Portugal

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1. WHAT ARE THE SOURCES OF INSURANCE AND REINSURANCE LAW?

Given that the Portuguese legal system is a civil law system, the primary source of law is statutory law. Court decisions are only relevant for the purposes of interpretation or where otherwise specified. In Portugal, insurance contracts and the activities of insurance companies are governed by different statutes, emanating from both the Portuguese Parliament and from the Portuguese Government, as provided for in the Portuguese Constitution.

The fundamental statute applicable to insurance contracts is Decree-Law 72/2008 of 16 April 2008, which approved the Law of Insurance Contracts (hereinafter LIC). This statute, which entered into force on 1 January 2009, contains a general part on the main aspects of insurance contracts; such as contract formation, pre-contractual and contractual duties of information, the payment of premiums, insurance coverage, co-insurance and reinsurance, group insurance, risk alteration, claims and termination. This general part is followed by two additional parts concerning respectively, indemnity insurance and personal insurance. In the first of these additional parts there are provisions on the most common sub-types of indemnity insurance contracts: liability insurance, fire insurance, crop and livestock insurance, goods in transit insurance, financial insurance, legal expenses insurance and assistance insurance. The latter contains provisions on life, accident and health insurance.

Notwithstanding the enactment of the LIC, the legal framework on maritime insurance is set out in the Portuguese Commercial Code approved by the Charter of Law of 28 June 1888.

Furthermore, there are several legal rules concerning certain types of insurance contracts eg, accidents-at-work insurance, motor vehicle liability insurance and credit and security insurance, which are not included in the LIC but are widely dispersed throughout other statutes and regulations.

Separate statutes also regulate some particular aspects of the insurance contract in general or of certain types of insurance contracts eg, crop insurance, fire insurance and accident insurance. For instance, Decree-Law 384/2007 of 19 November 2007, establishes the duty of information of the insurer to the beneficiary in life and accident insurance, and in capitalisation operations foreseeing a beneficiary in the event of death, and sets up a central register of such contracts and operations.

Occasionally provisions of statutes whose primary subject matter is not

insurance also apply to insurance contracts, due to the latter falling generally (or being in some cases able to fall) within their scope: this may be observed with regard to, among other statutes, Decree-Law 446/85 of 25 October 1885 (as amended) on standard terms, Decree-Law 143/2001 of 26 April 2001 (as amended), regulating contracts negotiated at a distance (distance selling), Law 14/2008 of 14 July 2008, on the prohibition of sexual discrimination in the provision of goods and services, or the Portuguese Securities Code Decree-Law 486/99 of 13 November 1999 (as amended), which is partially applicable to insurance contracts linked to investment funds.

Contractual matters not specifically dealt with by the above-mentioned statutes are subsidiarily governed by the Portuguese Commercial Code of 1888 and the Portuguese Civil Code of 1966.

The principal statute which regulates the activity of insurance companies, mainly from a regulatory point of view, is Decree-Law 94-B/98, of 17 April 1998 (as amended). It sets forth the main requirements with which insurance companies must comply in order to be able to operate in Portugal. Unlike the above-mentioned legislation, this statute is essentially the product of the implementation of EU Directives. In terms of insurance supervision, this statute is supplemented by that which sets out the powers of the Portuguese regulator, the Portuguese Insurance Institute (Instituto de Seguros de Portugal), approved by Decree-Law 289/2001 of 13 November 2001 (as amended).

The activity of insurance and reinsurance mediation is largely regulated by Decree-Law 144/2006, of 31 July 2006 (as amended). This statute also draws heavily on EU Directives.

The Portuguese Insurance Institute is also entitled to issue its own regulatory norms (*Normas Regulamentares*), to the extent that the existing legislation allows for the furtherance of certain aspects thereof by the Portuguese Insurance Institute.

As a member state of the EU, Portugal is also bound by European legislation on insurance matters, comprising not only the general principles and provisions of the Treaty of Rome, but also Regulations, Directives, Decisions and Recommendations. The EU's main objectives here are to ensure that the most significant European principles, such as freedom of establishment and freedom to provide services, are upheld by the legislation of all member states.

2. HOW AND BY WHOM IS INSURANCE/REINSURANCE REGULATED?

The insurance/reinsurance sector in Portugal is supervised by the Portuguese Insurance Institute. The rules on insurance and reinsurance supervision are mostly set out in two key legal instruments: Decree-Law 94-B/98, of 17 April 1998 (as amended), which sets out the legal framework of insurance/reinsurance regulation, and in particular aspects regarding the access of insurance/reinsurance companies to the market and the performance of insurance/reinsurance activity in Portugal; and Decree-Law 289/2001, of 13 November 2001 (as amended), which sets forth the organisation and powers of the Portuguese Insurance Institute. Insurance

supervision has a dual focus. On the one hand, there is prudential supervision, aimed at ensuring financial stability through risk recognition and control, resulting in measures designed to secure both the system's and individual operators' resilience. On the other hand, there is behavioural supervision, aimed at ensuring market transparency and consumer protection, by creating and overseeing rules of conduct to be complied with by said operators-insurers, reinsurers and insurance intermediaries.

The Portuguese Insurance Institute's scope of supervision mainly extends to Portuguese insurance companies and to the local branches of non-EU insurance companies. Supervision of activity in Portugal of insurance companies from other EU member states is mostly performed by the relevant member state's insurance regulator, pursuant to the principle of the home member state's control. There are, however, some exceptions to this principle ie, certain supervisory powers which are shared by the home member state insurance regulator and the Portuguese Insurance Institute. Supervision is also an attribution of the Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* or CMVM), in what concerns certain aspects of insurance contracts linked to investment funds, eg 'unit-linked' products. The CMVM may also issue regulations to the effect of supervision.

In its supervisory capacity, the Portuguese Insurance Institute is entitled, among other powers provided for, to:

(i) verify the compliance of insurance/reinsurance companies under its supervision with technical, financial, legal and tax obligations;
(ii) obtain information from insurance/reinsurance companies regarding their situation and activity;
(iii) take all necessary measures to ensure that the activity of insurance/reinsurance companies complies with the applicable legal and regulatory provisions, and eliminate any irregularity which might harm the insured persons or beneficiaries;
(iv) guarantee the enforcement of the measures referred to in (iii), if necessary by means of judicial proceedings; and
(v) obtain all necessary information on contracts that are in the possession of insurance intermediaries.

In order to be able efficiently to carry out those and other duties, the Portuguese Insurance Institute is additionally entitled to issue binding instructions and recommendations to insurance/reinsurance companies.

Besides supervision, the Portuguese Insurance Institute has many other responsibilities, including: rendering assistance to the Portuguese Government in defining the insurance sector's policies, supplementing the existing legislation by issuing regulatory provisions, and executing those policies and regulations, as well as the task of collaborating with national authorities and similar entities from other EU member states. The Portuguese Insurance Institute also supervises the activities of insurance/reinsurance mediation and pension fund management.

The Portuguese Government has publicly stated its intention to reform the supervision of the three major financial markets by adopting a dual model known as 'Twin Peaks'. This would entail replacing the

current market regulators with one regulator responsible for prudential supervision of all financial markets, and one regulator responsible for behavioural supervision of all financial markets. This would therefore lead to the extinction of the Portuguese Insurance Institute. However, no such legislative measures have been enacted yet so it is difficult to predict what will happen in this regard.

3. FORMATION OF A CONTRACT OF INSURANCE/ REINSURANCE

3.1 What is the duty of utmost good faith?

Under the general Portuguese law of contract there is a general duty of good faith imposed on each party during the negotiation and formation of a contract. In case of breach of this duty, the breaching party is liable for any damage caused to the other party (Article 227 of the Portuguese Civil Code). Besides duties of loyalty and of confidentiality, it is accepted that such pre-contractual duty of good faith includes duties of information regarding the relevant elements of the contract before its conclusion. However, certain doubts can arise in determining the extent of these pre-contractual duties of information. In fact, on the one hand, the parties must know all the relevant facts in order, clearly and consciously, to decide whether and how they intend to enter into the contract; on the other hand, in many cases, the withholding of some information may also be used as a relevant instrument of the negotiations, obviously within certain boundaries (this being known as *dolus bonus*).

Thus, it is understood that the extent of the pre-contractual duties of information may vary, depending on several factors, such as the parties, the type of contract, the way the contract is formed, the interests protected and other particular circumstances of each case. In this sense, according to Portuguese law, there are certain types of contracts – such as consumer contracts, contracts entered into between the financial intermediaries and their clients and insurance contracts – in which the parties have different contractual positions and levels of knowledge, with one of the parties being normally able to impose and/or negotiate more favourable conditions in order to protect their interests. In these cases, Portuguese law imposes specific, more detailed and, in several cases, stricter pre-contractual duties of information upon the parties, including duties of disclosure and duties of clarification (which are not generally foreseen in Article 227 of the Portuguese Civil Code). In these cases, it might make sense to affirm that there is a duty of utmost good faith.

Portuguese law imposes duties of information and clarification on the insurer *vis-à-vis* the policyholder concerning certain mandatory contractual elements of insurance contracts, such as the insurance coverage and its limits and exclusions, payment conditions, the duration of the contract and the applicable law, among others (Articles 18 and 20 LIC). Where the insurance contract has been concluded at a distance or with a consumer, there are specific duties of information which must also be fulfilled by the parties in accordance with specific legislation applicable to these matters.

Portuguese law also regulates the manner in which this information is presented to the policyholder. Such information must be provided in a clear way,

in writing and in Portuguese (except if the parties agree otherwise). Of course, it must also be provided before the contract is concluded (Article 21 LIC).

Since the entry into force of LIC on 1 January 2009, the insurer has a special duty of clarification regarding the scope of the insurance contract (Article 22 LIC).

Also applicable to most insurance contracts are the rules and requirements contained in the Portuguese legislation on standard terms (Decree-Law 446/85 of 25 October 1985, as amended), which protects consumers as well as professionals with regard to unfair contract terms, and which has incorporated the implementation of EC Directive 93/13 of 5 April 1993.

Equally, given that the policyholder or insured party is in a better position to provide the insurer with relevant information that allows the latter to assess and calculate an essential element of the insurance contract – the risk – they are also bound by specific and stricter duties of information: they have a positive duty of disclosure of all the facts that affect the risk before the contract is concluded (see below).

The duty of good faith also imposes contractual duties of information and disclosure on both contracting parties throughout the period of existence of the insurance contract.

3.2 What are the requirements on a purchaser of insurance or reinsurance to disclose information about the risk to the insurer and to present the risk 'fairly'?

According to Article 24 of LIC, the policyholder and/or the insured are obliged to disclose accurately, before the conclusion of the contract, all circumstances that they are aware of and reasonably consider that may affect the appreciation of the risk by the insurer. This obligation exists regardless of whether or not the insurer chooses to ask them to fill in a questionnaire in which such circumstances have been specifically addressed. This duty only extends to circumstances known by the policyholder or the insured. However, the policyholder and the insured have to make an effort to recall all facts that may affect the risk, namely, all facts that a normal and reasonable person would consider relevant to the assessment of the risk by an insurer.

Portuguese law clearly establishes that this duty of disclosure is independent of the presentation of a questionnaire by the insurer. However, Portuguese law sets out certain limits to this duty of disclosure. Should the insurer choose to ask potential policyholders to fill in a questionnaire, the insurer has to: ensure that the questions allow for accurate, clear and complete answers; review the answers provided before the conclusion of the contract; and ask for a clarification or revision of the answers provided, in case they are missing or in any way incomplete, uncertain, inaccurate or contradictory.

Finally, before the conclusion of the contract, the scope, limits and consequences of breach of this duty of disclosure must be explained by the insurer to the policyholder or the insured. Otherwise, the insurer may be liable for the damage arising from the breach of this duty.

The policyholder and the insured remain bound to duties of disclosure throughout the life of their insurance contracts.

3.3 What are the remedies for breach?

According to Article 23 of LIC, a breach by the insurer of the information duties set forth in Articles 18-22 of LIC may give rise to:

- the obligation to pay damages for loss arising out of such breach, on the basis of the general terms of the law; as previously mentioned, the general terms regarding this matter are set out in Article 227 of the Portuguese Civil Code, according to which the wilful or negligent breach of pre-contractual bona fide duties may give rise to civil liability;
- retroactive termination of the agreement by the policyholder, except in cases where it can be established that the breach of the insurer's duties did not reasonably affect the policyholder's decision to enter into the contract or where a third party has already made a claim under the contract. As mentioned above, the right retroactively to terminate the insurance contract must be exercised within 30 days from the date in which the policyholder received the documents which comprise the insurance policy.

The law provides for similar consequences whenever the insurer has apparently fulfilled its information duties, but the policy conditions turn out not to be in accordance with the information previously disclosed to the policyholder or to the insured.

The wilful breach of the policyholder's duties of disclosure regarding elements able to affect the assessment of risk is deemed as sufficient justification for the annulment of the contract, if the insurer so wishes and gives proper notice within the specified time limit, as provided for in Article 25 of LIC. In such a case, the general terms regarding the annulment of contracts apply, not without some adjustments. In particular, the insurer does not have to indemnify a claim arising out of an event taking place before it became aware of the breach of the information duties or during the annulment period. However, if the insurer has not wilfully or with gross negligence somehow contributed to the policyholder's breach, it is entitled to receive the premium regarding the period of annulment or, if the policyholder's breach was fraudulent, the premium corresponding to the entire duration of the contract.

In case of negligent breach of the same duties, and under the terms and within the period specified in Article 26 of LIC, the insurer is entitled to: (i) propose changes to the contract, setting up a time limit for the policyholder's acceptance or counter-offer; or (ii) terminate the contract, in case it succeeds in demonstrating that it has a policy of not entering into any contracts for the coverage of risks related to the omitted or wrongfully described facts.

4. WHAT IS THE ROLE AND FUNCTION OF INTERMEDIARIES?

In general terms, the function of insurance and reinsurance intermediaries is to bring together insurers and reinsurers and their potential clients.

According to Decree-Law 144/2006 of 31 July 2006, which implemented EC Directive 2002/92 of 9 December 2002 and sets out the legal framework of insurance and reinsurance mediation (the LIM), insurance and reinsurance mediation comprises the introducing, offering or carrying out other work preparatory to the conclusion of contracts of insurance or

reinsurance, of concluding such contracts or of assisting in the management and performance of such contracts, in particular in the event of a claim.

Accordingly, the LIM qualifies as an insurance intermediary any legal or natural person which initiates or exercises, for consideration, the activity of insurance mediation and as reinsurance intermediary any legal or natural person which initiates or exercises, for consideration, the activity of reinsurance mediation.

The exact role of the insurance intermediaries depends on the type of insurance intermediary involved. According to Portuguese law, which in this regard reflects the contents of the above-mentioned Directive, there are three kinds of insurance intermediary:

- tied insurance intermediaries ie, any person carrying on the activity of insurance mediation: (i) in the name and on behalf of one or more insurance undertakings in the case of insurance products which are not in competition, but who does not collect premiums or amounts intended for policyholders, insured or beneficiaries and who acts under the full responsibility of those insurance undertakings for the products which concern them respectively; and (ii) in addition to its principal professional activity, under the auspices of one or several insurance undertakings if the insurance is complementary to the goods or services supplied in the framework of this principal professional activity, and the person does not collect premiums or amounts intended for policyholders, insured or beneficiaries, and who acts under the sole responsibility of one or several insurance undertakings for the products which concern them respectively;
- insurance agents ie, intermediaries performing mediation activity in the name and on behalf of one or more insurance companies, or of another insurance intermediary, in accordance with the terms set out in the contracts entered into with the latter. Insurance agents may even intervene, per the insurance company's request, in the regularisation of any claims;
- insurance brokers ie, intermediaries that exercise their mediation activity independently from insurance companies, thus basing their activity on an impartial analysis of significant amounts of insurance contracts available in the market, so allowing them to advise their clients – the potential policyholders – according to their specific needs. Insurance brokers prepare the conclusion of contracts, provide assistance on those contracts and deliver technical opinions on insurance matters. So as to ensure insurance brokers' independence, they must maintain a certain degree of dispersion concerning the origin of their profits, which is defined by means of a regulation issued by the Portuguese Insurance Institute.

The exercise of insurance mediation within any of these kinds of insurance mediation companies is subject to registration with the Portuguese Insurance Institute. The LIM provides for certain particular requirements which the companies must comply with, in order to be able to be registered as insurance intermediaries.

There are certain duties intermediaries are legally bound to perform, most of them set forth in the LIM. Amongst others, insurance intermediaries must refrain from entering into contracts on behalf of insurance undertakings unless the latter have granted them powers to do so. They must refrain from covering

risks in their own name, must provide correct and efficient assistance under the contracts in the conclusion of which they intervene and try to prevent the issuance of incomplete or inaccurate statements by the policyholder. They must keep a record of the contracts in which they acted as intermediaries, inform the insurer of any change in the risks to be covered, advise potential policyholders on which contracts most effectively cover their risks and meet their interests and supply clarification on any issues related to such contracts. Furthermore, intermediaries perform market research, studies and analysis on insurance, giving their clients the necessary information to make reasonable decisions, based on their specific needs, on the contract clauses and the implicit costs, and also assist them in the regularisation of their claims.

The LIM also sets out specific duties of insurance brokers, taking primarily into account the independent nature of this kind of insurance mediation. One example is the obligation to suggest to the policyholders appropriate measures to avoid and reduce exposure to risk. Likewise the setting up of a system, the principles of which must be contained in a written document, so as to ensure equal treatment of all their clients and adequate management of their personal data and of claims and complaints.

4.1 For whom do they act?

In short, tied insurance intermediaries act on behalf of one or several insurance undertakings regarding their insurance products. Insurance agents act on behalf of one or several insurance undertakings or another insurance intermediary. Insurance brokers act independently of insurance companies and must be impartial with all of them, their clients being potential policyholders that approach them. Please see section 4, above, for a more detailed description.

5. WHAT ARE THE REQUIREMENTS AND DISTINGUISHING FEATURES OF INSURANCE CONTRACTS AND REINSURANCE CONTRACTS?

According to Article 1 of LIC, the typical contents of an insurance contract are: coverage by an insurer of certain risks of the policyholder or of a third party, by agreeing to provide the latter with an agreed benefit in case the aleatory event provided for in the contract occurs; and the payment by the policyholder of the respective insurance premium.

Article 72 of LIC further defines a reinsurance contract as a contract according to which one of the parties, the reinsurer, covers the risks of an insurer or of another reinsurer.

In reinsurance contracts, insurance companies act as policyholders and reinsurance companies cover the risks of the former. As the two parties exercise insurance activities professionally, applicable legislation is far less concerned with protection of the weaker party. Accordingly, the conclusion of reinsurance contracts is mostly subject to the principle of contractual freedom, being in general terms only subject to the boundaries of public policy provisions and specific legal restrictions. The vast majority of applicable legal provisions merely establish rules applicable by default. To some extent, the same also applies to insurance contracts covering large risks. However, a number of legal requirements

are commonly applicable to all insurance and reinsurance contracts.

Portuguese law sets out a number of specific requirements for insurance and reinsurance contracts. The most significant ones are addressed below. Firstly, however, as regards the parties, it is important to note that in order for an insurance contract to be valid the entity performing the role of insurer – or reinsurer – must be a certain type of legal person and be duly licensed to perform insurance activities in Portugal.

5.1 Requirement of insurable interest

The insured must have an interest in the risk covered worthy of legal protection (Article 43 of LIC). The contract will be invalid should the insured lack any interest in the covered risk when the contract is concluded, or will be terminated *ex lege* if and when such interest disappears.

In addition, Article 14 of LIC sets out some interests which are not legally insurable, thus prohibiting insurance coverage of:

(i) criminal, administrative or disciplinary liability (this prohibition does not extend to related civil liability);
(ii) kidnapping, hijacking and other crimes against personal freedom;
(iii) possession or transportation of narcotics or drugs, the consumption of which is prohibited;
(iv) death of children under 14 years of age, or of anyone incapable of taking care of oneself due to mental illness or for any other reason.

The prohibitions referred to in (ii) and (iv) above do not extend to strictly compensatory indemnities and the prohibition regarding 14-year old and younger children mentioned in (iv) does not apply whenever the policyholders are schools, sport institutions or similar entities which are not the beneficiaries of such insurance contracts.

The parties' agreement on the insured interests is naturally also subject to the general limits set out in the Portuguese Civil Code. Hence, the object of an insurance contract, like that of any other contract, must not be contrary to the law, public policy or morality, as such concepts are construed under general civil law in Portugal.

5.2 Transfer of risk

The transfer of risk from the insured/reinsured to the insurer/reinsurer is one of the essential aspects of insurance and reinsurance contracts. Such transfer may be said to occur when coverage of the risk by the insurer becomes effective, that is, when the insurer/reinsurer becomes bound to provide the insured/reinsured with the agreed benefit in case the aleatory event provided for in the contract occurs.

In accordance with Portuguese law, even though the transfer of risk may occur on the date freely set out by the parties in the insurance contract for such purpose (Article 42 of LIC), no transfer of risk may be effective without prior payment of the insurance premium (Article 59 of LIC). Once payment has occurred, coverage may be retroactive (Article 42 of LIC).

5.3 Prohibition against gambling

Gambling contracts are null and void, pursuant to the Portuguese Civil

Code. Some significant exceptions are, however, provided for by law. Insurance contracts are not affected by such legal restrictions, as the latter do not fall within the legal definition of gambling. Indeed, while in insurance contracts the parties agree on the transfer of a pre-existent risk, in gambling contracts the parties create a new risk which, typically, will randomly determine who wins and who loses. The requirement of insurable interest is thus key to the legal distinction between insurance and gambling contracts.

5.4 Form

According to Articles 32 and 74 of LIC, insurance and reinsurance contracts are not formal contracts, as their validity is not dependent upon them being entered into in writing or in any other specified form. This means that they are valid and effective from the moment the parties reach an agreement.

Nonetheless, (i) the insurer is bound to set out the terms of the insurance contracts in a written document – the insurance policy – which it is bound to deliver to the policyholder; and (ii) the terms of reinsurance contracts must also be put down in writing. These provisions are aimed essentially at ensuring that the contents of insurance and reinsurance contracts – which may be quite long and complex – are defined and made available in a written form, for evidentiary purposes. This also ensures that, in the event that such a document is found lacking, the parties will not be taken by surprise by the contract's invalidity.

6. WHERE ARE THE CONTRACT TERMS TO BE FOUND?

The contract terms are found in the wording of the written document(s) the law calls the insurance policy. As stated above, even though an insurance contract does not have to be drawn up in writing in order to be valid under Portuguese law, the insurer is obliged to set out the terms of the contract in writing, at the time that the contract is concluded or subsequently, sign the policy and deliver it to the policyholder, pursuant to Article 32 of LIC.

A typical insurance policy will be composed of a document containing terms individually negotiated between the insurer and the policyholder, usually called the contract's particular conditions (*'condições particulares'*) which makes reference to another, much larger document containing the insurer's standard terms – the contract's general and special conditions (*'condições gerais e especiais'*). The form the policyholder typically fills in when offering to enter into an insurance contract will also compose part of the policy, as will any questionnaires that are filled in by the policyholder and/or the insured when the contract is being formed. Finally, any endorsements from time to time agreed by the parties will also be integrated within the insurance policy, such endorsements usually being called additional minutes (*'actas adicionais'*).

Although not part of the policy, any concrete and objective messages contained in the insurer's advertisements will also be deemed to integrate the contract by operation of the law (Article 33 of LIC).

Finally, a few aspects of insurance contracts are mandatorily regulated by law and cannot be discarded by the parties. Articles 12 and 13 of LIC specify which provisions of this statute contain absolute mandatory rules (ie, rules that may not be changed by convention of the parties) and relative mandatory rules (ie, rules

that may be changed by convention of the parties only if such convention sets out a rule which is more favourable to the policyholder, the insured or beneficiary). In addition, many other terms are deemed to be part of the contract by default: that is, they will be included in the contract unless the parties agree otherwise. An example is the exclusion whereby life insurance contracts do not cover death by suicide in the year following the contract's conclusion (Article 191 of LIC).

6.1 Slip

Please see section 6, above.

6.2 Wording

Please see section 6, above.

6.3 Implied terms, incorporated terms

Please see section 6, above.

7. CLASSIFICATION OF TERMS: WARRANTIES, CONDITION PRECEDENTS: SUSPENSIVE CONDITIONS OR SIMPLE CONDITIONS

The classification of terms into warranties and conditions does not apply to the laws of Portugal. The scope of each contractual term and the consequences of a breach are to be determined individually through contract interpretation and the applicability of the relevant rules. Of particular importance in this regard are the rules which mandatorily establish the consequences of any wilful or negligent errors or omissions in the provision of information on the insured risk by the policyholder and the insured, thus prohibiting insurers from imposing any stronger terms (Articles 25 and 26 of LIC).

8. LOSS

8.1 Triggers of loss

Article 99 of LIC defines a trigger of loss (*'sinistro'*) as the whole or partial verification of the event which activates the coverage of risk provided for in the agreement.

In view of the application of the principle of contractual freedom to insurance contracts (Article 11 of LIC), the question of which events shall give rise to an obligation by the insurer to supply the agreed benefit to the insured or to injured third parties must ultimately be answered on a case-by-case basis through contractual interpretation.

Nevertheless, the law does provide for the more usual scope of coverage of the classes of insurance which it specifically regulates. There are a few limits applicable in general to triggering events as well as several restrictions to contractual freedom in the parties' definition of triggering events in mandatory insurance contracts.

8.2 Proximate cause

There is no specific rule of Portuguese insurance law that deals precisely with the degree of causality which must exist between the triggering event and the loss suffered by the insured person.

For such purpose, and more prominently concerning certain kinds of indemnity insurance, one usually resorts to the general principles of civil liability law set out in the Portuguese Civil Code.

The obligation to indemnify pursuant to civil liability is dependent upon an assessment of causality between the damaging event and the loss suffered, made in accordance with the criteria of Article 563 of the Portuguese Civil Code. According to the this, as commonly interpreted and applied by the courts, a party shall be liable for any loss caused to the other party when such loss would not have occurred but for the action of the former (the sine qua non condition), except if, in abstract, such action would not be considered as adequate, according to the normal course of events, to cause such result.

8.3 Burden of proof

According to Article 100 of LIC, the occurrence of the loss must be communicated to the insurer by the policyholder, insured or beneficiary within the time limit set out in the insurance contract. If no time limit is stipulated, the loss must be communicated within eight days from the moment the occurrence of the event came to their knowledge. This notification must describe the circumstances of the event (essentially when and where it occurred), its possible causes and consequences.

In view of the above provision, we may conclude that it is the policyholder, insured or beneficiary who must provide evidence of the occurrence of the loss. The policyholder, insured or beneficiary must also provide the insurer with all the information it requests regarding the event and its consequences. Even though the extent of the information to be provided is usually defined in the policies themselves, it is understood that, generally, it shall be based on a reasonable diligence rule according to the *bonus pater familias* criterion commonly used in Portuguese civil law.

The insurer must fulfil its payment obligation pursuant to the contract only upon confirmation of the occurrence of the event, its causes, circumstances and consequences (Article 102 of LIC).

These provisions draw upon the general principle regarding burden of proof in Portuguese law, according to which the party which invokes a right bears the burden of evidencing the events which lay at the foundation of such right (Article 342(1) of the Portuguese Civil Code). Accordingly, and pursuant to the same general principle, the other party (the insurer) will bear the burden of proving any event which impedes, modifies or determines the extinction of the right invoked (Article 342(2) of the Portuguese Civil Code).

Given the above-mentioned principle, the distinction between all risks insurance and named-perils insurance is vital under the laws of Portugal. Thus, in the first kind of insurance, once the loss has been evidenced, it is for the insurer to prove that the event will fall under any one of the contract's exclusions. In the second kind of insurance, it is the policyholder, insured or beneficiary who must provide evidence regarding the cause of the loss, as simply proving that the loss has occurred will not suffice.

9. CLAIM PROCESS

9.1 Notification

As mentioned above, proper notice that the loss has occurred should be given to the insurer by the policyholder, insured or beneficiary within eight days from the date they became aware of the event which caused the loss, unless a longer term has been stipulated in the contract. The term 'proper notice' refers to the explanation of the circumstances of the occurrence of the loss, its possible causes and related consequences ie, all information relevant to the analysis of the claim and quantification of the loss. Such information should be provided by whoever has knowledge of it, hence the rule's reference, to the policyholder, insured or, if applicable, beneficiary.

If these requirements are not complied with, it is not possible for the insurer simply to refuse the claim. Article 101 of LIC holds that the contract may allow for a reduction of the benefit to be provided by the insurer to the extent of the damage caused to the insurer by such non-compliance. Only if such non-compliance is intentional and causes significant damage to the insurer may the contract determine a forfeiture of the right to an indemnity or any other insurance benefit.

If the insurer became aware of the loss by any other means within the agreed term however, or proof is made as to the unreasonableness of requiring an earlier notice under the circumstances, the rule referred to in the previous paragraph shall not apply and the insurer is obliged to accept the claim.

In mandatory civil liability insurance, such contractual clauses regarding non-compliance with the notice requirements are unenforceable as against the injured persons, the insurer being however entitled to reimbursement by the policyholder and/or the insured, subject to the same limitations (Articles 100 and 101 of LIC).

9.2 Claims co-operation

Regarding claims co-operation, two kinds of duties may be identified: on the one side, the duty of the policyholder, the insured and the beneficiary to provide the insurer with information regarding the event; on the other side, their duty to mitigate losses.

Regarding the first kind of duty, as previously referred to LIC sets out that the notice of loss made by the policyholder, insured or beneficiary must specify the circumstances of the event, its possible causes and consequences. Furthermore the policyholder, insured or beneficiary must provide all relevant information regarding the loss and its consequences that the insurer reasonably requests.

In the case of mandatory motor vehicle insurance, this obligation is set out in more detail. It is foreseen that the policyholder or insured must also provide all elements and relevant documents and/or witnesses for the appropriate assessment of the liability – Article 34 of Decree-Law 291/2007 of 21 August 2007.

Regarding the second kind of duty, the policyholder, insured or whoever may benefit from an indemnity insurance all bear the burden of avoiding or limiting losses by all possible means available to them. Non-compliance with this damage-mitigation requirement has the consequences described above in section 8. Since these provisions are mainly aimed at protecting the insurer's

best interest, the law imposes on the insurer the duty of reimbursement of any costs and expenses incurred by the policyholder, insured or beneficiary, even if the means employed prove to be ineffective (Articles 126 ff. of LIC).

A specific provision regarding co-operation comprising the two kinds of duties referred to above is established for civil liability insurance contracts only, within Article 140 of LIC on the powers of defence of the insurer within judicial and administrative proceedings. This provides that the insured must supply the insurer with all information reasonably requested and refrain from worsening the substantive and procedural position of the insurer.

9.3 Proof of loss

As a rule, evidence of the loss may be provided by any possible means, within the general limits of the law. Nonetheless, the parties may agree to limit the admissible means of evidence, pursuant to the principle of contractual freedom, and without prejudice to any applicable rules and general principles of the law which may hinder such contractual freedom.

9.4 Fraud

If the policyholder, insured or anyone who may benefit from an insurance contract supplies the insurer with erroneous or inaccurate information with the knowledge that the information is false or misleading and does so with an intent to benefit from such behaviour, whether or not a claim is contemporaneously lodged, the contract will be annulled or will cease to bind the parties, depending on whether such behaviour happened before or after the contract has been concluded, and any claims lodged will be forfeited.

If the event which triggered the loss has been wilfully caused or aggravated by the policyholder, insured or beneficiary with a view to receiving the insurance indemnity, the respective claim may be refused by the insurer.

This type of insurance fraud may also constitute a criminal offence, punishable with a fine or with imprisonment of a maximum of eight years under Article 219 of the Portuguese Penal Code.

9.5 Subrogation

Unless otherwise agreed between the parties to the insurance contract, if any payment is made by the insurer under an indemnity insurance contract in respect of a claim, the insurer shall be subrogated in the insured's rights against any third party who may be liable for the loss, up to the amount paid by the insurer (Article 136 of LIC).

That rule does not extend to cases of negligence where the insured is responsible for the third party who is liable for the loss or where the third party who is liable for the loss is the insured's spouse or domestic partner, or their relatives in the ascending or descending lines living in the same household as the insured, except when such liability is covered by another insurance contract.

The policyholder or insured shall be liable, up to the amount paid by the insurer, for any actions or omissions that hinder the insurer from recovering any sums pursuant to its subrogation rights.

In principle, partial subrogation does not prejudice the insured's right to

recover uninsured losses, except when otherwise provided in respect of any large risk insurance contract (Article 136 of LIC).

The rule on subrogation is the opposite in the case of non-indemnity insurance contracts (Article 181 of LIC). In such contracts, if any pre-determined amount is paid by the insurer pursuant to a stipulation of the contract, the general rule is that the insurer shall not be entitled to subrogation. The parties, however, may agree otherwise.

Finally, from a procedural perspective, as a result of subrogation, insurers have the legal capacity to bring an action directly against the third party (Article 593(1) of the Portuguese Civil Code).

9.6 Double insurance

According to Articles 133 and 180 of LIC, the same risk relating to the same interest can be covered simultaneously, and for an identical period of time, by two or more independent insurance contracts concluded with two or more insurers, even when the sum total of all insured capitals exceed the value of such risks.

In such cases of double insurance, the policyholder or insured must give notice of it to each relevant insurer, as soon as they become aware of the situation and must disclose the situation in any claim they lodge. Fraudulent breach of the duty to disclose that information to the insurers relieves them from their obligation to perform under the insurance contracts.

In non-indemnity insurance, the danger of over-compensating the insured does not exist, as any pre-determined amounts paid under such insurance contracts may freely be accumulated by the insured.

In indemnity insurance, however, the rule that compensation is always limited to the amount of the loss will apply. Accordingly, the insured is allowed to demand payment under any or all of the relevant insurance contracts. Unless otherwise agreed, each insurer involved in a claim shall be liable for the loss, up to the respective indemnity limit, in proportion to the maximum amount that each might have had to pay if there was a single insurance contract.

10. REINSURANCE CLAIMS ISSUES

10.1 Follow settlements

There is no rule similar to the 'follow the settlements' rule under Portuguese law but neither are there any mandatory legal provisions which forbid the stipulation of a similar rule in reinsurance contracts. It is thus a matter left to the parties' contractual freedom, as is the case with most matters in the field of reinsurance.

One could say that the primary source of the rules applicable to the parties of a reinsurance contract is the contract itself, in view of the fact that the legal provisions on insurance contracts are applicable to reinsurance contracts only by default, to the extent they are compatible with reinsurance (Article 73 of LIC). Pursuant to the principle of contractual freedom, the parties are free to stipulate the exact contents of the reinsurance contract, subject only to the limits arising out of mandatory provisions of general law (such as those of public policy and morality).

Nothing being provided thereon on the reinsurance contract, the terms of the underlying insurance contract will have no immediate effects on the

contractual relationship between the insurer (cedent) and the reinsurer, as authors and courts unanimously accept that a principle of relativity of contracts exists under Portuguese law, meaning that the provisions of a contract are only binding upon its parties (Article 406(2) of the Portuguese Civil Code).

10.2 Claims control

Similarly, no specific rule on claims control by reinsurers exists under Portuguese law. Also in line with the principle of the relativity of contracts, Article 75(1) of the LIC clearly sets out that, without prejudice to any different stipulations made in the reinsurance agreement, as a general rule the reinsurance does not set forth any direct link between policyholders of insurance contracts and the respective reinsurers. Again, this aspect is subject to the contractual freedom of the parties ie, they may agree otherwise and frequently do so. Even if no such agreement is included in the reinsurance contract, it is also possible for reinsurers to take action in the claims process in the capacity of agents of, or experts named by, the insurers.

10.3 Aggregation

With no specific rules regarding aggregation in reinsurance contracts either, this matter is also subject to the principle of contractual freedom.

10.4 Law and jurisdiction

The determination of the law applicable to contractual obligations entered into after 17 December 2009 shall be made in accordance with EC Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I), which applies in general to reinsurance, even though Article 1 of the Regulation excludes from its scope a certain kind of insurance contract.

As Article 7 of the Regulation, which deals specifically with insurance contracts, expressly excludes reinsurance from its scope, Articles 3 and 4, regarding contractual obligations in general, apply.

According to Article 3 of the Regulation, the parties may choose the law applicable to the whole or part of the contract, such choice having to be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

Article 4 of the Regulation further sets out a framework for the cases in which the law applicable to the contract has not been chosen by the parties in accordance with Article 3. In such cases, in what specifically concerns reinsurance contracts, the law governing the contract will be the law of the country of the corporate seat of the party required to effect the characteristic performance of the contract (which, in reinsurance contracts, is unanimously accepted to be the reinsurer).

As a final remark, it is quite common for reinsurance contracts relating to risks situated in Portugal to be subject to a foreign law and for the parties to choose a foreign jurisdiction to settle reinsurance disputes. No judicial decisions are known which deal specifically with reinsurance. Therefore, this area of the law remains essentially theoretical, as it has yet not been seriously tested in practice.