



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Insurance & Reinsurance

This country-specific Q&A gives a pragmatic overview of the law and practice of insurance & reinsurance law in the Japan.

It addresses topics such as contract regulation, licensing, penalties, policyholder protection, alternative dispute resolution as well as personal insight and opinion as to the future of the insurance market over the next five years.

This Q&A is part of the global guide to Insurance & Reinsurance. For a full list of jurisdictional Insurance & Reinsurance Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/insurance-reinsurance>

MORAIS LEITÃO
GALVÃO TELES
SOARES DA SILVA

Country Author: Morais Leitão, Galvão Teles, Soares da Silva & Associados

The Legal 500

Margarida Lima Rego


Nuno Sobreira

Francisco Vieira de Almeida

1. **How is the writing of insurance contracts regulated in the jurisdiction?**

Insurance is a regulated activity which is only accessible to duly authorized insurers. The activity's main regulation is that approved by Law 147/2015 of 9 September (the "Portuguese Insurance Regulatory Law" or "PIRL"). This statute contains the legal framework for the taking up and pursuit of insurance and reinsurance activities in Portugal and for the most part it is the direct result of the implementation of relevant European directives, most notably the Solvency II Directive.

The writing of insurance contracts is governed by a different regulation: that approved by Decree-Law 72/2008 of 16 April, as amended by Law 147/2015 of 9 September (the "Portuguese Insurance Contract Law" or "PICL"). PICL sets forth general provisions,



applicable to all types of insurance contracts, such as (i) contract formation, (ii) information duties of the insurer and the policyholder/insured, (iii) execution of the contract, (iv) payment of insurance premium, (v) coinsurance, (vi) reinsurance, (vii) group insurance, (viii) claims handling, and (ix) termination.

However, the main source of contract law in Portugal is the Portuguese Civil Code, which sets forth many general contractual provisions also applicable to insurance contracts.

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2. Are types of insurers regulated differently (i.e. life companies, reinsurers)?

All insurers and reinsurers, whether life or non-life, are subject to the same legal framework: that set forth in PIRL, which has implemented the Solvency II Directive in Portugal. All such undertakings fall under the supervision of ASF. However, some different requirements apply to different classes of undertakings. For instance, PIRL sets forth different minimum capital requirements for direct insurers and reinsurers; for life and non-life insurers and reinsurers; within non-life insurance the limits also vary depending on the classes of insurance products to be distributed. In addition, sales of different types of insurance products are subject to specific requirements, notably with regard to information duties.

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3. Are insurance brokers and other types of market intermediary subject to regulation?

Insurance intermediation is also a regulated activity in Portugal which is only accessible to duly authorized intermediaries. The legal framework governing insurance and reinsurance mediation in Portugal is currently that set forth in Decree-Law 144/2006 of 31 July. However, it is expected to be replaced upon the implementation of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016: the Insurance Distribution Directive. This directive must be implemented by 1 July 2018

and the new regulation must come into force by 1 October 2018.

Currently the three main categories of insurance intermediaries are (i) tied insurance intermediaries (who carry on their activity in the name and on behalf of one or more insurance undertakings or as a complement to their professional activity), (ii) insurance agents (who carry on their insurance mediation activity on behalf of one or more insurance undertakings or of another insurance intermediary), and (iii) insurance brokers (who carry on their activity with total independence from the insurance undertakings, so as to provide clients with an impartial evaluation of the insurance products available in the market in order to present them with the product that best suits their interests).

The new regulation is expected to eliminate the first category of intermediaries, but the distinction between insurance agents and insurance brokers is expected to subsist. A new category of intermediaries carrying on their activity on an ancillary basis is expected to be created under the new framework.

Insurance intermediaries are also under the supervision of ASF.

4. Is authorisation or a licence required and if so, how long does it take on average to obtain such permission?

In order for insurance and reinsurance undertakings to operate in Portugal, they must apply for a license. For such purpose, the entities must comply with the requirements provided for in PIRL. Insurance intermediaries are also required to apply for a license in order to operate in Portugal.

Insurance or reinsurance undertakings as well as insurance intermediaries based in another EU member state may also pursue their activities in Portugal under the freedom of establishment principle, by setting up a branch in Portugal, or even without one, under the freedom to provide services principle. In accordance with the principle of freedom to provide services, it is not required for an insurance or reinsurance undertaking or an intermediary to have a physical presence in Portugal so as to write

insurance policies in Portugal.

In order to incorporate an insurance or reinsurance undertaking in Portugal, an application must be submitted to ASF. Under article 56 of PIRL, ASF's decision must be notified to the applicant within 6 months. However, there might be a need to complement or clarify the information initially provided, in which case the authorisation process may take up to 12 months. The same timeframe is applicable to the authorization request to establish a branch in Portugal of an entity incorporated in a third country, i.e., countries that are not member states of the EU.

For the purposes of an insurance or reinsurance undertaking (duly licensed in a EU member state) operating in Portugal, the supervisory authority of the relevant member state must communicate to ASF the intention of the undertaking to operate in Portugal. ASF must, within 2 months, reply to the communication setting forth the conditions under which such entity may exercise its activity in Portugal.

5. Are there restrictions over who owns or controls insurers (including restrictions on foreign ownership)?

According to article 162 of PIRL, the direct or indirect acquirer of a shareholding stake in an insurance or reinsurance undertaking, as well as any other shareholder that intends to increase its shareholding stake, must communicate such circumstance to ASF provided that (i) the following thresholds are met: 10%, 20%, 33.33% and 50%, or (ii) the company becomes an affiliate company.

The aforementioned thresholds shall also be applicable to the acquisition of voting rights.

ASF might oppose to the projected acquisition/transfer provided that the person/entity being considered fails to guarantee a sound and prudent management of the insurance or reinsurance undertaking.

The reduction of a qualified shareholding to a stake below 20%, 33.33% and 50% is

also subject to prior communication to the ASF.

As regards to foreign ownership, PIRL does not impose any limitations as long as the insurer complies with the provisions set forth thereunder.

6. Is it possible to insure risks without a licence or authorisation? (i.e. on a non-admitted basis)?

In principle, insurance and reinsurance undertakings may not pursue insurance businesses in Portugal unless they have been duly licensed by ASF, except if the undertakings are headquartered in an EU member state and have been licensed by their home country competent authority.

However, please note that under articles 245 to 247 of PIRL there might be an exemption from authorisation requirements for reinsurers from third countries that carry on reinsurance business in Portugal without a branch, provided that the European Commission has decided that the solvency regime in that relevant country is at least equivalent to the regime described in the Solvency II Directive.

7. What penalty is available for those who operate without appropriate permission?

According to article 356 of PIRL, it is a criminal offence to pursue the insurance or reinsurance businesses in Portugal without the necessary authorisation/license. The offender might be punished with up to 5 years imprisonment or a fine. In some cases, the offence is also punishable with an additional penalty, which may include the prohibition to conduct business for a period of up to 5 years or even the judicial dissolution of the entity.

Under article 370 of PIRL, it is a serious misdemeanour to carry out insurance or reinsurance activities without the relevant authorisation. The aforementioned

misdemeanour is punishable with a fine of up to € 300,000, for individuals, and up to € 1,500,000 for corporations.

According to article 16 of PICL, if a non-authorized entity carries out insurance activities and enters into an insurance contract, such contract is null and void. However, such nullity does not exonerate the non-authorized entity from having to comply with the obligations that would result from such agreement or the law if the agreement was valid (unless the counterparty to the agreement knew about the lack of proper authorization).

8. How rigorous is the supervisory and enforcement environment?

As it was mentioned above, the Portuguese insurance regulator is ASF - Autoridade de Supervisão de Seguros e Fundos de Pensões. It is responsible for supervising the activities carried out by insurance and reinsurance undertakings with registered office in Portugal, including the activity carried out by such undertakings in other EU member states (through a branch or under the principle of freedom to provide services), as well as the activity pursued in third countries. It is also responsible for supervising the activity of insurance undertakings with registered office in a third country that pursue their activity in Portugal through a branch. Finally, ASF also checks compliance with legal, regulatory and administrative provisions by insurance and reinsurance undertakings with registered office in a EU member state, that pursue their activity in Portugal (through a branch or under the principle of freedom to provide services).

The supervisory duties of ASF include the verification of solvency status, the constitution of technical provisions, the assets and eligible own funds of the insurance and reinsurance undertakings, as well as their accounting regime, corporate governance and their behavioural action.

ASF has a wide range of powers so as to guarantee and perform the aforementioned duties, including the power to (i) verify technical, financial, accounting and legal conformity of the activities pursued by insurance and reinsurance undertakings under its supervision, (ii) request detailed information on the situation of insurance and reinsurance undertakings, as well as to proceed with inspection to their respective

facilities, (iii) adopt all preventive and corrective measures deemed necessary, (iv) develop quantitative instruments so as to evaluate the solvency of the insurance and reinsurance undertakings, and (v) demand the correction of deficiencies and irregularities detected.

9. **How is the solvency of insurers (and reinsurers where relevant) supervised?**

Portuguese insurance undertakings are subject to the requirements imposed by the Solvency II Directive, which have been strengthened so as to ensure financial stability of the insurance sector (in order to protect policyholders, insureds and beneficiaries). PIRL imposes certain rules with regard to prudential supervision, in line with the Solvency II Directive:

- a. Minimum capital requirements for insurance undertakings (which may vary depending on the type of insurance products distributed);
- b. Minimum solvency requirements for insurance undertakings (calculated on the basis of the risk-assessment system);
- c. It is mandatory to implement of a risk-assessment system, capable of identifying, measuring, monitoring, managing and communicating risks to which the insurance undertakings might be exposed.

ASF might make use of its powers mentioned above so as to ensure the solvency of insurance and reinsurance undertakings in Portugal. On another perspective, PIRL sets forth that insurance and reinsurance undertakings must perform a self-assessment of their own solvency, which shall be communicated to ASF. Furthermore, insurance and reinsurance undertakings are required to disclose an annual solvency and financial report.

10. **What are the minimum capital requirements?**

PIRL sets forth the minimum share capital requirements for insurance and reinsurance undertakings as follows:

a. The minimum share capital for the purposes of incorporating an insurance undertaking is:

- i) € 2,500,000 for the purposes of exclusively pursuing the distribution of one of the following insurance lines: illness, juridical protection or assistance;
- ii) € 7,500,000 in the event the undertaking pursues the distribution of more than one of the types of insurance lines mentioned under paragraph a. or other non-life insurance lines;
- iii) € 7,500,000 for the purposes pursuing life insurance activities;
- iv) € 15,000,000 in case it pursues both life and non-life insurance activities.

b. The minimum share capital for the purposes of incorporating a reinsurance undertaking is:

- i) € 7,500,000 for life or non-life reinsurance undertakings;
- ii) € 15,000,000 for the purpose of pursuing all types of reinsurance activities;
- iii) € 3,750,000 in case of mutual reinsurance.

As regards minimum capital requirements, PIRL sets forth a minimum level of security below which the corresponding capital should not fall. The minimum capital requirement has an absolute floor of:

- a. € 2,500,000 for non-life insurance undertakings, including captive insurance undertakings;
- b. € 3,700,000 for life insurance undertakings, including captive insurance undertakings;
- c. € 3,600,000 for reinsurance undertakings, except in case of captive insurance undertakings, where the floor shall be € 1,200,000.

11. **Is there a policyholder protection scheme?**

Insurance and reinsurance undertakings must implement specific proceedings for the purposes of identifying potential risks to their financial conditions (to the extent such risks may eventually result in a breach of the minimum capital requirements).

Under such circumstances (i.e. the actual verification of the risks), ASF shall implement all necessary measures so as to preserve the interests of policyholders, insureds and beneficiaries. The measures to be adopted by ASF include, among others:

- a. Restriction to the exercise of certain activities, notably with regard to some types of insurance products;
- b. Impose restrictions to the possibility of incurring in the distribution of new insurance products;
- c. Prohibit or impose limitations on distribution of dividends;
- d. Suspend or dismiss members of the corporate bodies, as well as to appoint temporary directors;
- e. Increase or decrease on the undertaking's share capital;
- f. Determine the transfer of qualified shareholding stakes;
- g. Determine the partial transfer of insurance contracts.

12. **How are groups supervised, if at all?**

PIRL sets forth that groups shall be subject to additional supervision which is supplementary to the individual supervision of insurance undertakings.

Group supervision is applicable to the following situations:

- a. Insurance and reinsurance undertakings that hold a shareholding stake in at least one insurance or reinsurance undertaking from a third country;

b. Insurance and reinsurance undertakings whose parent is a holding company in the insurance sector or a mixed financial holding with registered office in the EU;

c. Insurance or reinsurance undertakings whose parent is a holding company in the insurance sector or a mixed financial holding with registered office outside the EU or an insurance or reinsurance undertaking from a third country;

d. Insurance and reinsurance undertakings whose parent is a mixed holding company.

Article 284 of PIRL sets forth the criteria to designate the supervisory entity responsible for the supervision of the group. ASF shall be responsible for supervising the group if the insurance or reinsurance undertakings which are a party thereto are already (individually) subject to the supervision of ASF, as well as in other situations, including in the event the leading entity of the group has been licensed by ASF.

The competent authority responsible for the supervision of the group has the following rights and obligations:

a. Coordinate the process of gathering relevant or essential information for the purposes of supervising the group;

b. Revise and evaluate the financial status of the group;

c. Supervise compliance with solvency requirements, risk concentration monitoring and evaluating intragroup transactions;

d. Evaluate the corporate governance systems.

13. **Do senior managers have to meet fit and proper requirements and/or be approved?**

PIRL sets forth that insurance and reinsurance undertakings must guarantee that the

following individuals meet fit and proper requirements:

- a. Directors and other individuals responsible for the management of the insurance or reinsurance undertaking;
- b. Members of the supervisory board and the certified public accountant responsible for the issuance of the accountancy certificate;
- c. Top executives and other individuals in charge of key-functions;
- d. Other individuals that perform key-functions.

The aforementioned individuals (except for those provided under (d) above) must be registered with ASF. The registration procedure is set forth under Regulatory Rule 3/2017-R, of 18 May, issued by ASF.

14. **Are there restrictions on outsourcing parts of the business?**

PIRL determines that where an insurance or reinsurance undertaking outsources part of its business, the following conditions shall be met:

- a. The services provider cooperates with ASF for the purposes of supervising the part of the business that has been outsourced;
- b. The insurance and reinsurance undertakings, the respective auditors and ASF shall have access to the data regarding the outsourced parts of the business;
- c. ASF shall have access to the facilities of the services provider.

PIRL further determines that insurance and reinsurance undertakings shall not outsource parts of the business in such a way that may lead to:

- a. Impairment of the corporate governance system of the undertaking;
- b. An increase in the operational risk;
- c. Impairment to the capacity of ASF verifying compliance with the undertakings' legal duties;
- d. Impairment to the services rendered to the policyholders, insureds and beneficiaries.

15. **How are sales of insurance supervised or controlled?**

With regard to compulsory insurance contracts, PIRL sets forth that:

- a. ASF might require insurance undertakings to use standard clauses and policies for the purposes of contracting any type of compulsory insurance;
- b. Any insurance undertaking intending to distribute any compulsory insurance contract shall disclose/notify to ASF the general and specific conditions of the respective insurance policy.

As regards non-compulsory insurance contracts, ASF might request insurance and reinsurance undertakings with registered office in Portugal, as well as branches of insurance and reinsurance undertakings with registered office in another EU member state or in a third country, to disclose the general and specific conditions of the insurance policies, its tariffs, technical basis, and other relevant documents.

For the purposes of guaranteeing compliance with actuarial principles, ASF might request insurance and reinsurance undertakings with registered office in Portugal, as well as branches of insurance undertakings with registered office in a third country to disclose the technical basis applied for the purposes of calculating tariffs, instalments, contributions and technical provisions related to life insurance contracts.

16. **Are consumer policies subject to restrictions? If so, briefly describe the range of protections offered to consumer policyholders.**

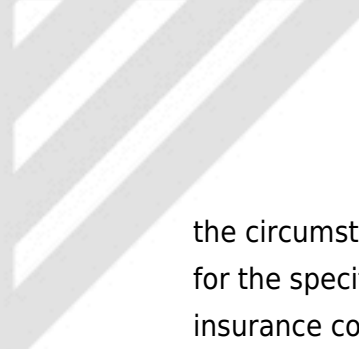
PIRL sets forth several duties of conduct for the benefit of policyholders, insured and beneficiaries, with the purpose of guaranteeing market transparency and customer protection. As a result thereof, ASF might prohibit or prevent insurance undertakings from distributing insurance products that impair or may impair the interest of the policyholders, insured and beneficiaries, notably as a consequence of the insurance products not being appropriate for the corresponding risk profile or in the event they clearly contribute to enhance conflict of interests among them.

Insurance undertakings must guarantee that relevant information and clarification duties are duly and timely performed. Furthermore, insurance undertakings must implement the necessary mechanisms for the purposes of preventing insurance products from being distributed without taking into consideration the policyholders' profile.

Insurance undertakings must also implement an autonomous function which shall be responsible for managing claims submitted by policyholders, insureds, beneficiaries or injured third parties, being such function composed by fit and proper and professionally qualified individuals. Additionally, each insurance undertaking must appoint a clients' ombudsman, which must be an individual with renowned prestige, qualification, reputation and independence, to whom policyholders, insureds, beneficiaries and injured third parties might submit their claims with relation to act or omissions of the insurance undertakings.

As regards to consumer policies, the principle of freedom of contract is applicable as a general rule. However, PICL provides a fairly comprehensive set of absolutely mandatory rules and another set of relatively mandatory rules that can only be altered to the benefit of policyholders, insured or beneficiaries.

The insurer must provide accurate information with regard to the insurance product. If



the circumstances so require, it shall further clarify which are the most suitable policies for the specific risk to be secured. From a consumer protection perspective, an insurance contract must be drafted in Portuguese (save as otherwise requested by the policyholder and agreed with the insurer), in clear terms, be brief and rigorous and, whenever deemed possible, make use of plain and simple language. The most relevant terms of the insurance policy must be drafted in highlighted characters (e.g. clauses on limitations or exclusion of cover).

As regards to the interpretation of insurance contracts, given the circumstance that a typical insurance policy is composed of a document containing terms individually negotiated by the insurance undertaking and the policyholder and a set of documents containing the contract's general and specific conditions, whenever a contradiction is detected between a standard term and a term individually negotiated between the parties, the latter shall prevail. In addition, an ambiguous standard term shall be interpreted in accordance with the meaning that is most favourable to the policyholder (that adheres to the standard terms).

Finally, it shall be pointed out that if the aggregate risk covered by the insurance policy is reduced and the parties do not reach an agreement as regards to the (reduced) premium to be paid, the policyholder shall be entitled to terminate the insurance contract.

17. Are the courts adept at handling complex commercial claims?

Assuming that the jurisdiction of the Portuguese courts applies, insurance related disputes fall under the competence of common judicial courts, which have reasonable experience in dealing with complex commercial claims, including insurance-related claims. The main criticism on the Portuguese judicial system is the average duration of the proceedings.

18. Is alternative dispute resolution well established in the

jurisdiction?

PICL allows for any disputes on validity, interpretation, performance and breach of insurance contracts may be settled through arbitration. However, at present only consumer-oriented alternative dispute resolution is well established in Portugal. In large risks insurance it is still fairly uncommon for insurance disputes to be resolved out of the regular judicial system.

We should highlight the popularity of an alternative dispute resolution centre dedicated to the resolution of insurance related consumer disputes. Centro de Informação, Mediação, Provedoria e Arbitragem de Seguros (CIMPAS) provides for mediation and arbitration proceedings in disputes resulting from insurance contracts. The arbitration centre deals with disputes resulting from (i) motor insurance contracts, (ii) residential and commercial insurance contracts, for claims not exceeding € 50,000, (iii) certain types of civil liability insurance, for claims not exceeding € 50,000. For the any other types of insurance, CIMPAS must contact the insurer for the purposes of adhering to the centre and resolving the relevant dispute.


19. What are the primary challenges to new market entrants?

Portugal has a mature insurance market that covers the majority of insurance and reinsurance lines. Foreign investment in the Portuguese insurance market, notably in existing insurance undertakings, has increased during the past few years and there are currently a few insurance undertakings with a high market share. Notwithstanding the aforementioned, the Portuguese insurance market is envisaged to continue growing as insurance indexes show that the local market is below average for EU standards.

Furthermore, newcomers to the local market may take advantage of technology-related opportunities and may benefit from being more agile as to respond to customers' needs which are constantly changing, more rapidly than ever before.



To what extent is the market being challenged by digital innovation?



Digital innovation is one of the greatest challenges to be faced across all sectors of the market. On the front-end of these challenges, we find that big data and other relevant upcoming technologies provide for a set of tools that will bring relevant changes to competition, productivity and client care. The impact is to be felt across all industries, including the insurance sector. The volume, variety and accuracy of the information that is currently available is expected to be used for risk assessment in each insurance product distributed. As an example, digital innovation will allow insurance undertakings to collect information on the insureds' driving style, the kinds of roads they are used to circulate on so as to better assess the risk associated with that specific insurance policy. The first attempt by an insurer to use such devices in Portugal was announced in 2018. This circumstance will inevitably lead to tailor made insurance policies which will be directed to a very specific individual (subject, however, to data protection rules implemented across Europe).

Furthermore, insurance undertakings are to adjust their communication channels so as to reach specific potential clients, which are increasingly more sophisticated, therefore preventing the necessity to resort to third parties to act as intermediaries.

21. Over the next five years what type of business do you see taking a market lead?

The current social, technological and economical context inevitably leads to the emergence of a new set of risks to which the insurance market shall be responsive, notably with respect to terrorism, cyberspace/cybercrime, data collection, environmental changes, population ageing or alternative transportation mechanisms.

As an example, we tend to believe that in the next few years, the majority of the customers will be accessing and purchasing goods and services through online platforms or devices and the transportation sector will become increasingly automated. Insurance undertakings have started and will continue to promote and adapt their products to the specific requirements of the industry. Insurtech startups have popped up and multiplied in larger markets, most notably the U.S. We believe that in the next five years we might see them turn up and grow in Portugal, although perhaps a few more years will be needed for them to take a marked lead in Portugal.

