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EDITORIAL

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Portugal

"Portuguese Law Firm of the Year"
Chambers Europe Awards for Excellence 2009 & IFLR Awards 2006 & Who's Who legal Awards 2006, 2008

"Best Portuguese Law Firm for Client Service"

Client Choice - International Law Office, 2008

"Best Portuguese Tax Firm"
International Tax Review - Tax Awards 2006, 2008

Poland

"Polish National Law Firm of the Year"
Chambers Europe Awards for Excellence 2008



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DOING BUSINESS IN PORTUGAL AND POLAND III

Labour Law



Basic legal framework

The most important statute governing employment law in Portugal is the new Labour Code (Law no. 7/2009, of 12th February)¹.

Labour law provisions which are not mandatory may be superseded by a collective agreement or by an employment contract, if the latter sets out more favourable terms and conditions for the employee. Notwithstanding, there are some nuclear matters - for instance personality rights, equal treatment, non-discrimination, paternity rights and employment of minors - in which collective agreements may only supersede statutory provisions if they set out more favourable terms and conditions for the employee.

¹ However, some rules of the preceding Labour Code (Law no. 99/2003, of 27th August), which was in force between December 2003 and February 2009, and the Law no. 35/2004, of 22th July, which regulated the Labour Code, are still in force concerning specific matters, which shall, in a nearer future, be regulated by new statutes.

Labour Law



The principal legal act governing labour relations in Poland is the Labour Code¹. All employment contracts should comply with the provisions of the Code. If the provisions of a contract are less favourable to the employee than those in the Code, they are deemed invalid and are automatically replaced by the relevant provisions of the Code.

Employment Contracts

The Labour Code provides for the following basic types of employment contract:

- non-fixed term contract – a permanent employment contract,
- fixed-term contract,
- specific task contract.

These types of contract can be preceded by an employment contract for a trial period of no longer than three months.

An employment contract should be drawn up in writing and should contain

¹ Act of 26 June 1974 (Journal of Laws of 1998, No. 21, Item 94, as amended).

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Under Polish labour law, workers can be employed by temporary employment agencies under two types of contract: an employment contract between the agency and the employee, and a service contract between the agency and the employer for whom work is to be performed.

Under Portuguese law, the two main types of employment contract are as follows:

- Open-ended employment contract, which is a permanent employment contract.
- Fixed-term and unfixed-term employment contract.

Employment contracts

Under Portuguese law, the two main types of employment contract are as follows:

- Open-ended employment contract, which is a permanent employment contract.
- Fixed-term and unfixed-term employment contract.

Employment contracts are not subject to any particular form, unless otherwise provided for by law. Generally, terms and conditions of employment need not be expressly agreed upon, as they are set forth by statutory provisions, collective agreements, work regulations or established practices.

During the trial period, the length of which depends on the type of employment contract executed by the parties and the type of work performed by the employee, either employer and employee may terminate the employment contract without prior notice (save if the trial period has lasted more than 60 or 120 days, in which case the employer must give a prior notice of 7 or 15 days) or just cause.

Remuneration

Salary is deemed to be that which employees are entitled to in consideration for their work, under the terms of their contract, of the rules applicable thereto or of established practices. The base salary and all other regular and periodic payments, directly or indirectly made, in money or otherwise, qualify as remuneration.

Until proven otherwise, it qualifies as remuneration any and all payment made by the employer to the employee. The employee cannot receive less than the applicable minimum salary in each month of contract, the latter being determined by law, amounting to € 450,00 for the 2009 calendar year.

Salary is usually paid fourteen times a year (12 months plus Christmas and vacation subsidies).

Termination

a) Termination by employer (dismissal)

The employer may only terminate the employment contract by dismissal:

- with just cause, in accordance with Article 351 of the Labour Code;

all key employment conditions, such as type of contract, place and nature of the work to be performed, start date and remuneration.

Under Polish labour law, workers can be employed by temporary employment agencies under two types of contract: an employment contract between the agency and the employee, and a service contract between the agency and the employer for whom work is to be performed.

Remuneration

Basic salaries must be paid at least once a month in cash in accordance with the rules and procedures applicable at a given company. Foreigners can transfer their remuneration abroad once all the relevant taxes have been paid.

The minimum wage for full-time work is specified by law and in 2009 is PLN 1,276.00.

Salaries should also be paid during periods when the employee is unable to work for reasons beyond his control and for periods of sick leave of up to 33 days in any calendar year (the amount paid is then 80% of the salary amount). If incapacity to work due to sickness exceeds 33 days in any calendar year, the employee receives sickness benefit from the Social Security Office (ZUS).

Dismissal

Fixed-term employment contracts and specific task contracts expire automatically at the end of the term for which the contract was concluded or when the specified task is completed.

In general, the minimum notice period for permanent employment contract depends on how long the employee has worked for the employer. Notice periods are:

- 2 weeks – for employment of up to 6 months;
- 1 month – for employment of between 6 months and 3 years;
- 3 months – for employment of over 3 years.

Notice should be given in writing and, in the case of a permanent employment contract, it should also give the reasons for dismissal. Employees can be dismissed without notice in cases

In Portugal, an employee may terminate his contract regardless of just cause, by way of written notice to the employer of no less than 30 or 60 days, depending on whether he has been employed for up to two years, in the first case, or for more than two years, in the second.

In Poland work is permissible on Sundays and holidays in rescue operations, in industries that have a continuous production cycle, in work performed in four shifts, and in public utility sectors.

- on grounds of redundancy; or
- on grounds of failure to adapt.

b) Termination by employee

An employee may terminate his contract regardless of just cause, by way of written notice to the employer of no less than 30 or 60 days, depending on whether he has been employed for up to two years, in the first case, or for more than two years, in the second.

Article 394 no. 2 of the Labour Code foresees situations that lead to the possibility of termination with just cause by employees, which entitle the latter to seek compensation for property and personal damage.

c) Termination of term contracts

Fixed-term contracts lapse at the end of their term, provided that the employer or the employee notifies the other party in writing of the intention to terminate the contract, 15 or 8 days, respectively, prior to the end of the term. Unfixed-term contracts lapse, when, the occurrence of the term being foreseeable, the employer notifies the employee of the termination, 7, 30 or 60 days prior to the completion of the specific task, if the contract was performed for less than six months, between six months and two years or more than two years, respectively.

Working time

Regular working hours may not exceed more than 8 hours per day or 40 hours per week.

However, several exceptions to this rule are laid down in the Labour Code, such as individual adaptability, group adaptability, bank of hours and concentrated work schedules.

Overtime should only be rendered when the undertaking has to meet eventual and transitory increase of work and which do not justify the admittance of another worker. Overtime can also be rendered in cases of force majeure or when it is indispensable to prevent or repair severe damages suffered by the company or for its viability.

There is a limit of overtime work, per year, for each employee, which varies according to the number of employees of the company.

specified in the Labour Code. Some groups of employees, e.g. pregnant women, women on maternity leave, people on annual leave or sick leave, are legally protected against dismissal.

Irrespective of how an employment contract is terminated, the employer has to provide the employee with a work certificate (containing information to be used as a reference by his next employer, e.g. on holidays, sick leave).

Work Time

In general, working hours should not exceed 40 hours per week and 8 hours per day. However, the Labour Code contains several exceptions to this rule.

Overtime (i.e. work performed outside the hours specified in the contract) is permissible only on the following conditions:

- rescue operations to save the lives of people or to protect property, or
- extraordinary requirements of the company.

Overtime cannot exceed four hours per day and 150 hours in any calendar year. Employees, except for employees in managerial positions, are entitled to extra remuneration for overtime work. Work is permissible on Sundays and holidays in rescue operations, in industries that have a continuous production cycle, in work performed in four shifts, and in public utility sectors.

Paid Leave

The number of days allowed as paid leave depends on the total period of employment and is as follows:

- 20 days – up to 10 years' employment;
- 26 days – after 10 years' employment.

Time spent on education is also included when calculating the period of employment, depending on the level of education completed. Detailed rules for these calculations are set out in the Labour Code. Employees in their first job, after each subsequent month of employment are entitled to 1/12 of the leave to which they are entitled after one year of work. In each subsequent year of employment, the employee is entitled to the full amount of annual leave. Paid leave cannot be renounced or financially compensated.

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Where employees have not been absent from work, or their only have duly justified absences during the civil year, the holiday leave may be increased up to three days.

Overtime work entitles employees to receive compensation, the amount of which varies upon the length and the day on which it is rendered. Additionally, employees are entitled to compensatory rest, whose length depends on whether overtime work was rendered on a business or on a rest day.

Annual leave

The annual holiday leave is of no less than 22 business days. Employees in their first year of employment are, after six months of performance of the employment contract, entitled to two days of holiday leave per month up to the maximum amount of 20 days.

Where employees have not been absent from work, or their only have duly justified absences during the civil year, the holiday leave may be increased up to three days.

Employees may waive part of their holiday leave entitlement and receive the corresponding pay and bonus, without losing their entitlement to take an actual holiday leave of 20 business days or the corresponding proportion in case of employees in their first year of employment.

Social Security System in Portugal

Social protection encompasses the following contingencies: sickness; maternity, paternity and adoption; unemployment; accidents at work and occupational diseases; invalidity; old age and death.

The general contributory rate for employees is 34,75%, of which 23,75% shall be supported by the employer and the remaining 11% by the employee.

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Renato Ferrão
Detail

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Social Security System in Poland

Social security in Poland comprises pension, disability, accident, and sickness insurance. Social security contributions are obligatory and are payable monthly. The amounts of contributions payable by the employer and the employee to each kind of insurance are given in the table below.

Type of Insurance	Contribution	Employer	Employee
Retirement	19.52%	9.76%	9.76%
Disability	6%	4.5%	1.5%
Accidents	0.67% to 3.60%	0.67% to 3.60%	-
Sickness	2.45%	-	2.45%

The health insurance contribution is 9% of the assessment basis. Contributions to health insurance are deducted from the individual's personal income tax liability.

Public Private Partnerships in Portugal (PPP's)

The specific statute where one can find the public procurement rules concerning PPP is the new Portuguese Public Contracts Code (the "Code"), approved by Decree-law nr. 18/2008, of January 29, that implements the European Union Directives 2004/17/CE and 2004/18/CE.

The Polish parliament was also working on a draft of the Public Works and Services Concessions Act. To date, Polish law has only recognised works concessions regulated under the current Public Procurement Act.

1. While modern Public Private Partnerships ("PPPs") in Portugal started in the early 1990s, the related legal concept of a "concession" has been used for a long time (at least since 1882 when a public services concession agreement was entered into between the Portuguese State and the company Edison Gower Bell for the exploration of the telephone public service).

Despite modern Portuguese PPPs usually use the general concept of "concession", they have different economic properties. For example, they rely on a pre-balanced base-case financial model and involve significant risk-transfer. There are several reasons for this PPP policy: (i) less expenditure of state funds, particularly because of governmental budgetary constraints; (ii) often, better efficiency in the performance of the relevant public service; (iii) transfer of a significant part of project risks to the private sector; and (iv) the general perception, both by the government and by the public, that PPPs are an effective way to achieve the rapid delivery of infrastructures and the improvement of services to end-users.

During the last decade, Portuguese public bodies wanting to finance toll roads, shadow toll roads, bridges, power plants and sport facilities have often adopted PPP alongside with project finance schemes. PPPs schemes seem to continue on the Portuguese agenda as the pipeline of PPP projects for the next years comprise impressive investment numbers: (i) 3.450 millions of euros in the roads sector; (ii) 8.350 millions of euros in the railway sector; (iii) 1.437 millions of euros in the health Sector; and (iv) 5.000 millions of euros in the new Lisbon Airport.

2. The specific statute where one can find the public procurement rules concerning PPP is the new Portuguese Public Contracts Code (the "Code"), approved by Decree-law nr. 18/2008, of January 29, that implements the European Union Directives 2004/17/

New Prospects for Co-Operation with the Public Sector in Poland

In the context of the public sector's extensive investment plans for upcoming years and even more extensive needs in almost every field, it is of great importance to look at the procedures for and forms of public procurement and public-private partnerships, especially in view of past, rather discouraging experience.

The political will to create and improve legal instruments and facilitate such projects is visible. Firstly, the Public Procurement Act of 29 January 2004 was recently amended (the amendments entered into force on 24 October 2008). The main aim of these changes was to harmonise Polish legislation with EU standards by amending certain provisions that the European Commission indicated as doubtful or contrary to EU law. As regards these amendments, the Polish legislator's intention was also to make procedures more flexible and to amend those provisions that had caused problems for both contracting authorities and businesses. In fact, some public authorities had been awaiting these changes before announcing tenders, which could be the reason for the significant number of public tenders announced at the end of 2008 and at the beginning of 2009.

The Polish parliament was also working on a draft of the Public Works and Services Concessions Act. To date, Polish law has only recognised works concessions regulated under the current Public Procurement Act. Thanks to the new Public Works and Services Concessions Act there will be a new instrument in Poland – already well known in other European countries, i.e. services concessions. The new law will also regulate works concessions in Poland more precisely. In our view, the new act will play an extremely important role in the development of infrastructure in Poland and generally in the execution of projects that have not yet been carried out due to a shortage of funds or experience on the part of the administration.

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The “contracting authority” must advertise the contract to be awarded in the Official Journal of the European Union and also in the Portuguese Official Gazette (“Diário da República”).

Both the Polish government and private investors with PPP experience in other EU countries will have an important educational role to play. The Polish authorities need to be shown examples of successful public private co-operation based on a sensible division of risks.

CE and 2004/18/CE. Nevertheless, one should always have in mind that there is a specific statute covering PPPs (Decree-law nr. 86/2003, of 26 April, 2003), which has to be balanced with the new public procurement rules.

Despite the existence of different types of procedures (all in line with the referred European Union Directives), such as the restricted tender or the competitive dialogue, the paradigm of the public procurement procedures is the (open) international public tender which comprises the following main stages:

- (1) The “contracting authority” must advertise the contract to be awarded in the Official Journal of the European Union and also in the Portuguese Official Gazette (“*Diário da República*”). At this stage, both the tender programme and the technical specifications (ledger book) must be in place referring, *inter alia*, to the award criteria which is usually the most economically advantageous bid (in certain situations the lowest price of the bids is the chosen award criteria).
- (2) After the bids have been received (note that there are minimum time limits for bidders to present their proposals, which avoids disadvantageous deadlines for bidders located in foreign countries), the bids are electronically opened and in the course of which the bids are accepted or rejected by the appointed jury.
- (3) Once bids are accepted the jury initiates the analysis of the admitted bids so as to prepare a “Preliminary Evaluation Report” in which the evaluation of the bids is included.
- (4) The bidders are then notified to present their considerations towards the evaluation of bids entailed in the report (“*Audiência Prévia*”). The jury is obliged to take a position over those observations when drafting the “Final Evaluation Report”.
- (5) Based on the “Final Evaluation Report”, the public authority decides to award the contract in question to

The Public Works and Services Concessions Act was finally approved on 9 January 2009 by parliament and should enter into force very soon.

Finally, in autumn 2008 legislative works started on a draft of a new Act on Public Private Partnerships, generally called PPP. The new PPP Act was approved on 19 December 2008 and is pending publication. This was long overdue, as the previous 2005 PPP Act had proven highly ineffective. The uncertainty created by the 2005 Act and the general suspicion of the public administration of any form of co-operation between authorities and private entrepreneurs resulted in very few PPP projects being implemented. The few projects that have been carried out were based on other legislative acts. In fact we are not aware of any successful project carried out under the previous act.

The legislator seems to have learned from past mistakes and is clearly trying to create a flexible, adaptable regulation that can be applied to all kind of projects, regardless of their volume. Unlike the previous act, the new law does not create an additional regime for co-operation between authorities and investors but rather attempts to bridge the gap between existing laws, such as the Public Procurement Act and the Concessions Act, i.e. to provide a general framework for projects of this type. Furthermore, the act has removed certain unnecessary formalities, such as the obligation for contracting authorities to carry out extensive and costly analyses before engaging in any PPP project. The result is a law that allows every situation to be shaped according to both parties’ intentions within the legal framework and for risks and obligations to be evenly distributed.

These legislative changes are, without doubt, good news for all investors and contractors interested in projects related to Polish infrastructure, such as roads,





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Advising with Value

Portugal is the European country that, in percentage of the GPD, most invests in PPP projects and will probably continue to be, having all the necessary tools in order to successfully deliver PPP projects.

The Polish authorities need to be shown examples of successful public private co-operation based on a sensible division of risks.

the bidder who has presented the best bid, considering the chosen award criteria.

Considering that most of the PPP schemes usually use the general concept of "concession" (works concession or services concession agreements, as the case may be), the contracting authority may recourse to an additional stage of negotiation. Actually, this has been quite common. In this case the contracting authority will certainly choose the two better bids and will further negotiate directly with its promoters. At the end of these negotiations the selected bidders will be invited to submit their best and final offers ("BAFO"). These BAFO will then be evaluated so that the Jury is able to deliver a new evaluation Report to the final bidders indicating the best bid. This last evaluation Report will be submitted to the bidder's appreciation and, after their comments, a final decision is taken in respect to the award of the PPP.

3. Portugal is the European country that, in percentage of the GPD, most invests in PPP projects and will probably continue to be, having all the necessary tools in order to successfully deliver PPP projects: political engagement, experience and a Public Contracts Code in line with the relevant European Directives.

highways, sewage treatment plants or incinerators, that will have to be carried out in the years to come.

Both the Polish government and private investors with PPP experience in other EU countries will have an important educational role to play. The Polish authorities need to be shown examples of successful public private co-operation based on a sensible division of risks. To date, many attempts at PPP projects have beached, given the authorities' assumption that all commercial risk can be shifted to the investor. However, as a result of the current financial crisis, banks, if they start financing again, will be very cautious and will be looking for a well balanced risk allocation.

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In response to our clients' needs DZP has set up a specialist team dedicated to serving Portuguese clients planning to invest or operate in Poland. Our aim is to facilitate and simplify day-to-day contact with clients. We offer legal advice in Portuguese, provided by persons with an awareness of both the Portuguese legal system and its business culture. In addition to the excellent quality of the legal advice provided by our office, we guarantee our clients a perfect understanding of their needs and close contact with bilingual professionals with broad experience in providing legal advice to Portuguese companies. For further information please contact in Poland Marcin Krakowiak (Marcin.Krakowiak@dzp.pl); Katarzyna Kuzma (Katarzyna.Kuzma@dzp.pl); Tiago Costa (Tiago.Costa@dzp.pl).