LEGAL INSIGHTS

PUBLIC LAW | CONSTRUCTION

Legislation and case law updates

1st Quarter

HIGHLIGHTS

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OBJECTIVE IMPOSSIBILITY

Article 1215 of the Civil Code applies where the proposed solution is technically unfeasible. This provision covers alterations necessitated by objective reasons, such as interference with third-party rights or compliance with technical regulations and safety standards. In other words, it covers modifications that are essential to prevent defects or performance failures in the works.

In this case, the parties must negotiate the following: (i) the changes to be made to the project/works, and (ii) the new contractual terms (e.g. deadline, price and liabilities). If they cannot reach an agreement, the courts may determine the changes.

Nevertheless, the client may always terminate the contract (Article 1229 of the Civil Code), provided they compensate the contractor for work carried out and costs incurred.

However, if the works are objectively impossible to perform for reasons not attributable to either party, the obligation is extinguished due to objective impossibility of performance (Article 790 of the Civil Code). In such a case, the client cannot terminate the contract 'due to the contractor's fault' nor claim compensation for termination.

JUDGMENT OF THE NORTHERN CENTRAL ADMINISTRATIVE COURT OF 22/01/2026, CASE NO. 518/12.2BEPRT

SUSPENSION OF WORKS

If the client fails to pay the invoices, the contractor may suspend the works (Article 185 of the Legal Framework for Public Works Contracts, or 'RJEOP').

In the event of a suspension due to non-payment, of which the client has been notified, the contractor is entitled to compensation for any direct losses incurred during the suspension period, in accordance with Article 189(4) of the RJEOP. This includes site costs (e.g. staff, facilities and logistical equipment), daily bank guarantee/insurance costs and all other costs directly associated with this stoppage.

Compensation is payable only for the period between notification of suspension and notice to resume work, plus the strictly necessary days for recommissioning the site.

JUDGMENT OF THE NORTHERN CENTRAL ADMINISTRATIVE COURT OF 22/01/2026, CASE NO. 199/05.0BELRA.CS1

ADDITIONAL WORK

Any additional work carried out to rectify design errors and omissions that have been formally acknowledged by both parties is payable to the contractor. In accordance with Articles 15 and 16 of the RJEOP, the client is required to make the corresponding payment.

JUDGMENT OF THE NORTHERN CENTRAL ADMINISTRATIVE COURT OF 09/01/2026, CASE NO. 00275/23.7BEMDL

PRICE REVIEW

The signing of the final account usually means that the right to a price review is lost. However, the court recognises an exception where the economic indices used do not correspond to the legally established figures. In such cases, even after the final account for the works has been drawn up, the price adjustment must be recalculated on the basis of the corrected indices, provided that the correct indicators were only published subsequently by the competent authority.

JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 17/03/2026, CASE NO. 12/24.9BALSB

TAX RULES FOR URBAN REGENERATION CONTRACTS

For a contract to qualify for the reduced 6% VAT rate, it must be part of a strategic urban regeneration plan carried out by the local authority. Simply being located within an Urban Regeneration Area is not sufficient. Under the Legal Framework for Urban Regeneration (ARU), urban regeneration requires the approval of both the ARU's delimitation and an Urban Regeneration Operation (ORU) that falls within a municipal urban regeneration strategy or programme.

Therefore, only urban regeneration works that meet both of these requirements are eligible for the reduced VAT rate of 6% (Item 2.23 of List I, as set out in the CIVA).

- They must, in fact, be urban regeneration works.
- They must be carried out on properties situated in an Urban Regeneration Area for which an Urban Regeneration Operation has previously been approved.

Regarding the timeframe, the legal admissibility of there being no temporal overlap between the demarcation of the ARU and the approval of the ORU does not exempt the taxable person from complying with the conditions for the tax benefit. Therefore, although works in an ARU are permissible prior to the ORU's approval, the reduced VAT rate cannot apply if the works are carried out before the relevant ORU has been approved.

JUDGMENT OF THE COURT OF APPEAL OF GUIMARÃES OF 12/02/2026, CASE NO. 5490/22.8T8VNF.G1

DEFECTS

The client must notify the contractor of any defects within 30 days of becoming aware of them. Failure to do so will result in the right to claim rectification lapsing (Article 1220(1) of the Civil Code). Acknowledgement of the defect by the contractor is deemed to constitute such notification. If the defects were not known at the time of acceptance of the work, the right to have the defects remedied must be exercised within one year of notification (Article 1224 of the Civil Code). In no case may this right be exercised more than two years after the handover of the work.

However, the special provisions of Article 1225 of the Civil Code apply to properties intended for long-term use (such as residential buildings) where repair works are concerned. Article 1225 provides for extended time limits. These are one year for termination following discovery of the defects and one year for legal action, within a maximum limit of five years from delivery.

Under both provisions, the contractor's acceptance of the defects and their promise to repair them prevent the client's rights from lapsing, even if the notice is late (Article 331(2) of the Civil Code).

The contractor's liability for defects is limited to the works contracted for and carried out. They cannot be ordered to repair defects in areas of the property where they did not carry out work or assume a contractual obligation.

However, the client need only prove the existence of the defect, not its technical cause. It is the contractor's responsibility to prove that the defect originated beyond their control.

JUDGMENT OF THE COURT OF APPEAL OF PORTO OF 26/03/2026, CASE NO. 802/23.0T8PVZ.P1

DEFECTS

The concept of 'defect' encompasses any characteristic of the work that should not be present in its current form. This is determined by considering the terms of the agreement, applicable technical standards, the nature of the work and its economic and social function, and the standard expected of a diligent contractor.

The contractor assumes an obligation of result, not merely of means. According to Article 1208 of the Civil Code, the contractor is obliged to deliver work that is fit for satisfying the contractual purpose.

According to Article 3(1) of Decree-Law 67/2003, the contractor is liable to the consumer for any lack of conformity at the time of delivery. The consumer may demand repair, replacement, a price reduction or termination of the contract, in no particular order. In addition: (i) the right to withhold payment while the conditions for the defence of non-performance remain (Article 428 of the Civil Code), and (ii) the right to compensation for loss or damage resulting from defective performance (Article 12 of Law 24/96).

Until the contractor remedies the defect, the conditions for claiming non-performance remain in force, in principle. These conditions cease to apply when the client decides that the contractor is no longer able to carry out the repair, for example if the client entrusts the repair to a third party.

Therefore, the client cannot simultaneously: (i) opt for a third-party repair and seek compensation from the contractor for the cost; or (ii) refuse to pay the price on the grounds of a failure to repair, when the client no longer allows the contractor to carry out the repair themselves.

JUDGMENT OF THE COURT OF APPEAL OF LISBON OF 24/03/2026, CASE NO. 13041/23.0T8LSB.L1-7

PENALTY CLAUSES

Penalty clauses are permissible under Article 810(1) of the Civil Code.

However, Article 811(1) of the Civil Code prohibits the combination of the obligation to perform and the payment of a penalty clause, unless the latter is intended to penalise a delay in performance (i.e. penalty clauses for delay).

However, it is prohibited to combine a penalty clause of a compensatory nature, intended as compensation in lieu of performance, with the simultaneous demand for performance of the principal obligation.

Given the function of penalty clauses as compensatory sanctions, legal doctrine distinguishes between two types:

- If stipulated for definitive non-performance, it is a compensatory penalty clause.
- If provided for mere delay, it is a penalty clause for delay.

Legal doctrine also identifies:

- Punitive or coercive clauses (penalty clauses), which aim to penalise the debtor's wrongful conduct and pressure them into compliance. These clauses may not have a direct link to the loss or damage suffered.
- Liquidated damages clauses facilitate proof of loss by setting the amount of compensation or its minimum limit in advance.

In any case, the penalty clause appears in the Portuguese legal system as a predetermined amount of compensation, whether for non-performance or delay, intended to remedy any loss or damage. However, nothing prevents it from also performing a coercive function under the principle of contractual freedom, pressuring the debtor to comply, since non-compliance entitles the creditor to demand a more onerous payment.

It is common for the penalty clause to set compensation in excess of the actual damage, which is lawful. This is justified by the aim of avoiding disputes over the quantification of losses, as well as by the coercive and deterrent functions that the clause may fulfil.

The legal limit is set out in Article 811(3) of the Civil Code: if the creditor has opted for the general compensation regime, they may not claim compensation in excess of the losses resulting from the breach.

Furthermore, Article 812(1) of the Civil Code permits the equitable reduction of the penalty clause if it is manifestly excessive due to circumstances that have arisen since the contract was made, and any stipulation excluding such a possibility is void.

However, it must be borne in mind that:

- The reduction of the penalty clause cannot be ordered ex officio. Rather, it is for the liable party to request it by alleging and proving facts that demonstrate the manifestly excessive nature of the clause in light of the subsequently ascertained damages.
- Regardless of the validity of the clause, exercising the right it confers may be considered unlawful on the grounds of abuse of rights (Article 334 of the Civil Code) if the holder manifestly exceeds the limits of good faith, public policy, or the social or economic purpose of the right.

JUDGMENT OF THE COURT OF APPEAL OF COIMBRA OF 24/03/2026, CASE NO. 1694/23.4YIPRT.C2

DEFENCE OF NON-PERFORMANCE

This constitutes a means of defence for a contracting party in the event of a delay to the performance of the contract by the other party. Its purpose is to compel the defaulting party to perform, not to penalise them.

In a construction contract, invoking the defence on the grounds of defects is subject to the principle of proportionality. The client may withhold only that portion of the price that is proportional to the reduction in value caused by the defects until the defects have been remedied, new work has been carried out or the client has been compensated for losses incurred.

The criteria for calculating the price reduction due to defects that have not been remedied determine proportionality. If there are insufficient facts to quantify this, the judge may use their discretion to determine the portion of the price corresponding to the reduction in the value of the work resulting from the defects.

The client cannot withhold payment entirely for minor defects or finishing touches (Articles 793, 802 and 1222 of the Civil Code).

JUDGMENT OF THE COURT OF APPEAL OF GUIMARÃES OF 12/03/2026, CASE NO. 58988/23.0YIPRT.G1

RECTIFICATION OF DEFECTS

Defective performance occurs when the debtor breaches the principles of punctuality or conformity by performing the obligation in a way that differs from what was agreed, which is likely to prevent the creditor from being adequately satisfied (Articles 799(1), 913 et seq. and 1218 et seq. of the Civil Code).

Defective performance occurs when the defect or irregularity in the performance:

- causes damage to the creditor.
- devalues the performance; or
- prevents, hinders, or frustrates the purpose for which the performance is intended.

Defective performance occurs when the performance does not correspond to the requirements of the obligation as set out in the contract and in accordance with the principles of correctness and good faith.

The inaccuracy may be:

- quantitative, in cases of partial performance, whereby the effects of non-performance apply to the unperformed part (delay or definitive non-performance); or
- qualitative, resulting in a deviation from the performance, i.e. a defect or lack of quality.

In a building contract, the contractor's primary duty is to carry out the work in accordance with the agreement, free from defects that reduce its value or suitability for ordinary or specific intended use (Articles 1207 and 1208 of the Civil Code), and to perform and deliver within the agreed timeframe (Article 406 of the Civil Code).

If defects are found, the client must notify the contractor within 30 days of becoming aware of them; otherwise, the right to claim expires (Article 1220(1) of the Civil Code).

If the defects are remediable, the client may demand their repair. If the defects are not remediable, the client may demand that the work be redone (Article 1221(1) of the Civil Code).

If the defects are neither remedied nor new work carried out, the client may demand a reduction in price or termination of the contract, provided the defects render the work unsuitable for its intended purpose (Article 1222(1)).

The right to a reduction in price or termination presupposes that the contractor has failed to remedy the defects or carry out new work.

Exercising these rights does not preclude the right to compensation for damages suffered in accordance with the general principles of contractual civil liability (Article 1223 of the Civil Code). ■

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