The Insurance and Reinsurance Law Review

Editor
Peter Rogan

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EDITOR'S PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant: it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance plays an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

The insurance and reinsurance industry is remarkably resilient. In recent times it has been severely tested, but has passed the test on every occasion. Three examples spring to mind. As a lawyer steeped in the London market the first is the source of some personal pride. In the late 1980s and early 1990s the Lloyd's market suffered enormous losses arising largely as a result of a combination of asbestosis and pollution-related claims and the market practice, prevalent at the time, of placing inter-syndicate excess of loss retrocession in respect of catastrophe losses, commonly known as the London Market Excess of Loss (LMX) spiral. Those losses ultimately led to a plethora of litigation and forced many Lloyd's Names to cease underwriting. The scale of the losses also affected the solvency and liquidity of Lloyd's.

In 1996 Lloyd's implemented a reconstruction and renewal (R&R) plan, a complex market restructuring. Ultimately Equitas was established to reinsure and run off the 1992 and prior years' liabilities of the Names. In November 2006 National Indemnity Company, a member of the Berkshire Hathaway Group, reinsured all the liabilities of Equitas and Resolute Management Services Ltd, another member of the Berkshire Hathaway Group, took over responsibility for the run-off. On 25 June 2009 the English High Court approved the transfer of the 1992 and prior business of the Names to Equitas with the effect that, as a matter of English law, Lloyd's Names no longer have any liability for the 1992 and prior years' losses. This restructuring has been extremely successful in enabling Lloyd's not only to continue operating but to improve and enhance the service it provides. Lloyd's is today undoubtedly the world's leading market for internationally traded insurance and reinsurance.

The second test of the insurance and reinsurance market was the financial crisis of 2008–2009. While there were some high-profile casualties, in general the industry was able to withstand events better than other financial institutions, certainly better than the banks. With the exception of specialist lines such as directors' and officers' (D&O) and trade credit insurance, insurers and reinsurers suffered relatively little exposure to the financial market losses. The traditional insurance and reinsurance sectors were largely onlookers. Indeed I would go further and suggest that they arguably helped to provide a stabilising effect, given the nature of their business model and in particular a conservative investment approach. If the crisis has triggered a more stringent regulatory regime for financial services generally that is no bad thing, but it should not be forgotten that insurance activity neither led to, nor was unduly affected by, that crisis.

Finally, the natural catastrophes and man-made disasters of 2011 and 2012 have caused not only human tragedy and loss of life but also enormous insured losses. A 28 March 2012 study by Swiss Re (based on data from its *sigma* database) revealed that, altogether, natural catastrophe insured losses came to around US$110 billion, while losses from man-made disasters were around US$6 billion, making 2011 the second-highest catastrophe loss year ever for the insurance industry. 2012 was dominated by weather-related events in the United States, most notably Hurricane Sandy. On 19 December 2012, again based on *sigma* data, Swiss Re estimated that insurance losses arising from the catastrophic events of the year were set to reach approximately US$65 billion. The figure is of course moderate compared with 2011 but Swiss Re notes that it is above the average of the past 10 years.

The events of 2011 and 2012 provided significant challenges for the insurance and reinsurance industry for a number of reasons – one being the sizeable impact they had on manufacturing around the world, something that had not fully been appreciated in advance. However, the industry proved to be highly effective in overcoming these challenges. Despite losses on a historic scale and a difficult economic climate, it played a key role in bringing financial relief to populations, businesses and governments suffering from the effects of the disasters.

Events such as these test not only insurers and reinsurers but also the rigour of the law. From the English perspective, the Lloyd's Insurance and Reinsurance Reports, issued almost monthly, are never short of material to fill their pages. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. Taking the natural catastrophes as an example, these have thrown up issues of causation, claims notification, cooperation and control, the effect of 'follow the settlements' provisions and aggregation, to name but a few.

There are many insurance and reinsurance publications available. However, in this increasingly globalised industry there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative law basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Peter Rogan
Ince & Co
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April 2013

Chapter 17

PORTUGAL

Luísa Soares da Silva, Margarida Torres Gama and Diogo Coimbra Casqueiro[1]

I INTRODUCTION

In Portugal, the insurance contract was first regulated by the Portuguese Commercial Code of 1888. Historically, the most relevant insurance contracts entered into by Portuguese people and companies were maritime and transport insurances, due to the obvious maritime vocation of Portugal. Nevertheless, the economic development that Portugal saw, especially from the mid-1950s, transformed the country into a multifaceted society, where risk was extended to previously unsuspected sectors.

The export of risk to new sectors became even more apparent with the surfacing of the financial economy and its (increasingly complex) products. Before long, insurance and reinsurance contracts started to be used as financial instruments for those seeking to diversify their investment portfolios, as well as for those procuring to hedge the risks associated with their previous investments. That translated into an approximation of the insurance sector to the banking and securities sectors. This 'merging' may be pointed out as one of the causes leading up to the financial and subsequent sovereign debt crises, as it led to the development of highly complex financial products.

The industry was also pushed forward thanks to the creation, in 1997, of the Portuguese Insurance Institute ('ISP'), the national insurance regulator.

Leading up to 2011, a number of factors, both internal and foreign, led Portugal to a deep financial crisis. Although the aim of this chapter is not to examine those supposed causes, the analysis of any Portuguese economic sector (e.g., the insurance and reinsurance market) must take into consideration the fact that Portugal has, from that year, been a country under a financial bailout.

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Under the terms of the Memorandum of Understanding ('MoU') entered into by and between Portugal and the Troika (i.e., the International Monetary Fund, the European Commission and the European Central Bank), Portugal is facing a very tight schedule to implement several measures in order to make the national economy more resilient to future similar events. Nearly two years into the adoption of the programme, however, these measures have taken a toll on the real economy, with a clear impact on the lives of people and companies.

With a crisis background, and taking the MoU into consideration, some major changes are taking place in the market, and possible operations of concentration of business are recently being mentioned as expected to occur, including the publicly announced sale and consequent privatisation of the insurance arm of Caixa Geral de Depósitos ('CGD') group, which is the state-owned banking and insurance group.

II REGULATION

i The insurance regulator

As mentioned above, the Portuguese insurance regulator is the ISP. It was created by means of Decree-Law 251/97, of 26 September, although its current legal status is set forth in Decree-Law 289/2001, of 13 November ('DL 289/2001'), as amended. Its legal status is that of an administrative body, the ISP being a division of the Portuguese Public Administration. Under the terms of DL 289/2001, the ISP has the prerogative of issuing binding instructions towards insurance companies (Article 5(1)). It is also endowed with legislative initiative for insurance matters (Article 11(a)) and has the power to approve regulations and other normative acts that are mandatory for the entities that the ISP supervises (Article 11(b)). Moreover, the ISP has regulatory powers on matters concerning pension funds and pension funds' managing entities. These issues, however, will not be addressed in this chapter.

The ISP's regulatory activity covers two main areas: prudential supervision and behavioural supervision. Prudential supervision is destined to certify that (re)insurance companies comply with the rules regarding technical provisions and adequate solvency, thus guaranteeing that they maintain proper levels of own funds, and that they adopt the proceedings that are required so as to ensure a sane and prudent management of the company. Within this scope, and besides the rules regarding capital requirements, the ISP is also empowered to gather information on qualifying holders and their project towards the companies, as well as to gather the necessary and sufficient information to ascertain whether directors have carried out a sane and prudent management.

As for behavioural supervision, it translates in the ISP having to monitor insurance companies' compliance with the law, as well as the adoption by insurance companies of the best market practices regarding, *inter alia*, duties of information towards policyholders, insured persons and beneficiaries, claims handling proceedings and adequacy of the products sold and of the respective distribution means. The ISP is thus entitled to request all sorts of information so as to determine whether management fulfil their duties of conduct, and also to issue mandatory regulations and opinions, which, in addition to the law, establish duties aimed at ensuring the highest levels of transparency. Also worth mentioning is the ISP's role as one of the three Portuguese

regulators of the financial sector, alongside the Bank of Portugal ('BdP') and Portuguese Securities Exchange Commission ('CMVM'), jointly referred to as the National Council of Financial Supervisors ('CNSF'), created in 2000 by Decree-Law 228/2000, of 23 September. On this matter, Article 14 of DL 289/2001 provides for the ISP's collaboration with these other two entities in order to ensure the efficiency and overall coherence of supervision of the financial system. Furthermore, Article 40-A, recently added to Law 25/2008, of 5 June, by Decree-Law 18/2013, of 6 February, now expressly provides for the cooperation between Member States' financial national supervisors and the European Supervisory Authorities.

The ISP shares some of its supervision responsibilities with other regulators. This is the case, for instance, of the regulation of complex financial products, of which insurance contracts linked to investment funds are an example. Under Decree-Law 211-A/2008, of 3 November, BdP and CMVM issued a common understanding defining both their regulatory scope in relation to complex financial products. CMVM, under Regulation 2/2012, of 25 October, included unit linked insurance contracts under its regulation. Pursuant to the common understanding between CMVM and the ISP, of 14 November 2008, CMVM's regulatory scope in this regard is circumscribed to 'duties of conduct', set upon distributing entities in their relation with clients. The remaining matters (e.g., access, governance structures and mechanisms, financial guarantees, prudential aspects, investments, qualifying holdings, and European passport and accounting policies) remain under the ISP's authority.

ii Position of non-admitted insurers

The access to insurance and reinsurance activity in Portugal is regulated through Decree-Law 94-B/98, of 17 April, as amended ('DL 94-B/98'). Article 7 et seq. of DL 94-B/98 provide for requisites that insurance companies need to comply with in order to be able to carry out such activity. Non-compliance prohibits such companies from providing insurance services. The same principle applies to reinsurance activity (Article 5).

Notwithstanding, Article 4 of DL 94-B/98 determines that its rules are not applicable to certain entities, in particular to livestock mutual insurance companies, so long as (1) its by-laws permit the reinforcement of its contributions or the reduction of its provisions; (2) its activity only covers the inherent risks of the livestock insurance; and (3) its annual amount of contributions or provisions does not exceed €5 million. DL 94-B/98 is also not applicable to assistance companies whose activity is circumscribed by locally assisting people with disabilities and difficulties in movements (Article 123(18)), through contributions in kind, and whose income does not exceed €200,000.

In all other cases insurers must register with the ISP. Failure to comply with such duty constitutes a criminal offence and may make the insurer liable to a pecuniary administrative sanction.

Additionally, the above-mentioned is without prejudice to the possibility of insurance and reinsurance companies licensed in other EU Member States being able to provide insurance and reinsurance services in Portugal by means of the establishment of branches or of the free provision of services, within certain limits and subject to certain requirements set out in DL 94-B/98.

iii Position of brokers

On this topic, it should be stressed that, pursuant to Decree-Law 144/2006, of 31 July, as amended ('DL 144/2006'), insurance brokerage is a regulated activity. To clarify the Portuguese legal terminology, brokers are merely one of the three insurance intermediary categories, along with insurance agents and tied insurance intermediaries (Article 8). According to DL 144/2006, the taking up of insurance and reinsurance mediation activities is dependent upon the previous registration with the ISP of natural or legal persons in one of these categories, subject to some exceptions to the application of the DL 144/2006 regime provided for in Article 3 of DL 144/2006, and also without prejudice to the possibility of insurance intermediation companies licensed in other EU Member States being able to provide intermediation services in Portugal by means of the establishment of branches or of the free provision of services, within certain limits and subject to certain requirements set out in DL 144/2006.

The tied insurance intermediary is an intermediary who acts in the name and on behalf of one or more insurance companies or who acts supplementary to his or her main professional activity, in which case the commercialised products have to be accessorial to the goods or services provided within the scope of that activity. In any event, they cannot receive premiums or any amounts from the insured persons, policyholders or beneficiaries.

The insurance agent, while being able to receive the aforementioned amounts (as long as the contract entered into by and between the agent and the insurance company allows it), also acts in the name and on behalf of one or more insurance companies.

Finally, the broker, unlike the two previous categories, acts independently from the insurance companies, basing its activity on an impartial analysis of a number of insurance contracts available in the market, allowing the broker to advise his or her clients as to the one which best fits their specific traits. This category has higher independence standards than those of the other categories. Notably, brokers must abstain from any activity that may compromise their independence. They must also demonstrate that they possess adequate technical, commercial, administrative and accounting organisation. And they, themselves, must hold an insurance policy to cover the risks of their activity.

Further information on these topics is set out in Section III.iv, *infra*.

iv Requirements for authorisation

Article 7 et seq. of DL 94-B/98 establish the conditions and requirements for authorisation of insurance companies. Specifically, pursuant to Article 13, the company must be a limited company by shares and have a minimum share capital, the amount of which varies, considering the types of insurance to be pursued by the company.

In addition, the following have, in general, to cumulatively be gathered:

a shareholders detaining qualifying holdings must show their aptitude to guarantee a sane and prudent management of the company;

b the adequacy and sufficiency of the human resources relating to the goals to be achieved;

c the adequacy and sufficiency of financial resources considering the kinds of insurance to be pursed;

d the main centre of management of the insurance company shall be in Portugal; and

e whenever there are close relationships between the insurance company and other persons or companies, those may not impede the correct supervision of the entity.

v Regulation of individuals employed by insurers

There are no specificities, regarding the general rules, worth mentioning on this matter. Accordingly, individuals employed by insurers are, as usual, holders of an employment contract or of a services agreement, thus being subject to the general labour laws and laws regarding the provision of services. There are, however, regulatory demands concerning the composition of the board of directors which will be addressed below.

vi The distribution of products

There are, essentially, two main distribution channels: the traditional distribution and the bank distribution. The traditional chain of distribution operates through intermediaries, notably brokers, who perform market research and then offer clients the product they feel best suits the clients' specific traits.

The banking distributive chain involves the commercialisation of insurance in banking agencies. The banking distribution channels developed because of the connection between banking products and the coverage of the risks associated with such instruments, which became increasingly difficult and unpredictable. It was mainly for this distributive channel that online and phone insurance became regular ways of commercialising such insurance contracts.

vii Compulsory insurance (e.g., employers' liability)

The most important mandatory insurance contracts currently in force in Portugal, without prejudice to other existing mandatory contracts, are:

a Accidents in the workplace insurance:
- construction activity;
- forest guards;
- professional sportspersons;
- temporary work agencies;
- all workers (employees); and
- independent workers.

b Accidents in the course of duty insurance:
- staff and leaders of the judicial police.

c Personal accidents insurance:
- students;
- arbitrators and judges;
- sports agents with deficiencies;
- high competition athletes;
- day care and kindergarten workers;
- blood donors; and
- tissue and organ donors.

d Damages insurance:
- deposit and allotment of cultural assets; and
- buildings associated with asset-backed securities.

e Illness insurance:
- nationals of other EU Member States wishing to live in Portugal; and
- high competition athletes.

f Fire insurance (among others, regarding real estate under the 'horizontal property' framework).

g Guarantee insurance.

h Civil liability insurance:
- industrial activity;
- production of electric energy;
- insurance and reinsurance intermediaries;
- activities of collective transportation of children;
- lawyers;
- travel agencies;
- motor vehicles; and
- private security companies.

i Theft insurance:
- private security companies; and
- entities promoting the exhibition of works of art.

j Life insurance:
- military personnel working abroad on peace missions; and
- policemen and other Ministry of Internal Affairs dependents working abroad on peace and humanitarian missions.

viii Compensation and dispute resolution regimes (within the financial services context)

The Insurance Customers' Ombudsman, created through Article 131-E of DL 94-B/98, has the duty of receiving claims from insured people, policyholders, beneficiaries or injured third parties, regarding acts or omissions of insurance companies. The service takes place in Lisbon, at the Centre for Insurance Information, Mediation and Arbitration.

The Ombudsman is designated by and among insurance companies. Their functions involve receiving and assessing the claims of the above-mentioned people. The Ombudsman may not, however, revoke, reformulate or convert any decisions taken by insurance companies. Within the scope of their activity, they may only address non-binding recommendations to them, in order to promote and incentive better decisions and better claim handling procedures.

Finally, it should be noted that the Ombudsman competence extends only to those companies who have adhered to the service. The terms under which one may resort to the Insurance Customers' Ombudsman are further developed in a specific regulation.[2]

2 Available at www.cimpas.pt/pdf/Regulamento.pdf.

Regarding the relationship between insurance companies and their customers, there is also the possibility of filing a complaint with the ISP itself. Upon analysis of such complaints, the ISP asks the insurance company in question to pronounce itself on the alleged facts. If the ISP concludes there is misconduct, it may contribute to helping the parties reach an agreement. Moreover, the ISP will use such information so as to determine whether the insurance company's conduct deserves to be fined or otherwise.

ix Taxation of premiums

Premiums covering risks situated in Portuguese territory are subject to VAT in Portugal. However, Portuguese law provides for an exemption for financial products, which includes insurance contracts (Article 9 of the Portuguese VAT Code). Insofar as the payment of premiums is part of the insurance companies' profits, they are also subject to corporate income tax. Some insurance policies and respective incomes are also subject to stamp duty.

x Proposed changes to the regulatory system

On this subject, one of the main topics to mention is the potential implementation of Directive 2009/138/EC, of the European Parliament and Council ('Solvency II'). Pursuant to Directive 2012/23/EC, of the European Parliament and Council, Solvency II no longer has to be transposed by 31 October 2012, but by 30 June 2013. Furthermore, some of its provisions will only enter into force by 1 January 2014.

One of the fundamental aspects addressed by Solvency II is the possibility for the insurance companies to use internal models that are oriented towards risk management to calculate the solvency capital requirements. Such usage is dependent upon the previous authorisation of the model by the national regulators.

Under Article 112 of Solvency II, the internal models may be used to calculate one or more of the following risk modules: non-life underwriting risk, life underwriting risk, health underwriting risk, market risk and counterparty default risk. The solvency capital requirements for these modules are to be calculated internally, according to the orienting guidelines set out in Article 105. The models may be further used to evaluate the correct proportion between capital requirements and operational risk and for assessing the (re)insurance companies' capacity of absorbing unexpected losses derived from decreases in technical provisions, deferred taxes or a combination of the two.

This represents a dramatic change regarding the prior regime, as it grants the supervisory entities wider evaluation powers: they will now be granted the means to evaluate, in particular cases, whether (re)insurance companies have adequate assessment of their risks and of the respective proportional capital requirements. Specifically, the supervisory entities will only approve such models insofar as they pass a usage test, respect statistical quality, calibration, validation and documentation standards (as specified in Solvency II), and are apt to explain the causes and sources of profits and losses.

xi Other notable regulated aspects of the industry (e.g., ownership, mergers, capital requirements)

The first aspect to consider here is the communication of qualifying holdings. Under DL 94-B/98, qualifying holdings mean the holding of a stake not inferior to at least

10 per cent of a company's share capital, or the holding of voting rights that allow for a significant influence in the management of the held company. Article 43 of DL 94-B/98 states that whenever someone, directly or indirectly, intends to reach such threshold or a 20, 33 or 50 per cent stake in the share capital of an insurance company, the bidder must, prior to the acquisition, inform the ISP of its acquisition project. In determining whether to approve the acquisition or not, the ISP must decide whether such project allows for a sane and prudent management of the insurance company.

The second topic worth covering is that of mergers between insurance companies. Whenever the merger between two or more insurance companies involves the transfer of the contracts portfolio of any of the companies, such transfer needs to obtain the authorisation of the ISP. Such transfer will not be authorised whenever the insurance contracts are a part of the company's life insurance branch and at least 20 per cent of the insured of such contracts oppose the transfer.

It should also be mentioned that directors of a (re)insurance company need to satisfy some legal requirements, without which they may not take up such position. According to the law, directors have to possess adequate qualification, notably either through professional experience or academic qualifications. In addition, the law demands their good repute. Among other aspects, the following circumstances are considered to evidence lack of good repute: (1) conviction for theft, embezzlement, fraud, extortion, usury, intentional insolvency, creditor favouring, illegitimate appropriation of goods of the public or cooperative sectors, forgery, false statements, bribery, abuse of information, money laundering or manipulation of the capital markets; (2) the judicial declaration of bankruptcy of companies that had been managed by the person in question; and (3) conviction, in Portugal or abroad, for failure to comply with legal rules that command insurers, credit institutions, financial institutions and companies, and the capital markets. The law extends these requirements to the members of the supervisory board.

It should be said that adequate qualifications are presumed to exist, in the case for professional experience, whenever the person in question has carried out, competently, functions of responsibility in the financial sector.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Given that the Portuguese jurisdiction is a part of the civil law system, Portugal's main source of law is statutory law. Court decisions are only important insofar as they interpret statutory law or they apply it to a particular case. On certain occasions, however, these decisions are binding on other courts and interpreters.

Given this framework, the foremost Act to consider is Decree-Law 72/2008, of 16 April (as amended), which approved the Law of Insurance Contracts ('LCS'). This Act, in force since 1 January 2009, provides the general regime applicable to insurance contracts, throughout all of their existence. Accordingly, it specifies rules concerning contract formation, duties of information, premium payments, insurance coverage, reinsurance and co-insurance, group insurance, claims handling and termination. The LCS also contains two specific parts, addressing, respectively, indemnity insurance and personal insurance. As the first of these parts contains provisions concerning the most

common subtypes of indemnity insurance contracts (e.g., liability, fire, crop, livestock, goods in transit, financial, legal expenses and assistance insurances), the second addresses life, accident and health insurance.

It should be noted that, before the entry into force of the LCS, the insurance contract was a contract mainly regulated by the Portuguese Commercial Code of 1888 (approved by Charter of Law, of 28 June 1888) and several particular legal statutes. Unless otherwise specified, omissions are primarily filled with regard to the Portuguese Commercial Code and the Portuguese Civil Code.

There are some other statutes worth mentioning. A first group of statutes is that which regulates specific insurance contract subtypes, as is the case with motor vehicle liability insurance, credit and security insurance and accidents-at-work insurance. A second group of statutes is one which, notwithstanding the fact that they do not immediately concern insurance law, has important implications in interpreting the provisions of insurance contract law. Some of those statutes include, but are not limited to:

a the Portuguese Civil Code (approved by Decree-Law 47344, of 25 November 1966), as amended ('CC'), which contains important provisions on formation of contracts, contract interpretation, breach of contract and so forth;

b Decree-Law 446/85, of 25 October 1985 (as amended) ('DL 446/85'), on standard terms of contracts, their admissibility and interpretation;

c Decree-Law 143/2001, of 26 April 2001, on distance selling; and

d the Portuguese Securities Code, as amended (approved by Decree-Law 486/99, of 13 November 1999), applicable to insurance contracts where these are linked to investment funds.

Finally, it should be stressed that the ISP has the capacity to enact regulations on matters concerning insurance contracts, for the purpose of clarifying, interpreting and complementing the provisions of the law.[3]

ii Making the contract

The LCS establishes the typical ingredients of an insurance contract (Article 1). Pursuant to said provision, the first essential ingredient is a determined risk. By virtue of the contract, the insurer has a duty to perform an established conduct resulting from an uncertain event associated with that risk. On the other hand, the law establishes that the insured person, or the policyholder, as may be the case, has a contractual duty to pay a premium. Failure to pay determines that there is no coverage of the contractual risk. The risk is also determined, which means that no risk other than that provided for in the contract is covered by the insurer (Article 44). This statement also reveals that an insurance contract needs to be based upon a legally insurable interest (Article 43). By such interest, the law means an interest worthy of legal protection. In the event of insurance for damages, said interest concerns the preservation or integrity of the object

3 These are available at www.isp.pt.

insured. In life insurance, the insured person whom is not its beneficiary shall consent to the insurance.

Article 11 of the LCS establishes a principle of contractual freedom under which the parties are free to stipulate the contents of the contract. This, however, is merely a statement of principle, as the law is quick to establish imperative norms. As such, it is essential, for instance, that the insurer is a registered entity, authorised by the ISP to carry out the insurance activity in a particular type of insurance (life or non-life). Also, although the contract need not be in writing, the insurer must provide the insured person or the policyholder with a document containing the agreed terms of the contract (i.e., the insurance policy).

Another aspect worth mentioning is the information to be provided to the insurer before or upon completion of the contract. In this regard, Article 24 of the LCS provides that the insured person and/or the policyholder are obliged to accurately disclose, prior to the contract's conclusion, all circumstances that they know of and that they may reasonably deem significant for the insurer's appreciation of risk. This disclosure duty encompasses all circumstances that the policyholder or the insured person may reasonably know. Nonetheless, the standard for determining which circumstances qualify is that of an average and reasonable person, meaning that, should such a person deem certain circumstance as fit to influence risk, the policyholder or the insured person is required to mention it.

A final aspect to refer here is the duty of good faith. Under Article 227 of the CC, a general duty to act in good faith is imposed upon both parties in the negotiation and formation of contracts. Failure to comply determines liability for any damages caused to the counterparty. It is generally understood that, other than confidentiality and loyalty, the duty of good faith during a pre-contractual stage encompasses, among other conducts, duties of information regarding relevant contractual elements at this stage. The extent of these duties is, however, questionable. If, on the one hand, the parties must know all the relevant facts, it is arguable, on the other hand, that parties are entitled to withhold some information as an instrument of the negotiations. Conversely, the scope of these duties is dependent upon the type of contract, the parties and their position, among other aspects.

Articles 18 and 20 of the LCS must therefore be read in light of Article 227 of the CC. Under the aforementioned rules, the insurer must provide the insured person or the policyholder with information on, for example, the scope of covered risk, limitations and exclusions of coverage, the total amount of the premium, minimum and maximum amount of premium and claims procedures, among other aspects.

Under the same principle, and because the insured person is the most knowledgeable person of his own risks, he must disclose all relevant facts in determining the risk associated with the contract.

Finally it should be noted that, given that insurance contracts often resort to standard terms, DL 446/85 provides for a duty of communication of all clauses (Article 5) and a duty of information (Article 6), thus deepening the scope of the general information duties set forth in Article 227 of the CC.

iii Interpreting the contract

General rules of interpretation are provided by the CC (Articles 236 to 238). Under the general rule of Article 236 of the CC, the meaning of a certain contractual clause or term shall be that which a normal person, placed in the position of the real insured person, would deduce from the behaviour of the insurer. There is, hence, a burden of adequate statement and, diametrically, a burden of adequate understanding. When in doubt, Article 237 stipulates that, for gratuitous contracts, the less onerous sense should prevail. For onerous contracts (such as the insurance contract), the adopted sense should be that which leads to the highest balance possible.

In any case, an insurance contract should always be interpreted according to the principles that govern private law, notably, the principle of contractual freedom (Article 11 of the LCS) and the above-mentioned principle of good faith (Articles 227 and 239 of the CC).

As for incorporation of terms, we previously mentioned that the contract need not be written down in order to be valid. However, Article 32 of the LCS requires that its terms are provided to the insured in a written document (i.e., the insurance policy).

Typically, an insurance contract will contain terms that will have been individually negotiated between the parties – particular conditions – which, in turn, refer to standard terms, common to all the insurer's contracts – general and special conditions.

As for warranties, conditions and conditions precedent, the main principle involved is that of contractual freedom, therefore, they are for the parties to agree on, on a case-by-case basis, subject to absolutely and relatively mandatory rules (Articles 12 and 13 of the LCS). It should be noted, however, that the classification of terms into warranties and conditions does not apply in Portugal. The scope of contractual terms and the remedies for breach are determined on a case-by-case basis, according to the aforementioned general contract rules of interpretation.

Moreover, it should be noted that, within certain terms, the insurance contracts include the contents of the insurers' advertisements relating to them, so long as they are specific and objective (Article 33 of the LCS).

iv Intermediaries and the role of the broker

According to DL 144/2006, 'insurance mediation' shall be any activity that consists of presenting an insurance contract or preparing entry into an insurance contract or in helping to manage and execute said contract. These activities form the intermediary's role. Insurance mediation may be carried out by brokers, agents and tied insurance intermediaries.

On any account, the law provides for rules concerning 'good repute' of insurance intermediaries (Article 13). Accordingly, such requisite is considered lacking whenever the person in question has been convicted of, for example, theft, fraud, embezzlement, extortion, among other situations. Additionally, Article 14 of DL 144/2006 addresses incompatibilities. According to said rule, the fact that the insurance mediator is a board member of an insurance or reinsurance company is incompatible with insurance mediation. The same applies if that person is a member of the ISP, or an auditor for an insurance or reinsurance company, among other situations.

The law also requires insurance intermediation candidates to have some degree of literacy and qualifications (Article 12).

According to DL 144/2006, some of the duties intermediaries are bound to comply with include, but are not limited to:

a refraining from entering into contracts on behalf of insurance undertakings, unless granted with such powers;

b refraining from covering risk on their own behalf;

c providing correct and efficient assistance under the contracts in the conclusion of which they have taken a hand;

d keeping a record of the contracts in which they acted as intermediaries; and

e informing the insurer of any changes in the risks covered. With regard to brokers, they should conduct market research and studies so as to provide their clients with the information needed to make reasonable business decisions.

Taking into account their required independence, brokers have specific obligations, as is the case with suggesting to policyholders appropriate measures to avoid and reduce exposure to risk. The same goes for the duty to maintain a system, the principles of which are to be contained in a written document, so as to ensure equitable treatment of all the broker's clients. This is without prejudice to other legal requirements for the taking up of such activity.

v Claims

The claims procedure starts with 'proper notice'. Such term means the explanation, without prejudice to others, of the particular circumstances involving the loss, its possible causes and foreseeable or related consequences. In short, all facts that may contribute to quantify the loss. Proper notice needs to be given within eight days from the date on which the insured person or the policyholder became aware of the loss-triggering event.

Failure to comply does not immediately determine loss of coverage. Such outcome only takes place in the event that non-compliance was intentional. Otherwise, Article 101 of the LCS determines the reduction of the benefit.

Under Article 46 of the LCS, the insurer does not need to fulfil its contractual duty when the loss has been intentionally caused by the insured or the policyholder. Moreover, pursuant to Article 45(5)(6) of the LCS, if the policyholder acts in bad faith, the insurer that acted in good faith may retain the already paid premium. Bad faith will be presumed to have occurred whenever the insured person knew, when entering into the contract, that the loss had already occurred.

If the policyholder or the insured intentionally supplies the insurer erroneous information with the goal of extracting benefits from such conduct, the contract will be annulled or cease to bind the parties, depending on whether said behaviour took place before or after the contract had been concluded. In any case, all claims lodged will be forfeited.

Article 54(5) of the LCS allows for the premium debt to be extinct by set-off with a recognised, due and net credit up to the same amount of the premium debt. The set-off operates by mere declaration of one of the parties to the other (Article 848(1) of the CC), so long as the general requisites of the set-off, as per the CC, are met. Because

Article 853(1)(a) of the CC prohibits the set-off of credits arising from civil liability, the set-off of premium debts shall not be possible when that premium regards a civil liability insurance contract.

Article 59 of the LCS provides that coverage depends upon the previous payment of the insurance premium. Furthermore, Article 61(1) of the LCS establishes the immediate termination, with retroactive effects, for unlawful failure to pay due premiums. As such, reinstatement is not allowed in the Portuguese jurisdiction.

As for dispute resolution clauses, it is permitted to include such provisions in insurance contracts. By effect of such conventions, the parties may (1) in case of transnational disputes, define the country whose courts shall have jurisdiction to settle the dispute; and (2) remit the case to arbitration, instead of judicial courts. More doubtful is the agreement upon alternative clauses (i.e., clauses by which the parties have the alternative to resort to judicial courts or arbitral tribunals).

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

From a Portuguese law perspective, the matters regarding the country whose courts have jurisdiction to solve insurance-related disputes shall be generally determined in accordance with Article 8 et seq. of the Council Regulation (EC) 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation also provides for the freedom of the parties to agree on a certain jurisdiction for the settlement of disputes.

Assuming that the jurisdiction of the Portuguese courts applies, insurance disputes fall under the competence of common or judicial courts. The procedural rules are those included mainly in the Portuguese Civil Procedure Code, approved by Decree-Law 44129, of 28 November 1961, as amended ('CPC').

The applicable provisions regarding choice of law in insurance contracts are, in general, for contracts entered into after 17 December 2009,[4] contained in Article 7 of Regulation (EC) 593/2008, of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I). The LCS also contains a framework regarding conflicts of laws (Articles 5 to 10). However, considering the entering into force of Regulation (EC) 593/2008, it is understood that those provisions apply only to insurance agreements entered into or renewed between 1 January 2009 (the date on which the Portuguese Insurance Contract Framework (Decree-Law 72/2008, of

4 Please note that Regulation (EC) 593/2008 does not apply to insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

April 16) entered into force) and 17 December 2009 (the date in which Regulation (EC) 593/2008 entered into force).

The provisions of the above-mentioned Regulation set out that:

a An insurance contract covering a large risk (as defined in Article 5(d) of the First Council Directive 73/239/EEC, of 24 July 1973, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) shall be governed by the law freely chosen by the parties.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has its habitual residence. If it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

b In the case of any other insurance contracts, the parties are only free to choose from among the following laws:

> *(a) the law of any Member State where the risk is situated at the time of conclusion of the contract; (b) the law of the country where the policy holder has his habitual residence; (c) in the case of life assurance, the law of the Member State of which the policy holder is a national; (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State; (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.*

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

c In case of insurance contracts covering risks for which a Member State imposes an obligation to take out insurance: (1) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation; where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail; and (2) a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

It should be taken into account that the provisions of Article 7 do not apply to reinsurance contracts, which are subject to the general provisions on freedom of choice of law set out in Article 3 et seq. of the regulation.

According to the interpretation of the majority of the scholars, despite the above-mentioned provisions on choice of law, certain aspects of insurance contracts

may nonetheless be deemed to be ruled by certain mandatory provisions of Portuguese law, whose relevance and relation to public policy matters is such that their application cannot be set aside by means of choice of law.

Finally, regarding arbitration clauses, please see Section III.v, *supra*.

ii Litigation

There is no special judicial procedure for insurance disputes in Portugal. That goes to say that the general rules of the CPC apply. Depending upon the value of the dispute, there may be different stages of the ordinary process. Generally speaking, every civil lawsuit in Portugal starts with written pleadings. After reviewing them, the judge determines what facts need to be proved. After evidence has been produced on the controverted facts, there is discussion on matters of fact and, subsequently, on matters of law. Finally, the judge decides. The Portuguese default rule is that of free appeal of court decisions but there are certain limitations.

As for evidence, standard rules apply. As such, any party who invokes a right bears the burden of evidencing the events which lay at its foundation. Accordingly, anyone (namely, the insurer) wishing to invoke an event that impedes, modifies or extinguishes said right must prove it. It should be stressed that, in principle, all means of evidence are allowed, notably witnesses, documents and experts, among others.

Finally, and regarding costs, a new Procedural Costs Regulation has recently come into force. Under this new regulation, procedural costs, which are substantially dependent upon the amount of the claim, have increased considerably.

iii Arbitration

In Portugal, arbitration is currently regulated by Law 63/2011, of 14 December. Insurance arbitration does not have a different format from that of arbitration of other conflicts. Article 122 of the LCS provides that arbitration is permitted in insurance disputes, even when the disputes regard mandatory contracts or imperative rules.

On this matter, special attention must be paid to the arbitral clause, as it often regulates the different aspects of the arbitration to take place in the event of a dispute. The particulars of a determined arbitration (including the procedure to be followed) depend heavily on the arbitration clause, the drafting of which is characterised by a large degree of contractual freedom. Such freedom is limited by the demand for an equitable and due process (Article 20 of the Constitution of the Portuguese Republic).

Unless otherwise agreed by the parties, the arbitral tribunal decides whether to schedule sessions for the production of evidence or whether it may decide based on the parties' written pleadings and other documents submitted to the court by the parties. The arbitral tribunal may also permit that one of the parties requests a judicial court to demand a witness to bear evidence on certain facts.

The arbitrators decide according to the law, unless the parties have granted them powers to decide *ex aequo et bono*.

As for costs, arbitral proceedings vary heavily, depending on a number of factors, such as the number of sessions, number of arbitrators, types of remedies demanded for, and the institutional or *ad hoc* nature of the arbitration. However, practice has tended to show that they are somewhat higher than the costs of resorting to judicial courts.

It should be noted that insurance law has been a field in which arbitration has been resorted to with increasing frequency. This has been especially notorious in the case of vehicle insurance disputes.

iv Alternative dispute resolution

In Portugal, the main form of alternative dispute resolution ('ADR') is arbitration. For instance, a specialised institution has been created to address insurance conflicts: the Centre for Insurance Information, Mediation and Arbitration.

There are other forms of ADR, albeit their usage is somewhat uncommon in Portugal. Among them, there are mediation, conciliation and the justices of the peace courts ('*Julgados de Paz*').[5]

v Mediation

The Portuguese notion of mediation is found in Article 35 of Law 78/2001, of 13 July, which concerns the setting up of the justices of the peace courts ('Law 78/2001'). There, it is said that mediation is a private and extrajudicial form of ADR. The inclusion of Articles 249-A, 249-B and 249-C in the CPC extended the scope of mediation to all civil disputes, so long as the parties willingly decide to resort to such form of ADR.

Although it is a structured process (i.e., it obeys certain rules), its distinctive mark is the full empowerment of the parties. This means that even the mediator is not in charge of the process, its role being to facilitate the dialogue between the parties. In Portugal, the majority opinion is that the mediator cannot even propose solutions to the cause.

In general (and for the generality of disputes, including labour, family and criminal law disputes) it has been argued that the courts have no directory functions.

According to Article 249-B of the CPC, if, during pre-judicial mediation, the parties reach an agreement, they may, but are not mandated to, request the court's approval of such agreement, the aim of which is, arguably, to convey to it the same power as that of a judicial decision.

However, if the mediation has commenced during the course of a lawsuit, the judicial approval of the agreement is mandatory (Articles 56 of Law 78/2001 and 279-A of the CPC).

In both cases, however, the judge will evaluate the validity of the agreement in terms of its object. This means that the agreement must comply with *bonus mores* and the public order principle.

V YEAR IN REVIEW

Although there have not been major changes in the insurance sector recently, there are a few signs that the sector is evolving. A few aspects worth mentioning are outlined below.

5 The justices of the peace courts are non-judicial courts that have the power to resolve certain civil disputes of minor value. The legal framework of the justices of the peace courts provides for mediation as one of the alternative dispute resolution methods that shall be provided by the justices of the peace courts.

A proposal for a new European directive addressing the insurance intermediation services is currently under discussion. Under the current drafting of the proposal, some important changes are expected to take place, notably, at the level of the prerogatives and activities that intermediaries may carry out. The new proposal also aims to extend its scope so as to encompass services and activities previously left out, thus contributing to empowerment of the national regulatory bodies. For the first time, it also acknowledges and aims at regulating insurance contracts linked to investment products.

Also worth mentioning, on a legislative level, and linked to the difficult economic environment, is the recently enacted Law 57/2012, of 9 November, which entered into force on 1 January 2013. According to Article 1 of said Law, which amended Article 4 of Decree-Law 158/2002, of 2 July, the amounts relating to pension savings plans ('PPRs') and education saving plans ('PPEs'), insurance products widely known and subscribed in Portugal, which normally may only be used without penalties in specific situations described in the law, may now be reimbursed so as to allow that amount to be used as payment for debts arising from housing credit (regarding own and permanent houses of the participants in the PPR or in the PPE).[6] The Portuguese Insurers Association ('APS') has, however, been defending the understanding that such amounts may only be reimbursed, for this purpose, to those who demonstrate being in a difficult economic situation.

There have been some discussions as to the future of the financial sector regulators.

As mentioned above, there has been some evolution in the regulation of insurance contracts, namely where they are linked to financial products. Very recently, CMVM enacted Regulation 2/2012, of 25 October, which entered into force on 1 January 2013. This Regulation, quite unlike its predecessor, specifically mentions insurance contracts linked to investment funds as object of CMVM's regulative competence, thus splitting the regulatory powers on this matter between the ISP and CMVM.

In addition, due to the growing intertwinement between the financial sectors (insurance, banking and capital markets), there was much thought given to possible changes to Portuguese financial supervision, which led to a public consultation in 2009 regarding the adoption of the 'twin peaks' system, according to which the financial supervision duties should be split between two entities, one responsible for the prudential supervision and the other for the behavioural supervision. However, at present, no further developments in this subject have arisen.

It should, however, be noted that, pursuant to very recent legislation (Decree-Law 18/2013), which implemented the Omnibus I Directive into Portugal, it has been foreseen that the cooperation between national and European supervision entities should be increased: Decree-Law 18/2013 amended Decree-Law 145/2006, of 31 July, by providing that (1) the Portuguese supervisory authorities (which include the ISP) may exchange information with the national central banks, the ECB, the European System of Central Banks and with the European Systemic Risk Board; and (2) the Portuguese

6 This is particularly relevant taking into consideration that, according to recent information conveyed by the APS, PPRs seem to have been the investment product that granted the best return in the past five years.

supervisory authorities shall cooperate with the Joint Committee of the European Supervisory Authorities.

A new key trend has been developed in the Portuguese judicial courts: starting out with the Supreme Court of Justice's ('STJ') decision of 1 October 2009,[7] a considerable number of decisions have subsequently held that the use of motor vehicles (notably, cars) as an instrument to cause harm to people requires the insurer to cover the claims regarding damages to the victim. This duty arises independently of the driver's culpability, as per STJ's ruling of 5 June 2012,[8] and encompasses both personal and pecuniary damages, according to STJ's holdings of 20 January 2010,[9] and of 26 June 2012.[10]

On the market side, the major change was the publicly announced intention of the state to privatise the insurance arm of CGD group, as mentioned in Section I, *supra*.

On the supervision side, the ISP has been showing some concern with the matters of capital adequacy and the prevention of price dumping in the insurance sector. A concern with the risks analysis, including the identification of risks that may have a systemic impact, has also been shown by the regulator.

The ISP has conveyed that the major legislative initiatives expected to be pursued in the short term are the implementation of the Solvency II framework, the revision of the mandatory vehicle insurance framework and the creation of a legal framework for certain long-term and lifelong health insurance policies.

VI OUTLOOK AND CONCLUSIONS

Given the national current economic standing, the (re)insurance sector has been experiencing a contraction, both in terms of the number of companies in the market and of the number of people employed. This contraction is, in some cases, a reflection of the concentration that has recently been taking place.

However, it has been recognised that the overall quality of the services provided has been increasing, which has been shown by a decrease in the number of claims lodged, particularly in the non-life sector (especially, accidents in the working place, illness and vehicle insurance).

2011 and 2012 were years of recession. Particularly in the life insurance sector, the premium turnovers have fallen. The values relating to non-life insurance also decreased, but in a less significant manner. Nonetheless it can be said that both life and non-life sectors were situated in 2012 in amounts comparable to 2011. An exception to the decreasing trend was the increase in 2012 in investment-related insurance products. The performance of the insurance sector has also been negatively influenced by the performance of the national capital markets, which are a substantial part of the (re)insurance companies' investment portfolios. Nevertheless, according to the APS,

7 STJ 1/X/2009 (Souto Moura), Proc. 07P1583.

8 STJ 5/VI/2012 (Orlando Afonso), Proc. 100/10.9. This lawsuit, in particular, took 18 years before a final compensation amount could be definitely determined.

9 STJ 20/I/2010 (Mário Cruz), Proc. 60/2002.

10 STJ 26/VI/2012 (Salazar Casanova), Proc. 631/1999.

the insurance sector had its best financial results over the last five years, and in 2012 generated turnovers reaching up to €542 million.

There is also potential for an increase in certain types of insurance, as insured people are more likely to channel their savings into life and health insurance products, to the detriment of banking deposits, due to the lack of attractiveness that the banks' products are currently experiencing.

In short, it is expected that (re)insurance companies' activity in the future will primarily consist of managing their exploration ratios and their risks so as to maintain adequate solvency capital requirements, necessary in a time when there are too many unpredictable variables to ascertain their annual performance.

Appendix 1

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Luísa Soares da Silva joined the firm in 1990 and became a partner in 2001. She is a member of the corporate and commercial and capital markets group and coordinates the firm's insurance, reinsurance and pension funds team, providing ongoing assistance to insurance and pensions funds managing companies. She has been involved in complex transactions in the insurance market, including establishment of joint ventures, distribution agreements and mergers between insurance companies.

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Luísa Soares da Silva received her law degree from the Portuguese Catholic University Law School (1990), having also pursued postgraduate studies in European studies in the Portuguese Catholic University Law School (1992). She has also attended a course on legal aspects of international finance from the University of London (1994) and received legal training in acquisition finance in 2007.

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