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New Portuguese Insurance Contract Framework (Decree-Law 72/2008, of April 16)

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Soares da Silva, Lima Rego and Torres Gama on the New Portuguese Insurance Contract Framework (Decree-Law 72/2008, of April 16)

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SUMMARY: In this Expert Commentary, the authors discuss the New Portuguese Insurance Contract Framework, published in April 2008 and in force as from 1 January 2009, which represents important progress towards legal certainty for the basic rules governing insurance contracts.

ARTICLE: The New Portuguese Insurance Contract Framework, published in April 2008 and in force as from 1 January 2009, definitely represents an important progress towards legal certainty in what concerns the basic rules governing insurance contracts. The new statute not only summons all the basic principles common to all kinds of insurance, ruling, clarifying and detailing some key issues, but also provides for all new rules with respect to some new forms of insurance contracts, some of which were already being used by insurance market players.

16 April 2008 saw the publication of a statute setting out the general framework of insurance contracts (Decree-Law 72/2008, of April 16th). The Portuguese version of this statute may be found in

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This statute constitutes a significant innovation in Portugal, as it summons, for the first time in close to two centuries, all the rules applicable to insurance contracts in general and moreover some provisions applicable to particular classes of insurance contracts. The new framework will come into force on 1 January 2009.

This statute was long overdue; within the industry it was felt that the previous regulation needed to be updated and consolidated; a further factor was a widely shared perception that the regulation should be more user-friendly for consumers. Previously, insurance contracts were governed by a fragmentary legal framework dispersed throughout a variety of both long-standing and recent statutes (as, for instance, the Commercial Code of 1888, Decree of 21 October 1907, Law 2/71 of April 12th, Decree-Law 176/95, of July 26th on the transparency requirements for insurance companies and insurance contracts, Decree-Law no.94-B/98, of April 17th, on the taking up of insurance business, Decree-Law 142/2000, of July 15th,on the payment of insurance premiums). As a result, there were inconsistencies within the framework and a number of relevant issues were either overlooked or only partially addressed.

Main Principles and Features: In many ways, the new provisions do not substantially differ from the framework that is still in force. However, the legislator followed the innovative tendencies of recent legislation in other countries, and focused, on the one hand, on the protection of the weakest party and, on the other hand, on the recent multiplication of new forms of insurance contracts as well as of new purposes for old forms of insurance contracts (as, for example, group insurance, in articles 76 to 90, or co-insurance, in articles 62 to 71).

The protection of the policyholder constitutes a significant change; the general provisions pertaining to insurance contracts had been based on the liberal principle of the formal equality of the parties in the contract, which was understandable given that they dated back to 1888. Such heightened level of protection, which is stronger in mass insurance and arises from the connection to consumer protection rules, may be detected, for instance, in the determination that a great portion of the rules cannot be changed by the contracting parties, or can only be changed in favour of the policyholder (articles 11 to 13), or the determination that the insurance contracts made by entities not duly authorised as insurers are null and void, without prejudice to such entities remaining bound to perform their obligations towards the policyholder and the insured under such contract (article 16).

The legislator has put great emphasis on the formation, vicissitudes and cessation of insurance contracts. As to formation, clarification has been provided as to the fact that validity does not depend on the existence of a written contract, but the insurer must put its terms and conditions into a written policy that it must deliver to the policyholder (articles 32 and following). The burden of proof of such delivery falls upon the insurer. Similarly important is the provision concerning the prohibition of discriminatory practices, which now deepens the concept of what is considered a discriminatory practice and indicates the procedure to settle disputes arising from the refusal to contract by an insurer (article 15). The consequences of a change in risk have now been subject to a more thorough regulation, namely regarding the information duties arising from such change (articles 91 to 94). And the various forms of cessation have been systematically regulated (articles 105 to 117).

Information plays an important role in this statute. The insurers duties to inform the policyholder before, at the time and after the contract is signed must now meet more exigent standards, with an emphasis on the pre-contractual information duties to be fulfilled by the insurer, which are now, to a large extent, the same for life and non-life insurance its minimum content is now specified in the law (articles 18 to 26). Such duties have also been extended to group insurance, where there were previously many doubts as to who should be the recipient of such information (articles 78, 79 and 87) the law now clarifies the extent and contents of the right of the insured persons to be informed. A special duty of clarification has also been set forth, which depends on the complexity of the contract and on the amounts involved, and shall be mainly focused on the scope of the cover (article 22).The issue of information to be provided by the policyholder has also been regulated in a comprehensive way, with an emphasis on the initial declaration of the risk (article 24), the policyholders wilful or negligent misrepresentations respectively leading to the contracts voidability or to the insurers right to terminate or amend the contract (article 25 and 26).

Structure of the Statute. Following on from the general provisions applicable to all classes of insurance (articles 1 to 122), the statute regulates indemnity insurance in its second chapter (articles 123 to 174). This chapter separately regulates fire insurance (articles 149 to 151), crop and livestock insurance (articles 152 to 154), transportation insurance (articles 155 to 1609), financial insurance (articles 161 to 166), legal expenses insurance (articles 167 to 172) and civil liability insurance (articles 137 to 148), but not marine insurance, which is still governed by the Commercial Code of 1888. Novelties in the general provisions applicable to indemnity insurance include new default rules on salvation and mitigation (articles 126 and 127), calculation of the insurance compensation (articles 128 and following), over and under-insurance (articles 132 and 134), multiple insurance (article 133) and subrogation (article 136). There have also been meaningful developments in civil liability insurance. An important clarification was made, to the effect that claims made clauses are admissible under certain conditions. The recent increase in the number of mandatory types of civil liability insurance has led to the creation of specific solutions for such contracts, most notably the express introduction of a rule permitting the direct action of the injured party against the insurer (article 146).

The third and last chapter of the statute is dedicated to personal insurance (articles 175 to 217). It regulates life (articles 183 to 209), accident and health insurance (articles 210 to 217). The highlights of this regulation are to be found in the provisions regarding the risk, particularly the incontestability clause (article 188), the consequences of an increase of the risk (article 190) and the events of suicide and homicide (articles 191 and 192). With regard to accident and health insurance, the comprehensive required contents of the insurance policies are noteworthy.

Worthy of special note is the separation between insurance contracts covering large risks and those covering mass risks. Insofar as the former are concerned, the new framework mostly works by default, the parties being free to diverge from its rules, save in a very small number of exceptions. As regards the latter, however, there is an extensive list of provisions which may not be contractually derogated from or which may only be derogated from to the extent that the parties set forth a set of rules more favourable to the policyholder, the insured or the beneficiary of the insurance.

All aspects considered, this statute, even though on the whole it does not entail very significant changes in the industrys practices, will certainly require market players to pay close attention to the contents of the new framework, not only when drafting new insurance standard terms and amending existing ones in order for them to comply with the new provisions, but also, more widely, when (re)defining codes of conduct and commercial strategies. This task, which will largely benefit from the completeness, structure and cohesion of this new statute, will undoubtedly have to take into consideration the fact that it constitutes merely a general framework, thus having to be operated jointly with the provisions ruling each type of insurance, which may, in some cases, enrich or even derogate from the former. The actual terms in which this will be made are for the market (and the courts) to determine.

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