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Law and Practice

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1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

Portugal is a civil law system. The main source of law is statutory law. Consequently, court decisions do not have the same preponderance as in common law jurisdictions.

The Portuguese insurance and reinsurance legal framework is influenced by what is established in the European Union, namely, by the relevant European Union Directives and Regulations.

The main legal documents are the Insurance and Reinsurance Distribution Framework (IDF), approved by Law No 7/2019 of 16 January 2019, which implemented Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (IDD); the Insurance and Reinsurance Law (IRL), approved by Law No 147/2015 of 15 September 2015, which implemented Directive 2009/138/CE of European Parliament and the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II); the Insurance Contract Law (ICL), approved by Decree-Law No 72/2008 of 16 April 2008; and the regulations and circular letters issued by the Portuguese Insurance and Pension Funds Supervisory Authority (*Autoridade de Supervisão de Seguros e Fundos de Pensões*) (ASF).

These sources are supplemented by general Portuguese legislation, such as, the General Contractual Clauses Law (GCCL), approved by Decree-Law No 446/85 of 25 October 1985; the Consumer Protection Law (CPL), approved by Law No 24/96 of 31 July 1996, and other legal documents.

Although the courts' decisions and the ASF's understandings are not legally binding, they provide guidelines which should be taken into consideration when interpreting the aforementioned legislation.

2. Regulation of Insurance and Reinsurance

2.1 Regulatory Bodies and Legislative Guidance

The ASF is the competent entity for the prudential and market conduct supervision of the Portuguese insurance market, being included in the scope of its supervision the insurance and reinsurance undertakings and insurance distribution.

The mission of the ASF is to ensure the efficient functioning of the insurance market in Portugal, aiming at protecting policyholders, insured persons and beneficiaries. This is achieved by promoting the stability and financial soundness of all institu-

tions under its supervision, as well as ensuring the maintenance of high standards of market conduct on the part of the relevant players.

The duties and powers entrusted to the ASF for the pursuit of its mission are essentially set out in the following legislation:

- the ASF's Statutes, approved by Decree-Law 1/2015 of 6 January 2015;
- Law 67/2013 of 28 August 2013 establishing the general framework of the public supervisory authorities;
- the IRL; and
- the IDF.

Moreover, the opinions and guidelines of the European Insurance and Occupational Pensions Authority (EIOPA) play a relevant role, since they are, in general, fully adopted and enforced by the ASF.

2.2 The Writing of Insurance and Reinsurance

According to IRL, the insurance or reinsurance activity in Portugal may only be exercised by the following entities:

- insurance or reinsurance undertakings authorised and set up in Portugal in accordance with IRL;
- mutual insurance or reinsurance undertakings authorised in accordance with IRL (this type of entity does not play a relevant impact in the Portuguese market);
- branches of insurance or reinsurance undertakings having their head office in another Member State acting under the freedom of establishment regime;
- insurance or reinsurance undertakings having their head office in another Member State acting under the freedom of services basis; and
- branches of third-country insurance or reinsurance undertakings authorised in Portugal by ASF in accordance with IRL.

In Portugal, the main distinction is drawn between mass risks and large risks insurance.

In general terms, mass risks insurance comprises the insurance contracts subscribed by retail, non-professionals or SME. The mass risks insurance contracts are subject to stricter legal limitations, which are divided in absolutely and relatively imperative provisions.

Regarding the absolutely imperative provisions, ICL states that the parties cannot provide for a different solution from the one established in black letter law. This type of provisions encompasses matters such as, the obligation for the insurer to provide to the policyholder the policy dated and signed within 14 days

after the execution of the insurance contract (Articles 32 and 34), the need for the policy to be written in Portuguese, except if the policyholder agrees to receive it in other language (Article 36), the requirement for the existence of an insurable interest worthy of legal protection, otherwise the insurance contract will be void (Articles 43 and 44), the prohibition of payment in kind of the insurance premium (Article 54(1)), and the guarantees provided by the insurance contract being dependent on the payment of the premium (Article 59).

On the other hand, the relatively imperative provisions allow the parties to establish different solutions in the insurance contract, but only if they benefit the policyholder or the insured. These provisions cover a large set of consumer protection rules, which will need to be articulated with the general legal documents applicable in Portugal to contracts, such as the Civil Code, the GCCL, etc.

For large risks insurance, within the meaning of Article 13(27) of Solvency II, the parties have a broader freedom to deviate from the legal solutions provided under ICL.

The ICL does not establish specific rules to the underwriting of excess layers or reinsurance contracts.

2.3 The Taxation of Premium

Insurance Companies

The premium payments received by insurance companies are deemed as taxable income, taxed under the Corporate Income Tax general rules at a rate that may be up to 31.5%.

Furthermore, a fee corresponding to 0.048% (in respect of life insurance policies) or 0.242% (applicable to other types of policies) on the registered earnings has to be paid to the ASF (ASF Tax).

Policyholders

According to the Portuguese Personal Income Tax Code (PIT), the positive difference between the value paid as redemption, early termination or maturity payment of life policies or life-related transactions and the premium paid, or the amounts invested, is taxable as investment income. When the premium payments made on the first half of the term of the insurance policy corresponds to at least 35% of the premium total amount, the effective tax rate varies according to the time elapsed between the start date of the policy and the date on which the income is paid in favour of the beneficiaries, as follows:

- 28%, if the income is paid before the fifth year as from the start date of the insurance policy;

- 22.4%, if the income is paid from the fifth year and one day up to the eighth year as from the inception of the insurance policy; and
- 11.2%, if the income is paid from the eighth year and one day onwards as from the inception of the insurance policy.

If the conditions mentioned above are not cumulatively applicable, investment income obtained will be subject to a 28% PIT rate. Notwithstanding the above, Portuguese tax residents may always choose to aggregate such amounts to their taxable income, subjecting it to tax at progressive rates of up to 48%. If such option is followed, an additional surcharge up to 5% is due on the part of the taxable income exceeding EUR80,000.

Also, life insurance premiums, health insurance premiums, accident insurance premiums and vehicle insurance premiums are subject to a 2.5% fee applicable on the gross premium received, to be charged to the policyholder and paid to INEM, IP (Institute for Medical Emergence) (INEM Tax).

In what regards the Stamp Duty different rates are applicable:

- suretyship insurance policies – 3%;
- accident insurance policies, health insurance policies, credit insurance policies and agriculture and livestock insurance policies – 5%;
- transport of goods insurance policies – 5%;
- marine and aviation insurance policies – 5%;
- other insurance policies – 9%; and
- commissions regarding the above policies (except life insurance policies) – 2% (applicable on the premium amount deducted from the Stamp Duty).

The premiums received for reinsurance taken with companies legally operating in Portugal and the premiums and commissions related to life insurance are exempted of stamp duty.

According to the Stamp Duty Code, the insurance company has to deliver to the Portuguese Tax Authorities, on a monthly basis, a stamp duty statement informing of the taxable amount of the carried operations subject to stamp duty, as well any applicable stamp duty exemptions. In addition, insurance companies should declare annually the total amount of stamp duty that has been collected in the operations carried out, as well as the operations that benefit from stamp duty exemption.

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3. Overseas Firms Doing Business in this Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

As a rule, taking up insurance or reinsurance activities is subject to prior authorisation of the ASF. Therefore, the establishment in Portugal of branches by third countries' (non-EEA) insurance or reinsurance companies is subject to such authorisation, which in accordance with the IRL may only be granted if the applicant fulfils certain conditions, namely the following:

- it is authorised to conduct insurance or reinsurance activity in accordance with its national law, for more than five years;
- it has as sole corporate purpose taking up insurance or reinsurance activities;
- undertakes to keep in the branch proper accounts considering the business to be carried out in Portugal and to keep proper records of all business concluded;
- it appoints a general representative living in Portugal, who shall meet the requirements and conditions specially provided for in the IRL, who shall be registered with the ASF;
- it holds assets in Portugal in an amount equal to, at least, half of the applicable Minimum Capital Requirement (MCR), and deposits one quarter of such MCR as security;
- it commits to meet the Solvency Capital Requirement (SCR) and the MCR;
- for insurance undertakings covering risks of civil liability in respect of motor vehicles, other than carrier's liability, it appoints a claims representative in each Member State responsible for handling and settling claims in the victim's country in respect of accidents occurring in Member States other than victim's country;
- it presents a programme of activities in accordance with the IRL's requirements;
- it complies with the specific corporate governance requirements foreseen in the PIRL.

The branch of an insurance or reinsurance company may only be authorised to take up the types of insurance that it is authorised to take up in the home state and cannot simultaneously take up life and non-life insurance business in Portugal.

After the submission of the authorisation process, the ASF may request additional information or clarifications, as well as carry out any investigations deemed necessary to take the final decision. The ASF's decision must be issued in a maximum period of three months after the process is fully submitted. ASF authorisation shall expire if the branch is not incorporated in six months or if the same does not commence its activity in a twelve months period. The authorisation may also be cancelled by the ASF in the cases foreseen in the IRL, including, *inter alia*, if:

- the branch ceases or reduces significantly its activities in Portugal for a period higher than six months;
- the branch fails to meet any of the conditions for the access to the insurance and reinsurance activity foreseen in the IRL;
- there are serious irregularities affecting the governance system, financial organisation and internal control mechanisms; and
- the insurance or reinsurance company holding the branch ceases to be authorised to take up activities in the home state.

There is specific regime foreseen in the IRL for the authorisation of insurers with head office in Switzerland to carry out non-life insurance in Portugal.

The promotion of the internal European market entails the possibility of insurance or reinsurance companies authorised in Member States to carry on, throughout the European Union, all or part of their activities by establishing a branch or under the freedom to provide services.

Once granted in a Member State, the authorisation allows insurance and reinsurance companies to conduct their business in Portugal under the right of establishment (through a branch) or directly under the freedom to provide services principle. The exercise of its activities in Portugal is, however, subject to a procedure to be taken with ASF and to certain requirements, in the interest of the general good, being met.

According to the information officially disclosed by the regulator, the provision of services in Portugal by way of establishment (branch) must observe the following conditions:

- The premiums of the insurance contracts covering risks situated in Portuguese territory or in which Portugal is the member State of the commitment are subject to indirect taxes and parafiscal charges foreseen in the Portuguese law, without prejudice of what is established in the Value Added Tax Code, no matter which law will be applied to the contract and considering the special legislation applicable to the insurance business on the institutional scope of the free zones.
- Insurance undertakings that intend to cover risks situated in Portuguese territory or in which Portugal is the Member State of the commitment, must observe certain specific rules (Articles 18 to 23) of the ICL.
- The insurance undertaking that intends to explore life assurance, insurance personal accidents and capital redemption operations and, with beneficiaries in case of death of the insured or of the underwriter, must create and maintain a database compatible with the platform managed by the ASF,

which allows the automatic and immediate access to the information within it or, instead, sent to the ASF the information to be included on the referred database.

- Contracts for any insurance which is compulsory within the Portuguese legal system are ruled by Portuguese law, and the general and special conditions attached to such policies, as well as any amendments to it, must be registered on the ASF by the insurance undertaking which offers it, before the beginning of the respective business or one month from that date.
- If the undertaking intends to cover risks regarding the mandatory insurance of motor vehicle liability, it must present a declaration, written in Portuguese, confirming that it has become member of the National Green Card Bureau and that it will assure the contributions for the Motor Guarantee Fund; the insurance companies covering in Portugal the compulsory insurance of motor vehicle liability must send to the ASF a register containing the following information: an annual file with the registration numbers of motor vehicles normally based in Portugal and a weekly file with the changes of number registration.
- The companies that intend to cover in the national territory the optional motor vehicle insurance regarding own damages and/or the compulsory insurance of motor vehicle liability are obligated to implement and keeping an updated register of the period for the settlement of the claims on the scope of the motor vehicle insurance.
- If the insurer intends to cover risks related to the mandatory accidents at work insurance, it must accomplish with all the legal and regulatory dispositions due for the respective exploration, namely, guaranteeing the contributions legally due for the Accidents at Work Fund, being for that purpose, subjected to the supervision of the ASF without prejudice of financial supervision that will be of the exclusive competence of supervisory authority of the home Member State.
- The insurer must act in compliance with the general principles and rules of market conduct, namely regarding the treatment policy of policyholders, insured persons, underwriters, beneficiaries and third parties, publicity, agreements among insurance companies, claims managing and customer ombudsman and must also publish an updated code of conduct laying down guidelines on professional ethic.
- Besides the mentioned items related with the insurance activity, the insurance companies shall comply with mandatory provisions of Portuguese law, notably in what concerns insurance brokerage, general contractual terms (unfair terms) and tax matters.
- The insurance business premises shall also have available a complaints book.
- Before beginning its activity in Portugal, the branch of the insurance undertaking must be registered with the respec-

tive Commercial Registry Office, and the ASF must be informed of that proceeding.

As for the insurance business take up in Portugal under the freedom to provide services, the conditions are essentially the same, with a few minor differences.

The ICL establishes specific restrictions regarding risks that cannot be guaranteed under Portuguese law (forbidden insurances), such as, insurance contracts which guarantee:

- criminal, administrative or disciplinary liability;
- kidnapping, sequestration and other crimes against the personal freedom, save for civil compensations;
- possession or transportation of narcotics or drugs which consumption is prohibited; and
- death of children under the age of 14 or of those which, for psychic anomaly or another cause, are incapable to govern themselves, save for civil compensations.

With Brexit on the horizon, regulatory authorisation for insurance companies is becoming a key issue. The implications that Brexit will have on European financial markets are still characterised by a significant level of uncertainty, with several questions arising regarding the ability of UK-based insurers to provide services in other European countries.

Accordingly, European governments are already taking extraordinary measures to mitigate the impact of a possible no-deal Brexit.

In Portugal, Decree-Law No 147/2019 of 30 September contemplates the contingency measures to be applied to the financial area in the event of a no-deal Brexit. Article 9 of said Decree-law states that the insurance contracts covering risks located in Portugal or where Portugal is the Member State of the commitment, issued by an UK insurer under an existing authorisation prior to Brexit, will remain in place after Brexit until the term of said contracts, but they may not be extended.

3.2 Fronting

In Portugal, fronting is generally permitted. The cedant's retention may vary and it is usually subject to specific arrangements on a case-by-case basis, depending on the risks at stake.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

Portugal is experiencing an interesting period in what concerns M&A activities, marked by some transactions with significant

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impact. This period confirms a market trend that has been observed in previous years, towards the progressive entry of foreign investors into the Portuguese insurance sector.

Although there have been mergers of insurance companies in the past, M&A transactions in Portugal are mainly characterised by a predominance of acquisition operations. Among the parties involved in competitive acquisition processes, it is common to find large foreign investors who seek international expansion of their business, especially in Europe and perceive Portugal as an attractive market.

While in the past the ownership of insurance companies headquartered in Portugal was essentially concentrated in the major Portuguese financial groups, the current reality is that there is an increasing hegemonic presence of international investors, including international insurance players and private equity funds.

Even so, changes in the ownership of Portuguese insurance companies do not always imply a total disappearance of national financial institutions in the field of the insurance business. In fact, international investors have been entering into strategic partnerships with national banks in order to optimise their positioning in the country, capture growth opportunities, as well as achieve significant cost reductions.

In conclusion, the activity that has been taking place in Portugal demonstrates an interest of private equity agents in the local market, who see the country as a basis for the affirmation or reinforcement of a solid position in the European continent. For the next few years, insurance activity in Portugal is expected to be boosted as companies are now counting on the leverage of the new owners and a commitment to maintaining focus on strategic plans.

Finally, we can not only observe a tendency to change the control structures of Portuguese insurance companies, but also a phenomenon of concentration of market share.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

The IDD was implemented in Portugal by the IDF without any significant gold-plating or deviation.

Under the IDF, there are three types of insurance distributors:

- ancillary insurance intermediary (corresponding to the definition of Article 2(1)(4) of the IDD);

- insurance intermediary, comprising insurance agents and brokers (corresponding to the definition of Article 2(1)(3) of the IDD). The insurance agent is the insurance intermediary that carries out its distribution activities in the name and on behalf of one or more insurance companies, pursuant to a distribution contract executed with the latter. Conversely, the insurance broker carries out its distribution activities independently from insurance companies, on behalf of its clients (the policyholders); and
- insurance undertakings (corresponding to the definition of 2(1)(6) of the IDD).

There is no autonomous legal regime for the distribution of insurance through the banking channel (“bancassurance”), apart from the requirement that banking institutions cannot be registered as ancillary insurance intermediaries. As such, banking institutions are generally registered as insurance agents and play a relevant role, particularly in respect of life insurance connected with mortgage loans.

The direct sales channel still holds a small market share (around 6%, in accordance with the latest available data), mainly focusing in auto and other low complexity insurance products. Conversely, the distribution of insurance products through insurance intermediaries (including the bancassurance channel) remains the main channel for carrying out business.

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

Prior to conclusion of the insurance contract, the policyholder or the insured has the obligation to declare all the circumstances which are known to him and which may reasonably have a significant impact on the insurer’s assessment of the risk, even if the insurer does not specifically ask about such matter, for instance in the risk assessment questionnaire.

In turn, the insurer shall inform the policyholder, in writing (through a durable mean), in Portuguese language and prior to the execution of the insurance contract on the items provided for under Article 18 et seq of ICL, without prejudice to the mandatory information to be included in the policy, in particular:

- its name and legal status;
- the scope of the risk it intends to cover;
- the exclusions and limitations of coverage;
- the total value of the premium or, if this is not possible, the method of calculation, the means of payment of the premium and the consequences of non-payment;

- the conditions for the increase of the premium or bonuses that may apply to the insurance contract, stating the respective calculation regime;
- the maximum amount of coverage during in each term of the insurance contract;
- the term of the insurance contract and the arrangements for its renewal, termination with just cause and free termination;
- the transfer regime of the insurance contract;
- how to file complaints, the legal protection mechanisms afforded to the client and the competent supervisory authority; and
- the governing law of the insurance contract.

To the extent that the complexity of the insurance justifies it, the insurer shall, before concluding the contract, inform the policyholder about which types of insurance, among those it offers, are appropriate for the specific cover sought. This special obligation shall not apply to contracts relating to large risks or in which an insurance intermediary is involved, without prejudice to the specific obligations imposed on the latter under the IDF.

Furthermore, the insurer shall proactively seek the necessary information to allow it to carry out the risk assessment on the policyholder or insured person. Unless there is wilful intent of the policyholder or insured aiming at obtaining a gain at the expense of the insurer, if the insurer accepts to underwrite an insurance contract, it cannot take advantage of an omission to a question, an imprecise reply to a question made in broad terms, an incoherence or clear contradiction of the policyholder or insured, or other circumstances known to it, particularly if such circumstances are of public knowledge.

In accordance with contractual law principles, both parties shall act in good faith. However, regarding disclosure of information by the insurer in connection with consumers insurance contracts, Portuguese law affords more protection to the consumer, who is perceived as the weaker contractual party.

6.2 Failure to Comply With Obligations

If the information obligations described in **6.1 Obligations of the Insured and Insurer** are not complied with by the insurer, it may be subject to civil liability under general terms established in the Civil Code. Moreover, the breach of the insurer information obligations entitles the policyholder to terminate the insurance contract, save for the case where the breach of the insurer did not affect the decision of the policyholder to execute the contract. This termination right shall be exercised within 30 days as from the reception of the insurance policy and has retroactive effects, ie, the policyholder is entitled to the reimbursement of the premium paid.

On the other hand, in the case the policyholder or the insured person fail to disclose the information as detailed in point **6.1 Obligations of the Insured and Insurer**, it shall distinguish between wilful and negligent omissions or inaccuracies.

In case of wilful omission or inaccuracy of the policyholder or insured, the contract may be terminated by declaration sent by the insurer to the policyholder. In the absence of a claim, the statement shall be sent by the insurer within three months of becoming aware of such breach of the policyholder. The insurer shall not be obligated to cover the claim that occurs prior to being aware of the non-compliance referred to above or within the three months period, depending on the applicability of the annulment of the insurance contract regime. In such case, the insurer shall be entitled to the premium due until the end of the period of three months, unless there was wilful misconduct or gross negligence of the insurer or his representative. In case of wilful intent on the policyholder or the insured for the purpose of obtaining an advantage, the premium is due until the term of the insurance contract.

In case of negligent omission or inaccuracy of the policyholder or insured, the insurer may, by means of a declaration sent to the policyholder, within three months of becoming aware of the breach, propose an amendment of the contract, by setting a deadline of not less than 14 days for the acceptance or, if it allows it, a counter-proposal of the policyholder; or terminate the contract, showing that under no circumstances does it enters into contracts covering the risks relating to the fact omitted or inaccurately stated by the policyholder or insured.

The contract will cease to be effective 30 days after the declaration of termination has been sent or 20 days upon receipt by the policyholder of the proposed amendment, in case of no reply or refusal by the latter. In this case, the premium is returned pro rata temporis to the coverage provided.

If, prior to termination or amendment to the contract, a claim occurs whose consequences were influenced by fact that was negligently omitted or inaccurately stated, the insurer will cover the claim in proportion to the difference between the premium paid and the premium which would be due if, at the time of the execution of the contract, it had known the fact omitted or incorrectly stated; or, by demonstrating that under no circumstances would it have entered into such contract, the insurer may not cover the claim in which case it will only be obliged to reimburse the premium to the policyholder.

6.3 Intermediary Involvement

The insurance agent or the ancillary insurance agent are deemed to act on behalf of the insurer. Conversely, the insurance broker is taken to be acting in the interest of the client (policyholder).

The insurance agent and the ancillary insurance agent undertake to comply with the disclosure of the pre-contractual information referred in **6.1 Obligations of the Insured and Insurer** on behalf of the insurer, in addition to the obligation to comply with the specific information obligations under the IDF, which are aligned with the provisions set out under the IDD regime.

On the other hand, the insurance broker is under the obligation to act impartially on behalf of the client. Consequently, the insurance broker is subject to, *inter alia*, the obligation to suggest to the policyholder appropriate measures to prevent and reduce the risk faced by it, to base its distribution activity on the analysis of a sufficiently large and diversified number of contracts, as to the types of insurance contracts available on the market. When providing advice to the customer, the broker shall act so on the basis of an impartial and personal analysis, after analysing a sufficiently large and diverse number of insurance products.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

Notwithstanding the fact that the insurance contract is not legally subject to written form, the ICL establishes that the insurer shall provide the policy documentation relating to mass risks insurance contracts dated and signed to the policyholder within 14 days after the execution of the insurance contract (Articles 32 and 34), otherwise the policyholder will be entitled to terminate the contract and to be reimbursed of the total premium amount.

The ICL does not define the concept of insurance contract, however it details the main features of what shall the contract contain to be a valid insurance contract: ie, the insurer needs to cover a specific risk of the policyholder or the insured, the insurer is obligated to pay the compensation in the event the random event established in the contract occurs (the claim) and the policyholder has the obligation to pay the corresponding premium.

Moreover, as a matter of legal principle, the insured shall have an interest worthy of legal protection in relation to the risk covered, which shall constitute the insurable interest. In property and casualty insurance, the interest concerns the conservation or integrity of the guaranteed asset, right or property. Regarding life insurance, the insured person who is not the beneficiary of the contract needs to grant consent to the guarantee, except when the execution of the contract is intended to comply with a legal provision or a collective labour regulation instrument. Without an insurable interest worthy of legal protection, the contract may be deemed void or re-characterised as void gambling contract.

6.5 Multiple Insured or Potential Beneficiaries

The requirements mentioned shall be present all times. Therefore, there is no different position in the case of multiple insured or potential beneficiaries under the contract.

6.6 Consumer Contracts or Reinsurance Contracts

As stated throughout **6. Making an Insurance Contract**, consumer contracts are subject to stricter requirements under the ICL. Furthermore, the insurance contract is also subject to the general legislation applicable in Portugal to contracts with consumers, such as the Civil Code, the GCCL, the Marketing Act, etc.

In what concerns reinsurance contracts due to the fact that they are entered between professional entities, the ICL only establishes a few general requirements, such as, the reinsurance contract needs to be established in writing and to identify the risks included, the reinsurance contract does not produce any effect towards third parties, namely it will not be enforceable or create any link between the policyholder and the reinsurer. The provisions of the ICL applicable to the insurance contracts shall apply with the *mutatis mutandis* and on a subsidiary basis to reinsurance contracts, although, in practical terms, most of the ICL provisions should not be considered applicable to reinsurance contracts.

7. Alternative Risk Transfer

7.1 ART Transactions

The IRL states that, according to the Commission Delegated Regulation (EU) No 2015/35 of 10 October 2014, entities with the specific purpose of securitisation of insurance risks are entitled to carry out their activities in Portugal, with previous authorisation of the ASE.

However, until the present moment, we are not aware of any ART transactions made by insurance undertakings.

7.2 Foreign ART Transactions

See **7.1 ART Transactions**.

8. Interpreting an Insurance Contract

8.1 Contractual Interpretation and Use of Extraneous Evidence

The dominant position regarding the interpretation of insurance contracts is that the general contractual interpretation rules considering the position of the “average” policyholder shall apply. The average policyholder should be understood as

a person who executes the insurance contract, without having any specific technical knowledge on the insurance sector or insurance contracts.

In addition, insurance contracts executed with consumers are also subject to the CPL and the GCCL which, inter alia, establishes that the general contractual terms which are not negotiated between the parties shall be properly disclosed and explained by the insurer to the policyholder, otherwise they may be considered unenforceable towards the latter. Furthermore, the insurance contract may not contain abusive general clauses, ie, clauses that result in an unlevelled contractual playing field between the parties.

Non-consumer insurance contracts allow broader contractual freedom to the parties as well as have an impact in the concept of “average” policyholder since, depending of the specifics circumstances, the policyholder may be deemed as having a deeper knowledge of the insurance sector.

The pre-contractual stage as well as the application of general rules of the Civil Code on contractual matters, such as the concept of good faith and the principle of fair dealing with the counterparty, are also considered as an instrument to interpret the insurance contract. As such, the negotiation stage materials and exchanges between the parties, as well as the usual business practices may assist in defending a certain interpretation of the contract during a judicial proceeding.

The specific and objective marketing messages are legally deemed as integrated in the insurance contract, being excluded from the insurance contract the clauses that contradict such marketing messages, save for the case where they are more favourable to the policyholder or beneficiary.

Nevertheless, it should be expected from a judicial court a more pro policyholder stance in respect of consumer contracts due to the asymmetry of the parties.

8.2 Warranties

Generally, insurance contracts in Portugal do not contain warranties, without prejudice to specific contracts, particularly non-consumer contracts, which sometimes provide for this type of clause. Nevertheless, nothing hinders the parties from including warranties should they so choose, but they are not stipulated in the minimum requirements for the writing of a policy.

Warranties are not treated differently from the remaining contractual clauses of the insurance contract, being its value determined on a case by case basis.

Notwithstanding the lack of a specific legal regime for warranties in the ICL, there are certain provision included in the contract that may be deemed as being de facto a warranty, such as, the initial declaration of risk by the policyholder or insured person. However, the breach of this obligation is subject to a specific legal regime (see **6.2 Failure to Comply with Obligations**).

8.3 Conditions Precedent

It is not usual for insurance contracts in Portugal to have conditions precedent, namely for the insurer to be liable.

In principle, the insurer will be liable for paying the compensation established in the insurance contract in case a claim guaranteed by the contract occurs or if it breaches its obligations, particularly in case of non-compliance with the information obligations that cause a damage to the policyholder or insured.

The establishment of conditions precedent for the insurer to be liable towards the policyholder or insured may prove difficult to uphold in case of consumer contracts, since most provisions that apply to such contracts are either absolutely or relatively imperative (see **2.2 The Writing of Insurance and Reinsurance**).

In insurance contracts involving non-consumers or large risks, the parties have more latitude to provide specific terms and it is possible to establish a specific set of rules in this regard that deviate from the standard established for consumer contracts.

9. Disputes

9.1 Disputes Over Coverage

The policyholder or the insured must report the claim to the insurer within the period provided for in the contract or, failing this, within eight days of becoming aware of the claim.

The notification shall include information on the circumstances of the occurrence, the possible causes and consequences. It is the insurer's responsibility to verify the occurrence of the claim, its circumstances, causes and consequences. The policyholder and the insured must also provide the insurer with any clarification the latter may request in order to carry out such verification.

The insurer will then decide if the damage will be repaired or compensated. Should the contracting parties disagree on matters relating to insurance coverage, the policyholder, the insured or the beneficiary may lodge a claim with the ASF, the Consumer Protection Association, the Justice of the Peace, the Arbitration Centres or the Judicial Courts. These mechanisms,

in the absence of specific rules, are also applicable to disputes related to reinsurance contracts.

Regarding consumer contracts, the consumer can resort to one of the alternative dispute resolution means as described below and may always opt to pursue legal action before a judicial court.

The insurer's right to the premium shall lapse within two years of its due date. The other rights arising under the insurance contract shall lapse within five years of the date on which the holder became aware of the right, without prejudice to the general limitation period for contractual claims of 20 years, as from the event giving rise to the right.

9.2 Disputes Over Jurisdiction and Choice of Law

Disputes over jurisdiction regarding civil and commercial matters are resolved using two principal sets of jurisdictional rules – the European regime and Portuguese Statutory Law, where the former takes priority where it applies.

The jurisdictional rules that form part of the European regime, namely regarding proceedings instituted on or after 10 January 2015, are set out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation). Specifically, in matters relating to insurance, jurisdiction is determined based on distinct rules set out in the EU Regulation, which aim to protect the so-called “weaker party”.

As such, a policyholder, an insured or a beneficiary can choose to initiate proceedings against an insurer in the courts of different member states, namely the Member State where the insurer is domiciled or the Member State where the claimant is domiciled. The insurer, however, may only issue a claim before the courts of the member state where the defendant is domiciled. Contracting parties can, by agreement and provided certain circumstances are met, set aside these rules.

The governing law of the insurance contracts is to be determined in accordance with the provisions set out in Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

In general terms, the parties may freely choose the law applicable to the insurance contracts in accordance with Article 7 of the Rome I, with the restrictions (as to the law that may be chosen) set out in Article 7(3)(a) to (e) of said Regulation.

When the ICL is applicable to the insurance contract by reference made by Rome I, the parties have broad freedom to choose the law governing the insurance contract, provided that

the chosen law corresponds to a serious interest of the parties and it is connected with any element of the insurance contracts acceptable under private law (eg, residence, nationality of the parties, etc).

9.3 Litigation Process

In general terms, judicial proceedings in Portugal begin with written pleadings, where the claimant will file a statement of claim before the competent court and, subsequently, the defendant will be summoned to present its defence. Should the defendant file a counterclaim, the claimant is notified to reply by filing a rejoinder.

Following the written pleadings, the parties will be notified to attend a preliminary hearing where the judge will initially try to conciliate in order to reach a settlement.

Should the parties not reach an agreement, the hearing will continue in order to address certain procedural aspects, namely the selection of disputed facts that will be brought to trial.

At the preliminary hearing the final hearing will be scheduled, where the witnesses indicated by the parties will testify and, if applicable, the experts will be heard.

After the final hearing a judgment will be rendered by the court. This judgement is, provided certain requirements are met, appealable before the second instance court (appeal on the facts and/or on the law) and may be eventually appealable to the Supreme Court.

9.4 The Enforcement of Judgments

Should the losing party not voluntarily comply with the judgment of the court, the winning party may resort to enforcement proceedings, where various measures, such as the seizure and compulsory sale of assets, are available.

Without prejudice to international conventions and treaties in force (eg, the Lugano Convention), under Portuguese statutory law foreign court civil judgments are, in general, enforceable, provided they are subject to a previous confirmation procedure before a Portuguese second instance court.

The process is simple, as the court will only confirm whether certain formal requirements have been met and will not review the merits.

The applicant must file a request for recognition, together with a certified copy of the judgement to be recognised. The opposing party will be then summoned to reply within 15 days. In this case, the applicant may respond within ten days. The court will, before issuing the decision, notify the parties and the public

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prosecutor to present their final allegations within 15 days and then a judgment will be given.

Within the EU, the Recast Brussels Regulation sets out the conditions under which a judgment (concerning civil and commercial matters) issued in one Member State can be enforceable in another. Pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State shall be enforceable in Portugal without any declaration of enforceability being required.

9.5 The Enforcement of Arbitration Clauses

Arbitration clauses in commercial insurance and reinsurance contracts can be enforced.

The parties may choose to submit their claims regarding the insurance contract in general, to arbitration. There is even an arbitration centre specialised in the resolution of insurance disputes: the *Centro de Informação, Mediação, Provedoria e Arbitragem de Seguros* (CIMPAS).

CIMPAS is a private law association with competence to settle insurance disputes involving motor vehicle accidents, without any value limit, having more recently extended the scope of competence to other insurance contracts up to the limit of EUR50,000 per claim.

9.6 The Enforcement of Awards

An arbitral award has the same value as a judgement issued by a judicial court and so the enforcement requirements and proceedings are identical. Additionally, a foreign award recognised by a Portuguese court is immediately enforceable in substantially the same way as a domestic award.

The recognition and enforcement of arbitral awards is regulated both by the Portuguese Voluntary Arbitration Law and the Portuguese Civil Procedure Code. Portugal is party to several bilateral and multilateral treaties regarding the recognition and enforcement of arbitral awards.

The most important bilateral treaties include those between Portugal and Portuguese-speaking countries, such as Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. Portugal has also signed a Judiciary Agreement with the Special Administrative Region of Macao (People's Republic of China).

As for multilateral treaties, Portugal is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, and the Inter-American Convention on International Commercial

Arbitration. Portugal is also a party to the New York Convention, which entered into force in January 1995.

9.7 Alternative Dispute Resolution

The parties may submit their disputes to one or more means of alternative dispute resolution, of a public or private nature. In this area, it is particularly important to refer the Justice of the Peace, arbitration courts and mediation centres.

Justice of the Peace correspond to a class of courts of a public nature, subordinated to the regime of courts of law, but they are courts with special characteristics, competent to resolve quickly and cheaply cases of low value with a civil nature. They have jurisdiction to decide civil declaratory actions of a value not exceeding EUR15,000.

Consumer arbitration has increased following the transposition of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. In addition to the above, the availability of a European platform for online consumer dispute resolution, which includes insurance disputes, should be added.

In addition to arbitration, the possibility of mediation should be mentioned as a form of alternative dispute resolution, although it is seldom used in insurance matters.

Finally, a brief reference should be made to the fact that insurers must have a customer ombudsman to whom they can address their complaints when the insurers themselves do not provide a satisfactory response. Another possibility available to the interested parties is to file a complaint with the ASF.

9.8 Penalties for Late Payment of Claims

The delay in the payment of claims, where it is due and is of pecuniary nature, will result in an obligation to pay interest for late payment at the statutory rate in force, calculated from the day on which the insurer enters into default, in general terms and the insured may not claim compensation for eventual exceeding damage.

A delay by the insurer in the performance of a non-pecuniary claim will result in an obligation to pay compensation, in general terms, corresponding to the value of the damages arising from that delay.

10. Insurtech

10.1 Insurtech Developments

Innovation in the insurance sector has increasingly become a determining factor for the success of the companies and is a cornerstone in their strategic positioning for the future. The niche segments will gain relevance, but it will be mainly the structural changes that will mark the next ten years. Insurtech promotes a revolution in the functioning of insurance sector players, automation of operations, modernisation and improvement of all analytical processes.

A trend towards temporary and pay-per-use insurance that offers lower prices and greater product transparency to the end consumer is beginning to take off. These products may reduce claims costs. However, the real disruption lies in the applications that capture the behaviour of drivers and devices that record physical activity, thus allowing for the identification of behaviour and creation of appropriate pricing systems (telematics insurance).

In Portugal the Portuguese Association of Insurers (PAI) already developed new technology-based products such as e-SEGURNET, an alternative application to the paper version of the car accident friendly declaration; together with another initiative of the PAI, is the electronic reporting of accidents at work, which allows the insurer to act more quickly, involving health care providers and regularising the situation.

There is an increasing presence of technology in the insurance value chain, with a greater focus on distribution channels, which has forced many well-established insurers in the market to innovate and create partnerships with large technology companies and Insurtech, with the aim of becoming more competitive and, as a result, to win customers loyalty. Insurers operating in Portugal obviously make no exception to this pattern, as most of them are already part of global groups or are present in other highly-developed markets.

10.2 Regulatory Response

See 10.1 Insurtech Developments.

Until the present stage there is no specific legal or regulatory documents specifically addressing Insurtech matters, although we are aware that the ASF is closely following this new trend.

11. Emerging Risks and New Products

11.1 Emerging Risks

Portugal has a mature insurance industry that has proven capable of responding to the country's needs and attracting investment.

In Portugal, the emerging risks relate to:

- digital economy;
- sharing economy and new forms of mobility;
- demographic ageing;
- environmental and climate change; and
- sustainable financing.

Among the risks mentioned above, digital transformation is the one that raises the greatest difficulties, which becomes more evident when associated with protection and security of data and systems, namely in what concerns to the ethical standards in data use and to the cyber risks associated with high volumes of information held by operators.

For this matter, the ASF recommends that the competent authorities work together in order to develop a balanced and predictable regulatory framework that will enable them to provide a high level of consumer protection, without creating unnecessary barriers to innovation.

As for the growth of the sustainable financing the insurance industry now faces the challenge to establish itself as an active agent that provides new products and services capable of directing financial resources towards projects, companies and institutions that promote the transition to a new model for development of society, thus properly covering environmental risks, natural disasters and other specific related risks. This also challenges the insurance companies to innovate in the assessment and measurement of risks.

The intervention of the regulator in this matter will involve the promotion of a gradual and non-disruptive transition that safeguards both sustainability and financial and economic stability.

Demographic ageing is another major issue when assessing emerging risks in the insurance industry, particularly in Portugal's context. Increased longevity makes it necessary to generate more income and/or accumulate more savings during working life. Therefore, insurance products have an important contribution to make to the supply of solutions associated with longevity risk. On this subject, the regulator has stated its position in order to encourage insurance companies to design new products that are capable of reconciling regular income and protection flows with the risks of medical and other expenses (arising

from health problems resulting from the increase in age and dependence) and, on the other hand, capable of mobilising the accumulation of long-term savings.

The risks we are now talking about arise from a macro perspective. In the particular context of Portugal, we would also like to highlight the emergence of new products related to the Affordable Lease Programme (ALP). The ALP is a governmental housing policy that aims to promote an extended supply of rental housing at prices compatible with household incomes. In order to enter into the agreements foreseen in the ALP three insurances are required, one from the landlord and two for the tenants. However, most insurance companies are not interested in this kind of products, as the type of tenants who look for the affordable rental are the ones with the least financial possibilities. Even so, there are already new offers on the market to insure this type of tenant, both in terms of payment of the rent and in terms of damage to the property.

11.2 New Products or Alternative Solutions

See 11.1 Emerging Risks.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

The recently published IDF empowered ASF to draft regulations on several matters, eg, training courses, registration procedure of the insurance intermediaries, reporting, the ASF's database items, etc. However, until this date, only one regulation was

published by the ASF, but we believe that the ASF will continue using its powers to produce new regulations under the IDF.

Moreover, the ASF has regained in 2018 exclusive competence to supervise the distribution of insurance-based products, but until the present it did not issued regulations in order to detail the way it will exercise such powers. Therefore, it is possible that this matter could be further detailed by the ASF in the near future.

Lastly, in respect of anti-money laundering and terrorism financing, despite the publication of the local law that implemented AMLD 4 and the imminent implementation of AMLD 5, the ASF is yet to regulate this matter, despite being the competent supervisor for the insurance sector. In this sense, it should be expected the intervention of the ASF in this field, namely in what concerns the reporting obligations of the supervised entities towards the ASF.

13. Other Developments

13.1 Additional Market Developments

This is not applicable in this jurisdiction.

PORTUGAL LAW AND PRACTICE

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Vieira de Almeida (VdA) is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach in corporate legal services. The excellence of its highly specialised legal services covering several sectors and practice areas enables VdA to overcome the increasingly complex challenges faced by its clients. VdA offers robust solutions grounded in consistent stand-

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Helena Vaz Pinto is a partner of the M&A area of practice and also responsible for the insurance practice of the firm, that Helena initiated and that has been recognised by peers and clients as being an experienced and innovative team.

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