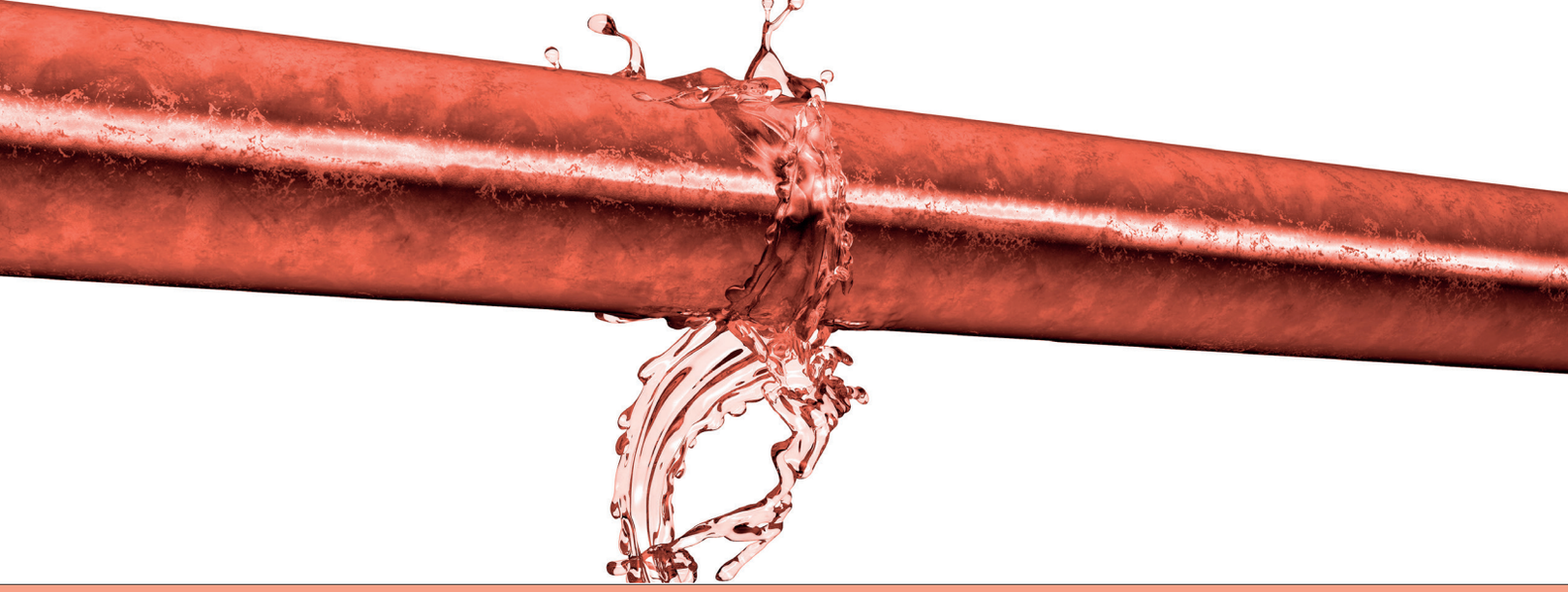

ICLG

The International Comparative Legal Guide to:

Insurance & Reinsurance 2017

6th Edition

A practical cross-border insight into insurance and reinsurance law

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General Chapters:

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Chapter 24

Portugal


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

According to the Portuguese Legal Framework on the Access to and Exercise of the Insurance and Reinsurance Activity (Decree-Law 147/2015 of 9th September), the Insurance and Pension Funds Supervisory Authority (*Autoridade de Supervisão de Seguros e Fundos de Pensões* – "**ASF**") is the national authority responsible for the regulation and supervision of insurance, reinsurance, pension funds and their management companies and insurance mediation, both from a prudential and a market conduct point of view, including the supervision of the activity of national and international insurance and reinsurance companies in Portugal.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

In Portugal, an insurance or reinsurance company is incorporated under the form of a company by shares ("*sociedade anónima*"), or a mutual insurance or reinsurance company (a limited liability cooperative company) or a European company. Minimum capital requirements, which vary depending on the type of company and on the risks such company will cover, must be complied with.

An authorisation to carry out the insurance or reinsurance activity must be previously requested to ASF in which concession depends on the fulfilment of the following requirements for the future company:

a) the shareholders having adequate capacity to ensure a sound and prudent model of management of the company;
b) a business plan is submitted according to the legal rules;
c) eligible basic own funds complying with the minimum capital requirement;
d) eligible own funds are sufficient to comply with the solvency capital requirement; and
e) a system of governance compliant with the applicable rules.

The request for authorisation must be submitted to ASF with the following documentation:

a) a decision of incorporation of the company;
b) a project of the articles of association of the company;
c) an identification of the shareholders;
d) a detailed description of the system of governance;
e) a description of any close relationships with other entities;
f) a name and address of the Claims Representative;
g) an identification of the person responsible for the authorisation procedure; and
h) a business plan.

Once the authorisation request is submitted, a decision must be taken by ASF and communicated to the applicant within the maximum deadline of 12 months counting from the date of the application. Should the communication not take place within the referred deadline, the application will be deemed rejected.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers may in fact write business in Portugal as established in Decree-Law 147/2015.

In case the insurer is authorised in one Member State of the European Union to carry out insurance activity, then it may carry out the insurance activity in Portugal through a branch or under the freedom to provide services' regime, provided a notification procedure (carried out between the authorities of both countries) is complied with.

In case the insurer is incorporated in a third country (outside EU), it may write business in Portugal through a branch provided a previous authorisation is granted by ASF. The proceeding for the concession of this authorisation is considerably more complex than the one required to incorporate a branch of a European insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In Portugal, freedom of contract is restricted, among other legal instruments, by the Civil Code and by Decree-Law 72/2008 of 16th April – the Portuguese Insurance Contract Law (hereinafter referred as "**PICL**").

Firstly, article 280º of the Civil Code establishes that the contents of contracts cannot be contrary to public order rules.

PICL establishes mandatory terms which restrict freedom of contract, namely in the cases of mass risks insurance, and generally the prohibition of contracting insurances which cover certain risks such as criminal, disciplinary or misdemeanour responsibility (although they may cover the civil liability associated to either of them), as well as accidental death of children under 14.

Also Decree-Law 446/85 of 25th October foresees the prohibition of abusive contractual clauses with a view to protect individuals

and consumers in the face of standard terms and clauses inserted in standard contracts, such as insurance policies.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The Portuguese Commercial Companies Code foresees the public civil liability of directors and officers for the damages caused to the company, to the shareholders and to the company's creditors in result of acts and omissions in breach of their legal duties.

The only case where it may be deemed that the directors are indemnified by the company is concerning company's damages resulting from act or omission of the director which was based upon a shareholders general assembly resolution.

1.6 Are there any forms of compulsory insurance?

There are numerous types of compulsory insurances, the most emblematic cases being the ones covering:

- car accidents – Decree-Law 291/2007 of 21st August;
- labour accidents – Decree-Law 260/2009 of 25th September;
- personal accidents regarding professional sport players – Law 5/2007 of 16th January;
- damage insurance regarding assets covered by leasing contracts – Decree-Law 149/95 of 24th July;
- fire insurance – Decree-Law 268/94 of 25th October; and
- public civil liability insurance regarding numerous professional activities.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The Portuguese substantive law relating to insurance is generally quite balanced in the determination of rights and obligations for insurers and insureds.

However, regarding mass risks insurance, the PICL bestows special protection to the policyholder and the insured including restraining contractual freedom of the parties, namely concerning the execution of the contract, premium payment, group insurance, etc.

Also Decree-Law 446/85 of 25th October allows ambiguous standard clauses to be interpreted in the most favourable manner to the insured, being that the failure to communicate those clauses to the insured may entail the exclusion of said clauses from the contract.

2.2 Can a third party bring a direct action against an insurer?

Car (motor) civil liability insurance law establishes that the legal action with a view to claim damages resulting from car accidents must be filed by the injured against the insurer solely – cfr. article 64º of Decree-Law 291/2007 of 21st August.

Article 140º of the PICL states that a third party may also bring a direct action against an insurer in the following cases:

- the insurance contract foreseeing said right; and
- if the insured informed the third party that an insurance contract exists and a direct negotiation took place between the third party and the insurer.

2.3 Can an insured bring a direct action against a reinsurer?

Pursuant to the principle of relativity of contracts (article 406º of the Civil Code), generally only the parties to a contract are bound by its terms and conditions.

Nonetheless, the law allows that in certain circumstances, the reinsurer may be responsible directly before the insured, namely (in certain conditions) in case of insolvency of the insurer and if the reinsurance contract foresees such possibility.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Where a policy holder or insured breaches a duty to disclose to insurers all matters material to the evaluation of a risk, the insurer has several remedies which depend on the nature of the misrepresentation or non-disclosure – article 24º, 25º and 26º of PICL.

In case of intentional misrepresentation or non-disclosure, the contract is voidable by the insurer, being this entitled to refuse the payment of the insurance capital or relevant compensation (to the insured or third parties) and to withhold the insurance premium.

In case of negligent misrepresentation or non-disclosure, the insurer may within a certain deadline propose an alteration to the contract or terminate it by proving that it would never had covered the risk associated to the fact that was omitted or imprecisely declared.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

In Portugal, there is a positive duty on the insured to disclose to the insurer all matters material to a risk. According to article 24º of the PICL, prior or upon the execution of the insurance contract, the insured and/or the policyholder must declare exactly all circumstances that he/she is aware of and which are considered reasonably significant for the insurer to assess the risk even if they were not specifically asked by the insurer.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right of subrogation is established in article 136º of the PICL, which states that the insurer who has paid compensation is automatically subrogated (for the amount paid) in the rights of the insured against the third party responsible for the damages.

The right of subrogation does not need to be foreseen in a clause of the insurance contract to be enforced.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Generally and pursuant to the dispositions of the Civil Proceeding Code, commercial insurance disputes of any value should be brought

to the first instance Civil Court of the district where the event which gave cause to the dispute took place.

Nevertheless, insurance disputes may also be brought: to the Criminal Courts (should the event be also considered a crime); to the arbitration tribunal (when the parties established for that effect an arbitration clause in writing); and to Judges of Peace (in the case of claims involving amounts not exceeding € 15,000,00).

In Portugal, civil claims may not be heard by a jury.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

In Portugal, a commercial case in a Civil Court commonly takes between one and three years to be decided in the first instance, depending on the jurisdiction and specific court where the case pends. An appeal generally takes one year to be awarded by the high court. There is no legal mechanism to shorten the referred time frame.

Arbitration Tribunals and Judges of Peace generally take less than one year to decide.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

According to article 410º and the following of the Civil Proceeding Code, the court has the power to order all diligences required to achieve the truth of the facts and the fair composition of claim, even if it was not subject to request of such kind by a party.

The above-mentioned includes the power to order the disclosure/discovery and inspection of documents, information and other objects regarding both the parties and non-parties to the action, provided that these are important for the decision of the claim. The referred information may also be requested to Public Authorities.

Should there be the objective fear that certain testimony, inspection or expertise evidence may become impossible to obtain, the relevant evidence may be ordered even before a case has commenced according to article 419º of the Civil Proceeding Code.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Under the Civil Proceeding Code and the Law Bar Association Rules, a party can withhold from disclosing documents relating to advice given by or correspondence exchanged with lawyers, or produced in the course of settlement negotiations/attempts, as well as documents whose disclosure would entail the breach of physical or moral integrity and/or the intrusion in familiar life.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Generally evidence is given by the witness at the final hearing either personally or by videoconference operated from the court of the district of residence.

Nonetheless, the courts have the powers to require witnesses to give evidence before the final hearing as per the answer to question 4.1 above.

The witness who refuses to give evidence is subject to a fine in an amount determined by the judge and to be taken into court.

4.4 Is evidence from witnesses allowed even if they are not present?

In the special cases established in article 500º of the Civil Proceeding Code, the evidence can also be given by means of: (i) videoconference operated from the court of the district of residence; (ii) letter rogatory sent to the authorities of the country of residence, when the witness lives overseas; (iii) from the witness' personal residence or public service in case of sickness or other impediment; and (iv) by written testimony.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The primary rule is that the expertise is ordered by the judge and is to be performed by an appropriate public service, hospital or laboratory. This is, for example, the case of medical expertise which is always performed by the public Institute of Legal Medicine.

Should this not be possible, the judge appoints a single expert indicated by mutual agreement of the parties or, should an agreement not be achieved, indicated by the judge.

In case of particular complexity and if one of the parties require so, the judge may appoint a panel of three experts indicated in the following terms: each party appoints one and the third is appointed by the judge.

In any case, the experts cannot have any relation with the parties or with the subject under discussion in the claim. In this context, the experts can only meet the parties individually if it is strictly required by the nature of the expertise (e.g. medical expertise).

Pursuant to the rules of the Civil Proceeding Code and the Court Fees Code, the costs of the expertise are advanced by both parties and borne at the end by the defeated party.

4.6 What sort of interim remedies are available from the courts?

Whenever there is the imminent risk for someone to suffer a serious and irreparable loss to a legitimate right, the Civil Court may award a protective order adequate to protect such right – *see* article 362º of the Civil Proceeding Code.

The protective order may assume any form that is adequate to the protection of the threatened right, and it may also assume the following specific types as established by the proceeding law:

- provisional restitution of the possession of properties;
- suspension of illegal companies shareholders' resolutions;
- provisional payment of alimony (to spouses, children or other dependents);
- provision payment of compensation (normally applicable to the injured in car accidents);
- seizure of debtors' assets to ensure the payment of debts to the creditor;
- embargo of construction works; and
- seizure of assets, goods or documents to prevent dissipation or occultation.

This type of proceeding, which is by nature urgent (it may take up to two weeks to be decided) and provisional, may be requested either prior to the relevant law suit or during the pendency of said action.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The defeated party in a law suit has the right to appeal from the decision of the first instance court to a higher court. The deadline to request the appeal is 30 days counting from the notification of the decision.

There are two levels of appeal: a first one to the Court of Appeal of the competent territorial area; and a second one to the Supreme Court only for specific legal questions.

The appeal to the Court of Appeal is only allowed for claims in an amount above €5.000,00, while the appeal to the Supreme Court is allowed for claims above €30.000,00.

The appeal to the Court of Appeal may be grounded on either legal or factual grounds. Considering that the witnesses' testimonies are audio-recorded, the appeal may also challenge the interpretation of such statements performed by the court. The appeal to the Supreme Court can only be grounded on legal grounds relating either to substantial or procedural questions.

The request of appeal is filed with the court whose decision is being appealed, and its transition to the higher court depends on the permission of the former. The granting or refusal of such permission depends purely on formal fundaments such as the amount of the claim or the fulfilment of the deadline. The eventual refusal of this permission may in its turn be subject to an appeal to the higher court.

The decision of an appeal normally takes up to one year.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The interest must be claimed by the plaintiff in the initial petition otherwise it is not awarded by the court.

Decree 277/2013 and Notice of 3rd January 2017 establish the following interest rates calculated per year:

- 4% for civil contractual or non-contractual credits;
- 7% for credits of commercial companies or other commercial entities; and
- 8% for credits of commercial companies towards other commercial companies for commercial transactions. This rate does not apply to compensations paid by insurance companies.

Should the court convict the defendant to pay the debt (capital) to the plaintiff, it will also convict him/her to pay interest calculated from the moment when the legal obligation was mature until the moment when it is duly satisfied by the debtor.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In Portugal, the amount of the court costs are proportional to the value being discussed in the legal proceeding. These costs are advanced to the court by both parties at the beginning of the proceeding and borne by the defeated party at the end of said proceeding. Should there be a partial conviction, the court also divides the costs proportionally between the parties.

For the above mentioned purpose, alongside with the court's final and definitive sentence, the winning party has the right to claim the court costs which were previously advanced by him/her from the defeated party.

Should the parties terminate the proceeding by means of an amicable settlement, the court fees may be reduced. The proportion of this reduction is arbitrarily determined by the judge and may be more relevant in high value claims.

In Portugal, there is no cost protection system for parties who make an offer which is rejected and who then obtain a better result before court.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

In the Portuguese legal system, there is not a rule that allows the courts to compel the parties to mediate disputes.

Law 29/2013 of 19th April, which establishes the legal framework of civil and commercial mediation, foresees the principle that the mediation procedure is voluntary and is subject to the informed and clear consent of the parties. Moreover, this law establishes that the parties are free to abandon this procedure at any phase of its course, and that the refusal to commence or to proceed with the mediation procedure cannot be deemed as a breach of the legal obligation of cooperation of the parties.

4.11 If a party refuses to a request to mediate, what consequences may follow?

According to the previous answer, there is no rule in the Portuguese legal system allowing the courts to compel the parties to mediate disputes.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

In Portugal, Voluntary Arbitration is ruled by Law 63/2011 of 14th December (Law of Voluntary Arbitration – "LVA").

Also, article 122º of PICL allows that any litigation concerning the validity, execution and non fulfilment of insurance contracts may be submitted to arbitration tribunals, even if the subject under discussion concerns compulsory insurance.

Should the parties establish an arbitration clause in a contract or other written document, namely in an insurance policy, and one of the parties submits the litigation to the state court, the state court must terminate this proceeding – article 5º of LAV.

The state court may also intervene in the conduct of an arbitration in the following cases:

- to appoint (under request of one of the parties) one or more of the arbitrators whenever the other party abstains from doing so;
- to destitute one or more of the arbitrators further to a "destitution proceeding" being carried out in the context of the arbitration proceeding; and
- assist the arbitration tribunal with the production of certain types of evidence.

Should the defeated party not comply with the tribunal award, the winning party in an arbitration proceeding is entitled to request the execution of the award to the state court.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The requisites of validity of an arbitration clause are the following: (i) it must be agreed in writing; and (ii) it must identify the specific legal relationship (between the parties) that, in case of dispute, shall be submitted to arbitration.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The courts can only refuse to enforce an arbitration clause should that clause be null and void, namely if it does not comply with the requisites referred to in the previous answer.

The parties may agree to arbitration through an arbitration clause entered into either before the dispute has arisen or afterwards.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The arbitration tribunal can generally make use of all the evidence proceedings indicated in the answer to question 4.1, namely the disclosure of documents if necessary with the state court assistance.

Furthermore, unless the parties have otherwise agreed, the arbitration tribunal may also award protective orders generally under the grounds and procedural terms indicated in the answer to question 4.6.

According to article 5º of LVA, a state court cannot order an injunction preventing any of the parties to start an arbitration proceeding.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

According to article 42º of LVA, the tribunal is legally bound to give detailed reasons for its award, unless the parties had agreed to renounce to such requisite.

Should the tribunal breach this obligation, the award will be declared null and void. The state court may remit the award back to the tribunal so that the reasons can be given.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

According to article 39º of LVA, the parties can only appeal from the contents, legal or factual grounds of the arbitration tribunal award should that possibility be specifically agreed by the parties in the arbitration clause.

Should that not be the case, the parties can only request the state court to declare the tribunal award null and void for the following reasons:

- an invalid arbitration clause;
- a breach of the civil proceeding principles of "parity of the parties" and/or "possibility to contradict" in the course of the arbitration;
- a decision regarding a subject which is out of the scope of the arbitration;
- an invalid composition of the arbitration tribunal panel;
- a final award not being produced in writing or not being duly substantiated;
- a final award being notified to the parties after the relevant legal or contractual deadline;
- the arbitration subject not being referable to Portuguese Law; and
- the contents of the award breaching principles of international public order.

The request of annulment of the tribunal decision must be requested to the state court within 60 days from the notification of the decision to the relevant party.

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