

Most important rules concerning ecommerce

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1 European directives on ecommerce and consumer rights:

- ▶ **European Law: directives' enforceability**
- ▶ **Harmonization necessity:**
- ▶ **Ex. Dir. 93/13/EEC (April 5th)**
- ▶ **Article 8. Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.**

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1 European directives on ecommerce and consumer rights:

- ▶ “Actual state of art”: Dir. 2011/83/EU (Oct. 25th)

Article 4

Level of harmonisation

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, **including more or less stringent provisions to ensure a different level of consumer protection**, unless otherwise provided for in this Directive.

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1 European directives on ecommerce and consumer rights:

- ▶ Dir. 93/13/EEC (April 5th) – Unfair Terms
- ▶ Article 1. 1. The purpose of this Directive is to **approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer**. (B2C)
- ▶ **Some definitions:**
- ▶ Article 2. [...] (b) 'consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession ;

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1 European directives on e-commerce and consumer rights:

- ▶ (c) 'seller or supplier means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.
- ▶ **Adehsion contract:**
- ▶ **Article 3. 1.** A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the **requirement of good faith**, it causes a **significant imbalance** in the parties' rights and obligations arising under the contract, **to the detriment of the consumer.**

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1 European directives on e-commerce and consumer rights:

- ▶ **2.** A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a **pre-formulated standard contract.**
- ▶ **Interpretation: article 5**
- ▶ [...] these terms must always be drafted in **plain, intelligible language.** Where there is doubt about the meaning of a term, the interpretation **most favourable to the consumer shall prevail.** [...].

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1 European directives on ecommerce and consumer rights:

Dir. 2011/83/UE: Distance Sales

Article 1 Subject matter

The purpose of this Directive is, through the achievement of a **high level of consumer protection**, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders. **(B2C)**

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1 European directives on ecommerce and consumer rights:

Dir. 2011/83/UE:

What is a distance contract?

What is a “off premises contract”?

What’s the difference between them?

Article 2: definitions

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1 European directives on e-commerce and consumer rights:

Dir. 2011/83/UE:

Art. 2

(7) '**distance contract**' means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme **without the simultaneous physical 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; (Ex. Internet)

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1 European directives on e-commerce and consumer rights:

(8) '**off-premises contract**' means any contract between the trader and the consumer:

- (a) simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- (b) on the business premises of the trader or through any **means of distance communication immediately after 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; or
- (c) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;

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1 European directives on ecommerce and consumer rights:

Article 6 – Information requirements for distance and off-premises contracts

1. Before the consumer is bound by a distance or off premises contract [...]:

- (a) characteristics of the goods or services;
- (b) the identity of the trader, such as his trading name;
- (c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, **to enable the consumer to contact the trader quickly and communicate with him efficiently;**

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1 European directives on ecommerce and consumer rights:

Article 6 – Information requirements for distance and off-premises contracts

- (d) total price of the goods or services inclusive of taxes;
- (e) cost of using the means of distance communication for the conclusion of the contract;
- (f) arrangements for payment, delivery, performance, the time;
- (g) Right of withdrawal and its conditions;
- (h) Goods and services guarantees; ...

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1 European directives on ecommerce and consumer rights:

Dir. 2011/83/EU: right to withdrawal

Article 9 [...] the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.

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1 European directives on ecommerce and consumer rights:

▶ Dir. 2000/31/EC – *Electronic Commerce Directive*

- all previous directives are applied;
- to ensure legal certainty and consumer confidence;
- *Spam* (art.7): must be identified as unsolicited commercial communications, and it is necessary the *prior consent of the recipient (opt in)*;

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1 European directives on ecommerce and consumer rights:

- ▶ Dir. 2000/31/EC
- ▶ Section 2: Commercial communications
- ▶ Art. 6 (information to be provided)
- ▶ Art. 7 (unsolicited commercial communication)
- ▶ Art. 9 (treatment of contracts)

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2 Ecommerce regulation in the US:

- ▶ **Uniform Computer Information Transactions Act**
- ▶ 1999
- ▶ Purpose of this act: to change the US UCC
- ▶ Passed only in two states: Virginia and Maryland

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2 Ecommerce regulation in the US:

- ▶ **Uniform Electronic Transactions Act (1999)**
- ▶ proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL)
- ▶ passed in 47 states, US Virgin Islands, District of Columbia, Puerto Rico
- ▶ Inspired by the *United Nations Commission on International Trade Law*

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2 Ecommerce regulation in the US:

- ▶ **Section 7 – legal recognition to electronic signatures, records and contracts**
- ▶ (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- ▶ (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- ▶ (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- ▶ (d) If a law requires a signature, an electronic signature satisfies the law.

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2 Ecommerce regulation in the US:

- ▶ **Section 12 – Retention of Electronic Records; originals** (accurately reflects the information + remains accessible for later reference);
- ▶ **Section 14 – Automated Transaction**
- ▶ **Section 15 – Time and Place of Sending and Receipt**

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3 Canadian Uniform Electronic Commerce Act (UECA):

- ▶ June 1999, the Uniform Law Conference of Canada
- ▶ Influenced by the *United Nations Commission on International Trade Law*
- ▶ Part 1 (sections 5–18) – functional equivalence between electronic and paper-based documents
- ▶ Part 2 (sections 19–23) – formation and operation of contracts
- ▶ Part 3 (sections 24–25) deals with the carriage of goods

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4 UNCITRAL Model Law on Electronic Commerce (1996):

- ▶ United Nations Commission on International Trade Law
- ▶ “electronic commerce that is acceptable to States with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations”
- ▶ “recommends that all States give favourable consideration to the Model Law”

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5 Ecommerce and Mercosul:

- ▶ “Mercado Comum do Sul” (Common Market of the Southern Cone): art. 1º Treaty of Asunción;
- ▶ “The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures;”
- ▶ Problems: unenforceable
- ▶ huge gap between the State Members’ legislation

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5 Ecommerce and Mercosul:

- **Attempts of harmonization:**
- **Justice Ministers' Meeting of States Members**, Dec. 1991;
- **Buenos Aires Protocol:** on International Jurisdiction in Contractual Matters (1994);
- **Las Leñas Protocol:** on Jurisdiction and recognition of civil, labor and commercial judgments, and international arbitration (BR – Dec. n° 6.891 de 2/07/2009);
- **Resolution 126/94:** on consumer protection; e
- **Santa Maria Protocol:** on international contracting and consumer protection – applicable law most favourable to consumer;

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6 Brazilian draft bill on ecommerce and consumer protection:

▶ Draft Bill 281/2012

Characteristics:

- **Harmonization** with international framework;
- **Influenced** by Model Law UNCITRAL and Dir. 200/31/EU;
- **Applicable law most favourable to consumer** (art. 7)
- **Information** (art. 33);
- **Spam** must be identified clearly and consumer can choose not to receive (opt out) (art. 33 par. 2);

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6 Brazilian draft bill on ecommerce and consumer protection:

- ▶ Art. 48 CDC: **receipt rule;**

“Par. Primeiro. Os contratos de consumo celebrados por meio telemático completam-se com a **recepção da aceitação identificada do consumidor pelo fornecedor** de produto ou serviço.

Par. Segundo. O fornecedor de produto ou serviço deve prover condições que assegurem a **integridade na elaboração e no armazenamento dos contratos** de consumo que sejam celebrados por meio telemático.”

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6 Brazilian draft bill on ecommerce and consumer protection:

- ▶ Art. 49 CDC: **right of withdrawal – 7 days;**

“O consumidor pode anular o contrato, no **prazo de 7 dias a contar** de sua assinatura ou do ato de recebimento do produto ou serviço, sempre que a contratação de fornecimento de produtos e serviços ocorrer fora do estabelecimento comercial, especialmente por meio telemático ou a domicílio.”

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