E. Distribution Contracts

The effects caused on the productive capacity of companies and the restrictions imposed on the circulation of goods and services may become an obstacle to the timely performance of distribution contracts. Furthermore, there are difficulties in disposing of the products.

Commercial distribution is typically based on two circuits: (i) **direct commercial distribution:** where the producer uses its own resources to distribute; and (ii) **indirect commercial distribution:** carried out by persons or companies other than the producer.

Of particular importance for these contracts are (i) the closure of establishments and facilities referred to in Annex I of [Decree 2-B/2020](#), according to article 9 of this Decree; (ii) the suspension of retail activities, except those that offer basic necessities or other goods that are considered essential under current circumstances, which are listed in Annex II of Decree 2-B/2020, under article 10 of that Decree; and (iii) the suspension of services provided in establishments open to the public, except those that provide frontline services or other services considered essential under current circumstances, which are listed in Annex II of Decree 2-B/2020, according to article 11 of said Decree.

In this framework, the effects of the pandemic on the performance of indirect distribution contracts should be examined, particularly with regard to **agency contracts, franchise contracts** and **commercial concession contracts**. It should be noted that of the three types identified, the only contract expressly regulated by law is the agency contract, through [Decree-Law 178/86](#).

Under article 11 of the abovementioned diploma, “the agent who finds it temporarily impossible to comply with the contract, fully or in part, must immediately notify the other party”. In this way, faced with an impossibility to fulfil its

obligations, the agent must comply with the duty to inform the other party of this circumstance. Moreover, article 14 states that, “the agent is entitled to be immediately informed if the other party is only able to conclude a much lower number of contracts than was agreed or was foreseeable, according to the circumstances”. Consequently, if the principal cannot conclude the planned contracts, it must inform the agent. Therefore, we are faced with information obligations established by law with which the parties must comply and which acquire special importance given the disturbances expected to be caused by the pandemic.

The regulation of the remaining distribution contracts will have to be found in the agreement between the parties or, as far as possible and whenever justified, by analogy with the provisions of the Decree-Law referred to above. Under the current circumstances, the analysis of the legal and contractual mechanisms that apply to the questions now raised will end up being especially focused on the agreement between the

parties regarding the temporary or permanent impossibility of fulfilling the obligations set forth in the contract, particularly by virtue of the force majeure clause.

That said, below are some of the most pressing problems that the current pandemic situation may cause in the context of fulfilling the obligations of these contracts. Some of the topics identified cut across all distribution contracts, while others will only be relevant to some of these contracts. It will all depend on the agreement between the parties regarding the structure of their commercial relationship.

In the absence of a contractual provision, one should turn to the general mechanisms, in particular, the impossibility of performing or modifying or terminating the contract due to a change in circumstances, without prejudice to the parties deciding to renegotiate their contracts and without forgetting that some cases correspond to breach pure and simple, sometimes with fault.

Topic	Risks	Background / Recommendations
Promotion and customer attraction (e.g., attending fairs, market research, advertising and publicity)	<ul style="list-style-type: none"> • The contract may impose an obligation upon the agent to be at certain promotional events or to advertise goods or services; • Given the closure of public and private establishments and the successive cancellation of events, the agent may not be able to attend the promotional events set out in the contract. 	<ul style="list-style-type: none"> • It may be considered notably whether the parties specified the promotional actions which the agent should carry out, the possibility of changes and the consequences of the cancellation of the scheduled events.

Topic	Risks	Background / Recommendations
Meeting sales targets	<ul style="list-style-type: none"> • The distributor may be unable to meet the sales targets set forth in the contract due to, among other reasons, the closure of the establishment or the absence of customers; • Failure to meet the sales targets below a certain threshold or for a period of time typically gives one of the parties the right to terminate the contract, or to withdraw from the distributor a possible exclusive benefit, in which case it will be necessary to ascertain the lawfulness of exercising this right. 	<ul style="list-style-type: none"> • The parties may have set sales targets. It must be determined whether these targets are fixed, whether adjustment, rebalancing or renegotiation mechanisms were set out and how they may be applied; • It is also important to determine the cause of failure to meet these targets, distinguished according to whether this is due to the suspension or reduction of supply from the producer <i>or</i> to the closure of the establishment by legal order or administrative act <i>or</i> to a sharp reduction in customers. This differentiation influences the legal consequences, especially in assessing the possibility of waiving the performance of obligations and/or the termination of the contract.
Acquisition of stocks under commercial concession contracts	<ul style="list-style-type: none"> • The parties may have stipulated an obligation for the concessionaire to acquire a certain quantity of products; • The concessionaire may find it impossible to buy the goods set out in the contract; • The grantor may not have goods available for acquisition by the concessionaire. 	<ul style="list-style-type: none"> • The parties may have set stock purchase targets. It may be considered whether these targets are fixed, whether adjustment, rebalancing or renegotiation mechanisms were set out and how they may be applied; • It may be considered whether the impossibility at stake is temporary or permanent.
After-sales service	<ul style="list-style-type: none"> • Besides the sale of products, the distributor may be required to provide after-sales services, such as provision of information, repair of defects or installation of products in the place of use. 	<ul style="list-style-type: none"> • The impossibility of performing these services must be considered notably in light of (i) the distribution contract; and (ii) the contract entered into with the final customer; • It is advised to check whether the contracts set out how the after-sales service should be provided, the distributor's flexibility in carrying out these services (<i>e.g.</i>, teleworking) and which alternative mechanisms may be considered; • Temporary or permanent impossibility to perform may be applicable.
Business opening hours	<ul style="list-style-type: none"> • In cases in which distributors carry out their activity in a commercial establishment (<i>e.g.</i>, restaurants, stores), they may be unable to open the establishment (or do so with restrictions), due to the legal framework resulting from the current pandemic. 	<ul style="list-style-type: none"> • The contract may set the hours (days and times) in which the establishment is open to the public; • One should confirm if the contract provides for the temporary closure of the establishment or the possibility of changing or renegotiating opening hours; • Temporary or permanent impossibility may be applicable.

II.F. Transport contracts

The transport of people and goods is particularly affected by the difficulties in circulation, lack of access to loading warehouses and the closure of premises. It should be noted that the execution of transport contracts may be integrated into more or less complex distribution chains, involving the supply of products to various economic agents, from consumers to retailers and producers. Consequently, the current crisis may particularly hinder the circulation and cause delays in carrying out transport, affecting productive processes or causing goods to perish.

By entering into a transport contract one of the parties undertakes to transport people or things from one place to another in return for a fee. Transport contracts may vary in terms of the means used (*e.g.*, buses, motor vehicles, trains), the things transported (*e.g.*, people, animals, goods), to the routes used for the purpose (*e.g.*, road, sea, rail). The obligation to transport may be accompanied by accessory obligations (*e.g.*, protection, storage, refrigeration, loading and unloading).

These contracts are regulated by international instruments and by several sectoral legislation, establishing special regimes related to the disruption of the performance of obligations by the parties. Without intending to be exhaustive, the following legislation should be taken into account:

- **Road transport of goods:**

- [Decree-Law 239/2003](#): establishes the legal regime for domestic road transport of goods;
- [Decree-Law 41-A/2010](#): regulates land transport, both road and rail, of dangerous goods. It transposes Directive 2006/90/EC, of the Commission, of 3 November, and Directive 2008/68/EC, of the European Parliament and of the Council, of 24 September, into Portuguese law;

- **Road transport of passengers:**

- [Decree-Law 251/98](#): regulates taxi licensing and market access;
- [Law 45/2018](#): legal regime for individual and paid passenger transport in unmarked vehicles via digital platforms;

- **Rail transport of passengers and luggage:**

[Decree-Law 58/2008](#): Establishes the legal regime applicable to contracts for rail transport of passengers and luggage, portable packages, pets, bicycles and other goods;

- **Maritime transport of goods:**

[Decree-Law 352/86](#): Establishes provisions for the reformulation of maritime law;

- **Maritime transport of people:**

[Decree-Law 349/86](#): Establishes rules about contracts for transport of passengers by sea;

The topics mentioned below essentially focus on the problems caused by the current pandemic for road transport:

Topic	Risks	Background / Recommendations
Delays in carrying out road transport	<ul style="list-style-type: none"> • The haulier which transports goods by road may be unable to deliver those goods within the agreed deadline; • The haulier may be held liable for the total or partial loss of the goods. 	<ul style="list-style-type: none"> • There is a delay in the delivery when the goods are not delivered to the consignee within the agreed period or, if no period was defined, within seven days following acceptance of the goods by the haulier; • When the goods are not delivered within seven days following the agreed deadline or, if no deadline was determined, within fifteen days following acceptance of the goods by the haulier, it is considered a total loss; • The haulier's liability should be considered to be excluded if the delay is due to unforeseeable circumstances or force majeure established in the general regime.
Impediments to carrying out road transport	<ul style="list-style-type: none"> • The haulier which transports goods by road may be unable to deliver those goods within the agreed deadline; • The haulier may be held liable for the total or partial loss of the goods. 	<ul style="list-style-type: none"> • The haulier must request instructions from the consignor or, if agreed, from the consignee; • The general regime applicable to road transport establishes the exclusion of the haulier's liability if the delay is due to unforeseeable circumstances or force majeure.
Perishing of goods within the scope of road transport	<ul style="list-style-type: none"> • Goods may perish due to delays in carrying out their transport. 	<ul style="list-style-type: none"> • The haulier should consider taking measures to conserve the goods; • The possibility of the haulier selling the goods should be considered.

II.G. Late payments

Performance of commercial contracts typically involves the payment of consideration for a good or service. In view of the effects of the pandemic on the economy and the difficulties suffered by economic agents in fulfilling obligations, payment obligations may be subject to delays, exacerbating the economic and financial effects caused by current circumstances and causing a contagion effect on companies and the economy in general.

At this time, given the lack of special legislation which sets forth a more flexible regime following the pandemic, the provisions of [Decree-Law 62/2013](#) continue to be particularly important. Under this regime, a (i) “late payment” is understood as “any failure to pay the amount due

within the contractual or legal deadline, provided the creditor has fulfilled its obligations, unless the delay cannot be assigned to the debtor”; and (ii) “commercial transaction” is “any transaction between companies or between companies and public entities for the supply of goods or services in exchange for remuneration”⁽³⁾. Contracts entered into with consumers and civil liability compensation payments, including those made by insurance companies, among others, are excluded from this regime⁽⁴⁾.

⁽³⁾ Article 3 (a) and article 3 (b) of Decree-Law 62/2013.

⁽⁴⁾ Article 2 of Decree-Law 62/2013.

The legal framework, however, is not limited to the above. Besides recourse to the general mechanisms laid down in the Civil Code, if applicable, one must now also consider the measures resulting from Decree-Law 10-J/2020. Indeed, taking into account that companies' liquidity and cash-flow management often depend on obtaining loans, the legal framework applicable to the performance of obligations – if the debtor can be considered a beneficiary and if the transaction is covered by this regime – should be considered jointly with the exceptional measures set forth in Decree-Law 10-J/2020, in particular, the prohibition of revocation, in whole or in part, of credit lines and loans, for the sums under contract, as well as the possibility of suspending payments⁽⁵⁾. It should be noted

that this regime will remain in force for a limited time and depends on meeting conditions related with the loan and to the debtor specifically.

It is equally important to keep in mind that the provisions of this regime require rigorous interpretation, since it concerns to monetary obligations and establishes more protection for the debtor than what would result from the general law.

Some additional aspects may be considered, without prejudice to others and to an analysis of the specific case, and without prejudice to the cases to which Decree-Law 10-J/2020, referred to immediately above, is applicable:

⁽⁵⁾ Article 4 of Decree-Law 10-J/2020. For further information, see [chapter VII](#) Contracts and Bank Guarantees.

Topic	Risks	Background / Recommendations
Notice for payment	<ul style="list-style-type: none"> • Determination of the moment when the payment obligation falls due; • Notice for the debtor to perform payment. 	<ul style="list-style-type: none"> • In the event of late payment, the creditor is entitled to interest, without need for a legal notification, to be counted from the date it falls due, or from the end of the payment deadline, set forth in the contract; • If the contract does not envisage the date or deadline for payment, the deadlines set forth in Decree-Law 62/2013 (e.g., 30 days counted from the date on which debtor has received the invoice) are applicable.
Applicable interest rate	<ul style="list-style-type: none"> • Existence of a contractual provision for determining the interest rate applicable to the late payment. 	<ul style="list-style-type: none"> • The interest applicable to late payments on commercial transactions between companies are those set out in the Commercial Code⁽⁶⁾ or those agreed between the parties.
Contractual clauses related with the payment of interest, maturity date of obligations or payment deadline	<ul style="list-style-type: none"> • The contract excludes payment of interest or compensation for costs of collecting the debt; • The existence of a clause excluding or limiting liability for default. 	<ul style="list-style-type: none"> • Clauses or commercial practices such as those described may be deemed forbidden. The possibility of arguing the nullity of such clauses must be analysed on a case-by-case basis.

⁽⁶⁾ If the parties have not set an interest rate, the supplementary interest rate by joint ordinance of the Ministers of Justice and Finance in relation to the credits held by commercial, individual or corporate companies (cf. article 102 (3) of the Commercial Code) should be considered. The interest rates applicable to default late payment in force in the first half of 2020 are envisaged under Notice 1568/2020 of the Directorate-General for the Treasury and Finance.

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