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# Insurance & Reinsurance

Portugal

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VdA

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# 2021

# PORTUGAL

## 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 and, consequently, court decisions do not have the same preponderance as in common law jurisdictions. The Portuguese insurance and reinsurance legal framework is influenced by the relevant EU 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 are supplemented by further relevant Portuguese legislation, including 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 legislation.

## 2. Regulation of Insurance and Reinsurance

### 2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

The ASF is the competent entity for the prudential and market conduct supervision of the Portuguese insurance market. The mission of ASF is to ensure the efficient functioning of the insurance market, protecting policyholders, insured persons and beneficiaries. This is achieved by promoting the stability and financial soundness of all institutions under its supervision,

as well as maintaining high standards of market conduct on the part of the relevant players.

The duties and powers entrusted to 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 the IRL, 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 the IRL;
- mutual insurance or reinsurance undertakings authorised in accordance with the IRL (this is less common 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 the ASF in accordance with IRL.

### Mass Risks and Large Risks

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, the 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;
  - the need for the policy to be written in Portuguese, except if the policyholder agrees to receive it in other language;
  - the requirement for the existence of an insurable interest worthy of legal protection, otherwise the insurance contract will be void;
  - the prohibition of payment in kind of the insurance premium; and
  - the guarantees provided by the insurance contract being dependent on the payment of the premium.
- 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.

However, 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 rates up to 31.5%. Furthermore, a fee corresponding to 0.048% (life insurance policies) or 0.242% (other types of policies) on the registered earnings has to be paid to the ASF ("ASF Tax").

### Policyholders

#### Personal income tax

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;

If the conditions mentioned are not cumulatively applicable, investment income obtained will be subject to a 28% PIT rate. 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).

### Stamp duty

Different stamp duty 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 a stamp duty statement to the Portuguese Tax Authorities on a monthly basis, detailing the operations subject to stamp duty and any stamp duty exemptions. Insurance companies should declare such details annually.

## 3. Overseas Firms Doing Business in the Jurisdiction

### 3.1 Overseas-Based Insurers or Reinsurers Authorisation

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 insurance or reinsurance activities;
- undertakes to keep in the branch proper accounts considering the business in Portugal and to keep proper records of all business concluded;
- it appoints a general representative living in Portugal with the requirements and conditions set out 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; and
- 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.

## Further Investigations

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. The ASF's 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 ASF in the cases foreseen in the IRL, including 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.

## EU Companies

The promotion of the internal European market entails the possibility of insurance or reinsurance companies authorised in member states to carry on, throughout the EU, 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 ASF procedures and certain requirements 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 included on 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, allowing the immediate access to the information or 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 before the beginning of the respective business or one month thereafter.

- 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 must send the ASF a register containing the required information.
- 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 keep 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 all the legal and regulatory dispositions due for the respective exploration, including the contribution for the Workers, and be also subject to the ASF supervision in that regard.
- The insurer must act in compliance with the general principles and the applicable rules of market conduct, and publish an updated code of conduct including guidelines on professional ethics.
- 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 commencing activity in Portugal, the branch of the insurance undertaking must be registered with the respective Commercial Registry Office, and the ASF must be informed.

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.

### *Specific restrictions*

The ICL establishes specific restrictions regarding risks that cannot be guaranteed under Portuguese law, 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 who are incapable to govern themselves, save for civil compensations.

### **Brexit**

Decree-Law No 106/2020 of 23 December 2020 (the “Decree-Law”) contemplated contingency measures to be applied to the financial area.

Particularly, Article 9 of the Decree-Law establishes that insurance contracts concluded with insurance undertakings established in the United Kingdom, under a licence to carry on insurance business in Portugal, before the end of the transitional period provided for in the Exit Agreement (31 December 2020), covering risks situated in territory Portuguese or for which Portugal is the member state of the commitment, shall remain in force until the date of termination provided for under the contract, without prejudice to its early termination pursuant to general legal terms. Moreover, such insurance contracts may not be extended after the end of the transitional period and may only be amended in the benefit of the policyholder, or when the amendment results from mandatory legal provision.

The phasing out activities carried out by insurance undertakings pursuant to the Decree-Law will remain subject to the rules and regulations applicable prior to the end of the transitional period, including for regulatory enforcement purposes.

Within two months, as from 31 December 2020, insurance undertakings shall send the ASF information on insurance agreements covering risks located in Portugal or for which Portugal is the member state of the commitment, that will be remain in their portfolio after such date. The reporting must be renewed annually by March 31st, by electronic-mail, as provided for in Schedule IV to the Decree-Law.

### **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**

As in previous years, 2020 was interesting regarding M&A activities, marked by some transactions with significant impact. This confirms the recent market trend towards the progressive entry of foreign investors into the Portuguese insurance sector, and consolidation processes carried out by major international insurance players acquiring Portuguese insurance companies.

Although there have been mergers in 2020, M&A transactions in Portugal are mainly characterised by a predominance of acquisition operations. 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, ownership of insurance companies headquartered in Portugal was dominated by the major Portuguese financial groups, the current reality is that there is an increasingly hegemonic presence of international investors (including international insurance players and private equity investors) as they enter into strategic partnerships with national banks to optimise their position, capture growth opportunities, and achieve significant cost reductions.

For the next few years, insurance activity in Portugal is expected to be boosted as companies are now counting on the leverage of new owners and a commitment to maintaining focus on strategic plans. It is anticipated that 2021 will be a year of changes, and the start of a new trend of stabilisation of the Portuguese insurance market, with major players more focused on the insurance business rather than M&A transactions.

## 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 intermediaries;
- insurance intermediaries, comprising insurance agents and brokers; and
- insurance undertakings.

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).

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 the conclusion of the insurance contract, the policyholder or the insured has the obligation to declare all the circumstances which are known to them 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 provide certain information to the policyholder, in writing and in Portuguese language, prior to the execution of the insurance contract, including:

- 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 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.

## Risk Assessments and Good Faith

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 of an Insurance Contract

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.

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

### Wilful Omission or Inaccuracy

In case of wilful omission or inaccuracy by 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 claims 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 a three-month period, unless there was wilful misconduct or gross negligence by the insurer or their representative.

In case of wilful intent on the policyholder or the insured for the purpose of obtaining an advantage, the premium is due for the term of the insurance contract.

### Negligent Omission or Inaccuracy

In case of negligent omission or inaccuracy by the policyholder or insured, the insurer may:

- within three months of becoming aware of the breach, by means of a declaration propose an amendment of the contract, 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 it never enters into contracts covering the risks relating to the fact omitted or inaccurately stated by the policyholder or insured.

### Termination

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 in an Insurance Contract

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 policyholder.

The insurance agent and the ancillary insurance agent undertake to comply with the disclosure of the pre-contractual information mentioned in **6.1 Obligations of the Insured and 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.

However, the insurance broker is under the obligation to act impartially on behalf of the client. Consequently, the insurance broker is subject to the obligation to suggest to the policyholder appropriate measures to prevent and reduce the risk faced and



must base its distribution activity on the analysis of a sufficiently large and diversified number of contracts, depending on market availability. When providing advice to the customer, the broker shall be impartial 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 insurance contracts are 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, otherwise the policyholder will be entitled to terminate the contract and full reimbursement.

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, constituting insurable interest. In property and casualty insurance, the interest concerns the conservation or integrity of the guaranteed asset, right or property. Regarding life insurance, an 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 a void gambling contract.

## 6.5 Multiple Insured or Potential Beneficiaries

In respect of life or personal insurance, parties which are not named insured may be beneficiaries of the contract and, unless otherwise agreed, the insured person appoints the beneficiary(ies).

The appointments may be made in the policy, in a subsequent written declaration received by the insurer, or in a will. Further, the identification, including tax identification number, and domicile of the insured person(s) and beneficiary(ies) must be indicated.

The person appointing the beneficiary(ies) may at any time revoke or change the appointment(s), unless they have expressly waived this right or, in the insurance of survival, if the beneficiary has adhered to the policy or accepted the benefit provided under the contract.

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, insurance contracts are also subject to the general legislation applicable in Portugal to contracts with consumers, such as the Civil Code, the GCCL, the Marketing Act, etc.

Regarding reinsurance contracts, the ICL only establishes a few general requirements, such as the need to be established in writing and to identify the risks included. The reinsurance contract does not produce any effect towards third parties, ie, is not enforceable nor creates links between the policyholder and the reinsurer. The provisions of the ICL applicable 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 the authorisation of the ASF.

However, there is no current knowledge 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 Interpretation of Insurance Contracts and Use of Extraneous Evidence

The dominant position regarding the interpretation of insurance contracts is that the 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 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 and 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 insurance contracts. As such, the negotiation stage materials and exchanges between the parties, as well as the usual business practices, may assist in defending interpretations of the contract during a judicial proceeding.

The specific and objective marketing messages are legally deemed as integrated in the insurance contract, clauses that contradict those marketing messages are excluded, save for where they are more favourable to the policyholder or beneficiary. Nevertheless, it should be expected that judicial court will be 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. 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, there are certain provision included that may be deemed a de facto warranty, such as the initial declaration of risk by the policyholder or insured person. Breach of this obligation is subject to a specific legal regime (see **6.2 Failure to Comply with Obligations of an Insurance Contract**).

## 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 person.

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. Insurance Disputes

### 9.1 Insurance Disputes over Coverage

The policyholder or 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, possible causes and consequences. The insurer must verify these and the policyholder and insured must provide any clarification requested 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 reinsurance contracts.

Regarding consumer contracts, the consumer can resort to one of the alternative dispute resolution (ADR) means as described in **9.7 Alternative Dispute Resolution**, 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 gen-

eral limitation period for contractual claims of 20 years from the event giving rise to the right.

In general terms, unnamed beneficiaries or other third parties cannot enforce an insurance contract as direct action by the third party against the insurer is not provided for, except in mandatory civil liability insurance, such as compulsory motor third-party liability insurance.

## 9.2 Insurance 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 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 which aim to protect the “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, primarily where the insurer or claimant are 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 an insurance contract is to be determined in accordance with the provisions set out in Regulation (EC) No 593/2008 of 17 June 2008, 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 Rome I, with restrictions as to the law that may be chosen set out therein, 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 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 prosecutor to present their final allegations within 15 days, 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 to arbitration and 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 (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, the Inter-American Convention on International Commercial Arbitration, and the New York Convention.

## 9.7 Alternative Dispute Resolution

The parties may submit their disputes to one or more means of ADR, 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.

The 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 (not exceeding EUR15,000) with a civil nature.

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 ADR for consumer disputes. Going forward, 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 ADR, 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, 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.

## 9.9 Insurers' Rights of Subrogation

The ICL provides, in respect to insurance of damages, the insurer who has paid the compensation is (automatically) subrogated, to the extent of the amount paid, to the rights of the insured against the third party liable for the claim. Regarding insurance of persons (ie, life, personal accident and health insurance), the supplementary regime provided for in the ICL is that of no subrogation of the insurer in the rights of the policyholder or beneficiary against the liable third party, although an agreement to the contrary is possible.

## 10. Insurtech

### 10.1 Insurtech Developments

Even if at a lower speed, 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, particularly so in 2020, due to COVID-19 pandemic, as insurance players were forced to bring forward their digital/innovation plans to face the "new normal", making innovation a top priority.

The niche segments will gain relevance, but it will be structural changes that will mark the next ten years. Insurtech promotes a revolution in the functioning of insurance 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 is taking 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).

Portuguese Association of Insurers (PAI) have 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.

## **Fintech and Insurtech**

In 2020, online platform The Digital Insurer (TDI) and Portuguese non-profit fintech community Portugal Fintech announced their collaboration creation: an interactive digital map (Portugal's Dynamic InsurTech Map) containing easily accessible information about Portuguese insurtech companies, including their innovations. Users can easily send requests for updates to the map, which is then updated every quarter. The map is linked to TDI's Insurtech directory, which provides information on global insurtech players.

There is an increasing presence of technology in the insurance sector, 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, aiming to become more competitive and to win customers loyalty. Insurers 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**

See **10.1 Insurtech Developments**.

To date, there are no specific legal or regulatory documents specifically addressing insurtech matters, although the ASF is closely following this new trend.

There is a large consensus that insurtech should be subject to more regulation. Portuguese regulators have been working to find ways to fit the business models these companies are developing within regulatory boundaries. More recently, EIOPA has issued guidelines on information and communication technology security and governance intended to provide clarification and transparency to market participants on a baseline for cybersecurity capabilities, avoid potential regulatory arbitrage, and foster supervisory convergence.

## **11. Emerging Risks and New Products**

### **11.1 Emerging Risks Affecting the Insurance Market**

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.

#### **A Digital Economy**

Digital transformation 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. In its guidelines on information and communication technology (ICT) security and governance, EIOPA highlights increasing ICT and cybersecurity risks resulting from the growing reliance on technology in the provision of insurance services and on day-to-day operations, including through the digitalisation of the insurance sector.

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 providing 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 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**

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, on the one hand, 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 Affordable Lease Programme

In the particular context of Portugal, it is worth highlighting 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 these 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.

### COVID-19

The COVID-19 pandemic appears to have created a business opportunity for insurance companies. A new service focusing on risk prevention and assessment has been developed whereby the service provider (an insurance company) analyses and identifies preventative measures and recommendations to reduce risks inherent in the activity of the relevant business client. The service operates as a complement to “traditional” insurance services, which focus on risk allocation and serve to support customers once risks have already materialised, and could be effective as a mechanism for insurance companies to expand the breadth of insurable assets and activities.

## 11.2 New Products or Alternative Solutions

See 11.1 Emerging Risks Affecting the Insurance Market.

## 12. Recent and Forthcoming Legal Developments

### 12.1 Developments Impacting on Insurers or Insurance Products

The recently published IDF empowered the ASF to draft regulations on several matters, eg, training courses, registration procedure of the insurance intermediaries, reporting, the ASF’s database items, etc.

In this respect, the ASF recently launched a public consultation for the new regulation on IDF and the final regulation was published on the ASF website on the last day of 2020. This new regulation replaces the existing, out of date, regulation (still approved in the context of the previous IDF of 2006) and is expected to clarify some queries resulting from the practical application of the 2019 IDF.

Moreover, in 2018 the ASF regained exclusive competence to supervise the distribution of insurance-based products, but has yet to issue any regulations detailing the way it will exercise such powers. Therefore, it is possible that this matter could be further detailed by the ASF.

Lastly, in respect of anti-money laundering and terrorism financing, despite the publication of the local law that implemented 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 ASF in this field, namely in what concerns the reporting obligations of the supervised entities towards.

### COVID-19

In the context of COVID-19, an exceptional and temporary regime relating to insurance contracts has been approved by Decree-Law No 20-F/2020 of 12 of May, as amended. This regime aims at protecting policyholders, insured and beneficiaries by establishing measures that focus on the payment of the insurance premium, making it more flexible and mirroring in the ongoing legal relationship the effects of the temporary reduction of risk in insurance contracts resulting from the significant reduction or suspension of the activity.

Moreover, several regulations and circular letters were also published by the ASF to tackle the challenges posed by COVID-19, in respect of:

- adjustment of contractual conditions;
- extension of deadlines to enquiries and requests from the supervisor and general complains;
- resuming on-site supervision actions and disclosure obligations towards ASF; and
- the details of the duties of insurers under Decree-Law No 20-F/2020.

## 13. Other Developments in Insurance Law

### 13.1 Additional Market Developments

There are no additional market developments in Portugal.

# PORTUGAL LAW AND PRACTICE

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