



## JURISDICTION AGREEMENTS IN ELECTRONIC CONTRACTS

Currently there is an exponential increase in the conclusion of contracts via the internet and new technologies, which on the one hand proves to be positive in the sense that it facilitates international trade, but on the other hand ends up increasing the risk of contracting parties being subject to several jurisdictions, as many as the different legal systems with which their business may be connected.

In fact, e-commerce consists of international trade, which is the result of a contracting process in which the contracting parties' declarations of will are produced and transmitted by

computerized means, thus dispensing with the physical presence of the parties.

The fact that these transactions are processed electronically raises difficulties in terms of determining the international jurisdiction of the courts, insofar as there is a ubiquitous, i.e. multi-jurisdictional nature to the internet, which can lead to and enhance situations of forum shopping.

In order to reduce this risk, it is customary to include jurisdiction clauses in contracts, particularly with consumers.

Specifically, the system of international jurisdiction of Portuguese courts is described in the articles of the Code of

Civil Procedure. However, due to the principle of the primacy of European Union law (Article 8(4) of the Constitution of the Portuguese Republic), it is necessary to pay attention to European and international instruments, namely Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Looking at this regulation, it is possible to see that it enshrines a principle of freedom of movement of judicial decisions, allowing the contracting parties to conclude jurisdiction pacts.

## WHAT ARE JURISDICTION AGREEMENTS?

A jurisdiction agreement is a pact by which the parties agree on aspects relating to jurisdiction, i.e. the international competence of their disputes.

Jurisdiction agreements are governed by Article 25 of Regulation (EU) No 1215/2012, which lays down very specific rules of validity:

- The agreement must confer jurisdiction on the courts of a Member State of the European Union;
- The agreement cannot be void under the law of the Member State designated by the parties;
  - a) This must be in writing or verbalised with written confirmation;

- b) It must be in accordance with the usage established between the parties; or
- c) In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

## IS IT POSSIBLE TO INCLUDE A JURISDICTION AGREEMENT IN A CONTRACT CONCLUDED OVER THE INTERNET?

The answer is yes, insofar as Article 25(2) of the Regulation allows jurisdiction agreements to be concluded by electronic means, equating the “written” necessary for the conclusion of the agreement with *“Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing”*.

In addition, it can be seen that the Regulation attaches considerable importance to this principle of party autonomy and also highlights attributive pacts, since it establishes the exclusive jurisdiction of the courts designated in the pacts, unless otherwise agreed.

## WHAT ABOUT CONSUMER CONTRACTS?

Despite the fact that the parties are free to determine the competent jurisdiction,

it is important to analyze the issue in the specific case.

In this way, and focusing in particular on consumer contracts, it is necessary to understand to what extent this principle of freedom to enter into agreements conferring jurisdiction is articulated and compatible with electronic consumer contracts.

The truth is that the freedom to enter into jurisdiction agreements is not absolute, as it is subject to certain limits imposed by the principle of protecting the weaker party, namely the consumer.

Bearing in mind that the contract has a consumer as the contracting party and a business or professional entity as the contracting party, it is immediately clear that it is the consumer who is the weakest party in the contractual relationship, since there is an asymmetrical relationship.

For this reason, it is the consumer who needs to have their interests and rights better protected (this protection being a requirement of EU law and the Constitution itself).

With this in mind, and with a special international jurisdiction applying to consumer contracts in section 4 of the Regulation, made up of articles 17, 18 and 19, the question arises as to whether jurisdiction pacts can be concluded in electronic contracts with consumers.

## IS IT POSSIBLE TO INCLUDE A JURISDICTION PACT IN ELECTRONIC CONSUMER CONTRACTS?

Once again, taking into account the principle of protecting the weaker part of the consumer, recital 18 of the Regulation states that “*in relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.*”.

In this regard, and with regard to the possibility of concluding jurisdiction pacts, it is necessary to look at Articles 25(4) and 19 of the Regulation:

### « Article 25.º

*4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.»*

In other words, consumer contracts can include choice of court clauses. However, these clauses are only valid if they meet the requirements of Article 19.

### « Article 19.º

*The provisions of this Section may be departed from only by an agreement:*

- 1. Which is entered into after the dispute has arisen;*

2. *Which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*
3. *Which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.»*

It is therefore possible for the parties to a consumer contract to include choice of court agreements, even if these contracts are concluded electronically.

In order to do this, it is important to comply with European standards or, on the other hand, if European law does not apply, the matter must be dealt with in the light of Article 94 of the Portuguese Code of Civil Procedure.

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