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# BRAZILIAN INSURANCE CONTRACT LAW: WILL THE STORK FINALLY DELIVERY IT IN 2018?

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It is a good time to talk about the future of insurance law in Brazil. In the Senate, the bill which will finally allow the country to have its first Insurance Contract Law is under advanced discussion.

In a world where the proliferation of novelties often exceeds the limits of the desired coexistence, business relations more than ever need legal certainty. Brazil today is perhaps a clear example of institutional and social uncertainty. To tackle this and achieve a reasonable level of progress, in addition to good corporate and state governance, it is essential to have a legal system that not only regulates the essence of business but also does this in an understandable manner. The State, individuals and companies need to feel they are safe when they enter into and execute their business.

This applies to legal business in general. Insurance companies still need clearer bylaws. In this case, protection is provided against unforeseen economic needs and the guarantee of protection is sold against what already seems impalpable in itself and is written down only by the party that makes a promise (insurance company) based on what often writes a third party (reinsurance company). Thanks to this intactness, insurances are considered to be black boxes – those who say they know them generally lie – and need legislation where they comply with the main rules, showing the way in the legal system as a whole. Bylaws apart from the legal system, such as resolutions and administrative official letters, are not enough; since they require of their interpreters much effort, experts and dictionaries, as well as discretionary creativity.

Insurance is also an instrument for the pursuit of economic public order. Without the instrumental insurances for economic activities, as well as for the autonomous guarantees that the insurance system can foster and the internal savings it can promote, the economic order is threatened and weakened.

They are also contractual links that regroup and ultimately resonate internationally, since the system which spreads risks often moves beyond national borders. That is why insurance contracts must be regulated with attention to the international scenario, not reproducing it, but reaching it with the necessary vaccines, preventing deviations and abuses. International reinsurers, dominated by a market with clearly subjective limits, and in which there are few players, naturally tend to expect that everything will be organized according to their own technical, legal and cultural reasons, rather than according to the historically constructed national legal reasons, in each country. A system of checks and balances, as commonly said, is always convenient for relationships to be more cooperative, long lasting and less conflicting.

For all these reasons countries seek to regulate the insurance business through *special laws on insurance contracts*.

There are few countries that combine the regulation of the *insurance contract* with that of the *insurance activity* (activity control law), such as France, which has a very comprehensive Insurance Code. Even rarer are the countries that continue to regulate the contractual matter of security in their Civil and Commercial Codes, such as Colombia and Paraguay.

The need for a special law on insurance contracts is not new, nor does it correspond to an outdated trend. Germany has an Insurance Contract Law since 1901; after many reforms, it amended another one in 2007. Belgium has an insurance contract law, since 1895; in April 2014, it issued a new law that came into force in November of that year, and insurers had to adjust their policies until June 1, 2015. Italy, which is always so attached to its Codes, has its 2008 Insurance Contract Law. Luxembourg and Japan have their own laws, between 1997 and 2008, respectively.

Portugal issued in 2007 its special law on the matter; by the way, the Portuguese law was based on only two bills, the German and the Brazilian (PL 3.555/2004). In a vocational course for judges promoted by the Portuguese Superior Judicial Council (Porto, 2009), Judge Moitinho de Almeida, the most renowned Portuguese-speaking insurance expert, in a lecture entitled "The Protection of the Policyholder and Insured Parties in the new insurance contract law", compared the then recent Portuguese law with foreign laws containing solutions more in line with the insurance business, always pointing out to the Brazilian project as a good paradigm.[1]

The United Kingdom, where written laws are rare, issued its special Insurance Contract law in 2015. The same happened with Denmark (1930, reforms in 2006-2015), Mexico (1935, reform 2013), India (1938), Ecuador (1963), Argentina (1967), Spain (1980), Israel (1981), Australia (1984), Austria (1958), Canada (1991), Japan (1995), Finland (1994), Greece (1997), New Zealand (1997), Norway (1989), Venezuela (2001), Switzerland (2004), Sweden (2005), Austria (2007), Portugal (2008), Cuba (2009), Costa Rica (2011), Turkey and Peru (2012), Chile (2013).

In Brazil, the legal community has been demanding a special law on insurance contracts for many decades.

The matter has been regulated by the Commercial Code of 1850, by Decree-Law 73/1966, and by the Civil Code of 2002, which contains rules drawn up in the 1940s and 1960s with a long delay, and even with setbacks.

This resulted in narrow-viewed rules, elaborated in the 1960s based on discussions that emerged in decisions of the Supreme Court of Brazil (STF), conflicts that dated back to the 1930s or 1940s.

An example is the solution that is provided in case an insured party fails to promptly pay the premium of the insurance that such party contracted. SUSEP has made efforts to establish a table of proportional terms, which we call a "*jaboticaba* table" because it is a Brazilian invention. Some insurance companies have already realized that it is best to write to the client so that he/she can settle the arrears. The Brazilian courts already understood uniformly that in order to suspend insurance coverage it is necessary for the

insurer to notify the insured party in advance, and grant such insured party a new term to pay the premium. However, the new backward Civil Code of 2002 brought the rule that a simple lack of punctuality suspends insurance coverage. Obviously, Brazilian courts did not accept it, once it is an ineffective rule which does not communicate with the general principles shaping the legal system, but some insurance companies willing to profit from judicialization, only admit the right to cover the claim after expiration of those who have the patience and the money to judicially fight for it.

In the late 1990s, it was known that the opening of reinsurance was imminent after nearly 70 years of IRB monopoly and, if there was no better regulation of the insurance contract, this would pose major problems for the industry.

Since the opening provided by Supplementary Law No. 126 of 2007, in May 2008, what has been growing in the Brazilian insurance market, despite the excessively patriotic publicity, are the so-called *prestamistas* (credit life insurance – which guarantee the credit to pay consumer installments in case of the insured death or disablement) and the extended guarantee insurance (which guarantee increased term for manufacturers' guarantee), two products with debatable morality and social relevance.

In addition to this whole uproar, the absence of a good law led the Brazilian Government (insurance superintendence, etc.) to draw up a number of normative documents, without the time and resources and without the democratic dispute and the care needed in drafting laws. A real mess.

A law is needed to gather the sparse laws, consolidate and harmonize them in a single law, making the normative insurance language compatible with the language generally used in the legal texts, making it easy to understand the main insurance rules for the protection of policyholders and insurers, regulating the consensual nature of insurance contracts and their application, and incorporating the advances of the Judiciary and the insurance technique, without encumbering operations, allowing them to develop with reasonable freedom, but according to clear rules and good principles, as per the best insurance contract laws.

Insurance for the protection of life, work, and property of individuals and large, medium-sized and small companies withered, and some practically disappeared. It came to such an extent that the president of a major international insurance company was greeted by his successor at his investiture ceremony for turning a small operation of large risk insurance into a thriving auto insurance operation.

Uncertainty on insurance contracts has reached alarming situations. Such contracts had their contents flattened, and their interpreters are financial executives, unconnected to the security considerations as we knew them until the eve of the opening. Brazilian infrastructure works, as well as private enterprises, remained covered by atrophied insurance contracts at best, and were thrown into the lottery of international arbitrations outside the country, based on unknown rights or the subjective equity of the arbitrators.[2]

In May 2004, the National Congress started to discuss the bill of what would be the first Brazilian Insurance Contract Law.

The draft was written by the Brazilian Institute of Insurance Law – IBDS, under my coordination and the coordination of the lawyer Flávio Queiroz de Bezerra Cavalcanti, and presented by then congressman José Eduardo Martins Cardozo, later Minister of Justice of Brazil.

It was undoubtedly one of the main texts of this kind in the 2000s. The drafting commission of the Portuguese special law, known as the "*Regime jurídico do contrato de seguro*" (Legal System of the Insurance Contract), as already mentioned, adopted only two legislative references in progress, the German and Brazilian bills:

"In order to draw up the draft, the Commission has taken into account, in addition to the national legislation in force and the various community Directives in this sector, the three Portuguese bills that review the insurance contract system (...), as well as some foreign legislation and bills under discussion in other countries to reform insurance law. (...). Regarding the bills under discussion, the Brazilian bill (Bill No. 3555, of 2004) and the German bill (Bill of the Federal Ministry of Justice for the Reform of the Insurance Contract Law, 2006) were taken into account. Such German bill was translated into Portuguese by the commission."[3]

Initially supported by the IBDS, the Brazilian Institute of Consumer Policy and Law (BRASILCON) and the Brazilian Institute for Consumer Protection (IDEC), the bill was immediately accepted by the business environment, receiving support from the Federation of Industries of the State of São Paulo (FIESP) and the National Confederation of Industries (CNI). Although it was widely supported in the insurance and reinsurance sector, entities representing insurance companies and brokers, the National Confederation of Insurance Companies (CNSeg) and the National Federation of Insurance Brokers (FENACOR) opposed to such bill.

Finally, in 2015 and 2017, CNSeg and FENACOR established with the IBDS an agenda that allowed for greater clarification on the content of the bill and resulted in the adoption of a common text that was eventually approved by the Chamber of Deputies, becoming a Bill of the Chamber (PLC 29/2017).

The resistance that emerged only recently, following the approval of PLC 29/2017 in the Chamber of Deputies, originates from the ABER – Brazilian Association of Reinsurance Companies and certain Law firms related to reinsurers.

The reinsurer sector, however, is divided. A major part of the sector continued to support the Bill, such as Terra Brasis, a reinsurer which considers it one of the elements necessary to realize the dream of Brazil becoming a center of excellence:

"In addition to these three points, the Botti believe that the new Insurance Law, summarized in the Chamber's Insurance Contract Bill (PLC 29/2017) under discussion in the Senate, would be important for the sector. It may have some misconceptions, but 90% is adequate. The sector would gain tremendously, especially consumers."

Currently, the Bill is in the Constitution and Justice Commission of the Federal Senate, and its rapporteur is Senator Armando Monteiro Neto, former president of CNI. If it is approved without changes in the Senate, it will proceed to presidential sanction. Otherwise, it will be necessary to reinvent the wheel in the Chamber of Deputies.

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1. https://www.csm.org.pt/ficheiros/eventos/formacao/2009_moitinhoalmeida_novo contratoseguro.pdf
2. This matter does not go unnoticed abroad. In an article named Insurance claims handling in Brazil, of October 2013, the U.S. law firm Locke Lord LLP stated "The vacuum of case law concerning reinsurance contracts in Brazil has caused the Instituto Brasileiro de Direito do Seguro to criticize the usage of arbitration and foreign courts determining disputes under these contracts. This position was adopted in light of the English Court of Appeal decision in Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 – it held that the arbitration clause is subject to English law despite that the policy provided for the application of Brazilian law." Available at https://www.lexology.com/library/detail.aspx?g=82d7308e-4104-4258-b967-e2ad8640e89d Access on July 30, 2018.
3. Available at http://www.asf.com.pt/NR/rdonlyres/DE68DB7F-5260-4BAF-B9ED-71144128EB90/0/OnovoRegimeJur%C3%ADdicodoContratodeSeguro.pdf Access on June 26, 2018.