

Consumer contracts Q&A: Brazil

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Brazil-specific information concerning the key legal and commercial considerations when drafting a consumer contract.

This Q&A provides country-specific commentary on *Practice note, Consumer contracts: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

General contract law framework

1. What are the requirements under national law for a valid contract to exist?

Under the Brazilian Civil Code (BCC), contracts must satisfy the following essential validity requirements:

- The parties must have capacity to contract.
- The contract purpose must be legal, possible, determined or determinable.
- The contract must be in a prescribed form or, at least, in a form not prohibited by law.

(Article 104, BCC.)

For a contract to exist, there must be mutual agreement between the parties, that is, there must be an offer and corresponding acceptance that are both valid and effective (Articles 427 to 435, BCC).

As a general rule, the contract does not need to be in writing to be valid and effective. Brazilian law adopts the principle of consensualism, which allows a contract to exist even if the offer and acceptance have been verbal or effected through other acts of non-verbal communication (for example, in a shop, a consumer simply taking an item and placing it in front of a cash register without saying anything) (see [Question 4](#)).

2. Does national law make a distinction between an offer and an invitation to treat? Are the circulation of price lists, catalogues, advertisements for sale and the display of items in a shop treated as an offer or as an invitation to treat?

In consumer contracts, all sufficiently precise information or advertising that is conveyed by any means of communication regarding offered or provided goods and services, imposes an obligation on the supplier and forms part of the contract (*Article 30, Código de Defesa do Consumidor, Law No.8.078/90 (CDC)*). Therefore, the circulation of such information or advertising should be considered, in principle, as an offering. An invitation to treat is not recognised in Brazil in relation to consumer contracts.

Under Article 35 of the CDC, in case of non-compliance with the offer, the consumer can demand, either:

- The enforcement of the initial offer.
- Delivery of an equal or similar product or service.
- Termination of the contract, in which case damages will be due for any losses incurred.

3. Is it necessary for the price of goods or services to be clearly stated for a contract to exist?

Yes, the supply of products or services must contain correct, clear, precise and conspicuous information, in Portuguese, about the price (*Article 31, CDC*). In addition, any clause in a consumer contract that authorises, even if indirectly, the supplier to modify the price of goods or services unilaterally, without the consumer's agreement, is considered abusive and is therefore null and void (*Article 51, X, CDC*).

4. Is it necessary for a contract for the sale of goods or supply of services to be in writing for it to be valid? Are any formalities necessary?

As a general rule, Brazilian law follows the principle of consensualism in contracts, which means that a mere verbal expression of will, or even non-verbal communication can generate a binding contract between the parties (see [Question 3](#)).

According to the BCC, in order to be valid, an expression of will does not depend on any special formality, except if the law expressly requires it (*Article 104, BCC*). The same applies to consumer contracts, except in specific cases where some formality is required by legislation (for example, to acquire a house or an apartment from a construction

company, the buyer must make a written contract before a notary; also, the acquisition of a vehicle must be registered with the transit department).

5. Does national law allow for a contract to be declared void in the event of mistake by one or both of the parties? Are any other remedies available?

In civil contracts, mistakes are a potential cause for declaring the contract void (*Article 171, II, BCC*).

The same principle applies to consumer contracts as part of the consumer protection against abusive terms. A mistake by the consumer can render the specific clause, and in some circumstances the entire contract, null and void (*Article 51, CDC*). The typical remedy in case of mistake is an action to declare the clause void, which can be filed by the consumer, by the Public Attorney or by consumer protection agencies (*Article 51, paragraph 4^o, CDC*). In general, the nullity of the contractual clause will not invalidate the whole contract, except if without this clause the contract imposes an excessive burden on one of the parties (*Article 51, paragraph 2^o, CDC*).

6. Does national law allow for a contract to be declared void in the event of misrepresentation by one of the parties? Are any other remedies available? Can silence constitute misrepresentation?

Misrepresentation is not specifically recognised under Brazilian law.

In consumer contracts, the supplier's obligation to inform is quite broad (*Article 30, CDC*). Lack of information contravenes the principles of good faith and equilibrium of the contract (*Article 4, III, CDC*). The supplier's failure to provide relevant information to the consumer may lead to the contract being declared void (*Article 51, IV, CDC*) and engage the supplier's liability.

If one of the parties intentionally omits to reveal a fact or quality that is essential to the formation of the contract and that is not known to the other party, this silence will be considered as a malicious omission (*Article 147, BCC*). In this case, the contract will be voidable and not void (*Article 145, BCC*). However, if both parties act with intent, neither of them will be able to claim compensation or the contract's annulment.

In addition, false or misleading advertising, as well as omitting important relevant information about goods or services, are punishable by detention and a fine (*Article 66, CDC*).

7. Is it possible to exclude liability for misrepresentation?

Clauses seeking to exclude or limit a supplier's liability in consumer contracts are null and void (*Article 51, I, CDC*), even if stated by the parties' free expression of will (*Article 25, CDC*).

However, if the consumer is a legal entity liability may be limited but not excluded, if the situation justifies this limitation (*Article 51, I, CDC*). The courts tend to be quite restrictive in accepting this exception.

Performance obligations

8. Does national law impose any general principles of fair commercial practices?

Yes. The principle of good faith, which covers conduct relating to co-operation, information and protection standards, is widely applied by regional and superior courts in Brazil (*Articles 4, III, and 51, IV, CDC*). The parties are obliged to act according to the principle of good faith and integrity when making the contract and executing it (*Article 422, CC*).

All obligations arising from consumer relations, when contrary to good faith and equity, should be considered null and void (*Article 51, IV, CDC*). Equity is presented as an indeterminate concept to be established by the judge, taking into consideration ethical and moral standards in consumer relations.

9. Does national law imply any terms into:

- Contracts for the sale of goods to a person dealing as a consumer?
- Contracts for the supply of services to a person dealing as a consumer?

In both contracts for the sale of goods and the supply of services there are implied terms that the goods and services are free from defects that may diminish their quality, quantity, durability and level of safety that is normally expected from them. The same requirements apply to information about the goods and services: it must be clear, precise and correct.

Any violation of these implied terms will generally be subject to a strict liability rule, allowing the consumer to seek pecuniary and non-pecuniary damages.

Alternatively the following remedies are available:

- In the case of defective goods, the supplier can repair the defect within a 30-day term. If the goods are not repaired, the consumer can opt for the substitution of the goods or the restitution of any payment already made, or a proportional reduction of the price (*Article. 18, paragraph 1^o, CDC*).
- In the case of defective services, the consumer can opt for the re-execution of the services without any additional costs, or the restitution of any payment already made, or a proportional reduction of the price (*Article 20, CDC*).

10. What liability exists for breach of an express term of a contract?

It depends on the type of breach of contract:

- If the object of the contract is not fulfilled at the time and place or in the manner provided in the contract, but there is still interest in the performance of the contract, the defaulting party may incur a moratorium penalty clause, which, in consumer contracts, may not exceed 2% of the value of the contract (*Article 52, §1^o, CDC*). The moratorium penalty clause does not have to be expressly set out in the agreement between the parties, because it is determined by Brazilian law. This does not authorise the termination of the contract.
- If the non-compliance undermines the value of the contract, it can lead to its termination and to liability for the defaulting party, who may be obligated to pay a compensatory penalty clause (*Articles 409 and 410, CC*). This clause must be written in the contract signed between the parties in order to be valid.

In addition, breach of an express term may lead to compensatory damages, including for pain and suffering (*Article 927, CC*).

The parties' manifestation of will in particular documents, receipts and pre-contracts related to the transaction between the consumer and supplier may generate the right to obtain specific execution, which is the right to oblige the other party to deliver exactly what was agreed upon the contract (*Article 48, CDC*). It is possible to convert the specific execution into compensation for losses and damages if it is requested by the consumer or if it is impossible to achieve the specific execution or a practical and equivalent result (*Article 84, CDC*).

11. What liability exists for breach of an implied term of a contract?

Liability is the same as for breach of an express term (see [Question 10](#)). In addition, defective products and services that could constitute a possible hazard to the health and safety of consumers, that are found to be improper and inadequate for consumption, or that contain a defect that may decrease its value or create a disparity with the information provided, may also give rise to civil liability (*Articles 12 to 25, CDC*).

Control of unfair contract terms

12. How does national law regulate the inclusion of unfair terms in a consumer contract?

All contractual obligations considered unfair, abusive or in violation of good faith practices will be considered null and void (*Article 51, IV, CDC*). See [Question 5](#).

13. To what extent does national law permit the use of terms that limit or exclude the liabilities to which a party to a consumer contract would otherwise be subject?

Clauses which preclude, limit or exonerate the supplier of goods or services from its obligation to indemnification because of vices or defects are prohibited (*Article 25, BCC*). This prohibition is not specific to consumer contracts, but extended to all contracts signed under Brazilian law.

In consumer contracts, clauses that preclude, exonerate or mitigate the supplier's liability for defects or that reduce consumer rights are considered null and void. There is an exception that allows the inclusion of clauses limiting liability where the consumer is a legal entity (*Article 51, I, CDC*). However, the courts are generally restrictive in their application of this exception (see [Question 7](#)).

Distance contracts

14. How does national law regulate contracts made at a distance (that do not involve face-to-face contact between the buyer and seller)?

A customer may terminate a contract made at a distance within seven days of the execution of the contract or the receipt of the product or service. The customer does not need a reason to terminate, and the supplier must return any amounts received from the consumer, monetarily updated (that is, updated from their historic value (the amount originally due) to the actual value (the amount due now or on the day of payment, considering inflation and other economic factors) (*Article 49, CDC*).

15. How does national law regulate door-to-door selling?

Door-to-door selling to consumers is regulated in the same way as distance selling (see [Question 14](#)) (*Article 49, CDC*).

Enforcement

16. Who is responsible for enforcing consumer protection legislation? What powers do enforcement authorities have?

The main bodies responsible for the effectiveness of consumer protection rules in Brazil are:

- The judiciary and its courts, which has jurisdiction powers over disputes related to consumer relations.
- The Public Attorney's office, through its agents and specialised attorneys, which have the power to investigate conduct affecting consumer protection.
- The Department of Consumer Protection, an agency of the Federal Ministry of Justice, which co-ordinates the National Consumer Protection System, with the power to investigate and sanction conduct affecting consumer protection.
- The Consumer Protection Offices (PROCONs) linked to the states' government, which deal with complaints made by consumers, with the power to investigate and sanction conduct affecting consumer protection.
- Private consumer protection associations, which are founded by individuals with the aim of promoting actions around consumer rights protection.

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