
INFORMATIVE NOTE



PLMJ

A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS
SOCIEDADE DE ADVOGADOS, RL

NEW REGIME ON CONTRACTS OF INSURANCE

The Portuguese Government has recently enacted the Decree-Law nr. 72/2008, published in the Portuguese Official Gazette on 16 April 2008, on contracts of insurance, which represents a significant milestone in the evolution of the regime applicable to contracts of insurance in Portugal.

The new contracts of insurance act has integrated in a single act and reformed legal provisions applicable to the contract of insurance previously dispersed in separate acts, such as the 1888 Commercial Code, Decree-Law nr. 94-B/98 of 17 April 1994, Decree-Law nr. 176/95 of 26 June 1995 and Decree-Law nr. 142/2000, of 15 July 2000.

The new regime laid down in the contracts of insurance act does not consist, however, of a mere compilation of separate acts. It entails significant innovations and developments on regulatory framework applicable to contracts of insurance, aiming at essentially achieving two objectives. On the one hand, to protect the weaker party in the contractual relationship, which is the policyholder, the insured or the beneficiary, in particular integrating and adapting to the reality of the insurance business certain features of regime contemplated in consumer protection legislation, with a view to reaching an improved balance between the insurer and the policy holder. On the other hand, to regulate new types of insurance emerging in the last years, such as the group contract of insurance and the contract of insurance for capitalization purposes.

The contracts of insurance act will enter into force on 1 January 2009. However, existing contracts of insurance subject to automatic renewal will be subject to the new act as from a renewal date falling on or after 1 January 2009, the insurance companies being under the obligation to notify the policyholder, 60 days before the renewal date, of the non-mandatory provisions applicable thereafter to the relevant contract of insurance. In relation to existing policies not subject to automatic renewal, the following shall apply: insurance policies covering risks NOT related with persons will continue to be governed by the former legislation governing contracts of insurance; insurance policies covering personal risks (e.g., life insurance) must be amended by the parties in conformity with new regime until 1 January 2011.

Without prejudice to a subsequent more detailed analysis of the new contracts of insurance act, we would highlight the following innovations:

(i) There is now an express indication of the mandatory provisions in the contracts of insurance act, which are then divided in absolute mandatory provisions (which the parties cannot waive or amend in insurance policies) and relative mandatory provisions (which the parties may amend or waive only in favour or for the benefit of the policy holder, the insured or the beneficiary);

(ii) Prohibition of discriminatory practices in connection with the execution, performance and cessation of contracts of insurance. The contracts of insurance act includes examples of discriminatory malpractices and establishes objective criteria in accordance to which certain discriminatory procedures may be acceptable. In this context, if the rejection of an insurance cover or an increase of the premium is based on a deficiency or an increased health risk, insurance undertakings are required to give customers the reasons for the rejection or the increase of the insurance premium based on the aforementioned objective criteria;

(iii) Imposition on the insurance undertakings of the duty to clarify the policyholder, prior to the entry into of the relevant contract of insurance, about which of the various forms of insurance, offered by the relevant insurer, is more suitable for the intended coverage, to the extent that such clarification is justified by the complexity of the coverage, amount of the premium and insured capital or is viable through the platform used for the conclusion of the contract;

(iv) The validity of a contract of insurance is no longer subject to compliance with any special form requirements; however, insurance undertakings are required to write down the terms of the relevant insurance policy. If agreed with the policyholder, insurance undertakings may also deliver the policy to the policyholder in an electronic long lasting support;

(v) Contracts of insurance may be drafted and entered into in a foreign language, at the request of the policyholder, subject to an agreement to that effect being entered into between the parties prior to the execution and delivery of the relevant insurance policy;

(vi) Contracts of insurance entered into by entities not authorized to pursue the insurance business in Portugal shall be null and void. However, such entities cannot allege the nullity and voidness of the contract of insurance against the policyholder unless the latter has acted in bad faith;

(vii) The regime of the initial risk statement has been expanded in order to ensure a fairer balance between insurance undertakings and customers. As from the entry into force of the new contracts of insurance act, although the policyholder is still under the obligation to inform the insurer of all circumstances relevant for the risk assessment, insurance undertakings must now inform policyholders of their information obligations and cannot adopt abusive conducts, such as using against policyholders the vagueness of responses given to broad questions or the failure to respond to questions in policy forms/applications accepted that way by the insurer;

(viii) The contracts of insurance act will maintain the existing regime contemplating a presumption that insurance undertakings are deemed to accept proposals for insurance policies with 14 days of their delivery by the policyholder. However, that presumption is watered down in the sense that insurance undertakings may now rebut such presumption if they provide evidence that they would never accept to sign with the relevant policyholder a contract of insurance governed by the terms and conditions set out in the relevant proposal;

(ix) With respect to risk, the contracts of insurance act contains specific solutions dealing with cases in which there is a reduction or an increase of the risk covered by the relevant insurance policy. In this context, certain reciprocal information duties are imposed on insurance undertakings and policyholders and modifications in, or cessation of, the insurance policy may be imposed to the extent that there is a material changes in the circumstances on which the parties have decided to enter into the relevant contract of insurance;

(x) The regime on the communication of losses covered by the insurance policy has also been expanded. A loss still has to be communicated to the insurance company no later than 8 days of its occurrence but a delay in delivering this communication shall only release the insurance company from its obligation to pay the relevant loss if such failure is due to a wilful misconduct of the policyholder or has caused a material damage to the insurance company;

(xi) Insurance undertakings (including managers, employees, agents and other assistants) must keep confidential all information coming to their knowledge in connection with the execution or performance of contracts of insurance, even if the same are not signed, are invalid or cease to be in force;

(xiii) Finally, the contracts of insurance act includes a specific chapter containing detailed rules applicable to property insurance (including civil liability insurance, fires insurance, harvest insurance, cattle insurance, goods transportation insurance, credit risk insurance, legal protection and assistance insurance) and personal insurance (including life insurance, capitalization transactions, personal accidents insurance and health insurance).

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Lisboa

Avenida da Liberdade n.º 224
1250-148 Lisboa

Tel: (351) 21 319 73 00
Fax: (351) 21 319 74 00

email geral: plmj@plmj.com

Porto

Avenida da Boavista n.º 2121, 4.º- 407
4100-137 Porto

Tel: (351) 22 607 47 00
Fax: (351) 22 607 47 50

Faro

Rua Pinheiro Chagas, 16, 2.º Dto. (à Pç. da Liberdade)
8000 - 406 Faro

Tel: (351) 289 80 41 37
Fax: (351) 289 80 35 88

Coimbra

Rua João Machado n.º 100
Edifício Coimbra, 5.º Andar, Salas 505, 506 e 507
3000-226 Coimbra

Tel: (351) 239 85 19 50
Fax: (351) 239 82 53 66

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