

THE PROFESSIONAL
NEGLIGENCE
LAW REVIEW

SIXTH EDITION

Editor
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PREFACE

This sixth edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in nine jurisdictions. The *Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders concerned with the liability and regulatory issues of professionals across the globe. The variation in law and practice across the different jurisdictions is very noticeable and underlines the usefulness of a guide such as this.

In most jurisdictions, we now face a period of claims and regulatory issues arising out of the current economic and social turbulence. Environmental, social and governance (commonly known as ESG) issues are also a dominant theme across many jurisdictions, and these are bringing about significant changes – and challenges – in both the public and the private sectors. Jurisdictions and professions will be affected in different ways, although all will be alive to the fact that rapidly changing regulatory and legal landscapes, coupled with economic downturns, are the dry tinder for professional mistakes and wrongdoing.

This sixth edition is the product of the skill and knowledge of leading practitioners in nine jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all those who have contributed to this edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found in Appendix 1. I would particularly like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and especially to Bryony Howe, who has assisted in its production with great knowledge and skill. Finally, the team at Law Business Research has managed the production of this edition with passion and great care. I am very grateful to all of them.

Nicholas Bird

Reynolds Porter Chamberlain LLP

London

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PORTUGAL

Adriano Squillacce and Raquel Cardoso Nunes¹

I INTRODUCTION

i Legal framework

Professional liability is subject to the tort liability or contractual liability legal framework, depending on whether there is a contractual relationship between the parties to the dispute. Pre-contractual liability may be applicable in some cases.

The general legal framework of tort and contractual liability is established in the Portuguese Civil Code (PCivC).² Specific acts of professional misconduct may also be considered crimes or administrative infractions governed by the Portuguese Criminal Code or specific criminal and administrative laws (for instance, the Legal Framework of Credit Institutions and Financial Companies (RGICSF), the Portuguese Securities Code and the Legal Framework on the Taking-up and Pursuit of the Business of Insurance and Reinsurance).

Additionally, there are sectoral laws that set out specific rules on the liability of specific professionals or complement the general legal framework established in the PCivC (for instance, the Portuguese Companies Code³).

As general rule, professional liability claims must meet all the following requirements: (1) unlawful conduct (either by act or by omission) of the professional defendant; (2) guilt of either wilful or negligent misconduct (except in cases of strict liability); (3) causal link between the conduct of the professional and the relevant damage claimed by the claimant; and (4) damage suffered (either actual losses or the loss of profit).

While these general requirements should apply to both, there are important differences between the legal frameworks for tort and contractual liability; for example: (1) the claimant has the burden of proof under both regimes, but the professional is presumed guilty in cases of contractual liability and has the burden to rebut this presumption; (2) limitation periods applicable to contractual liability are longer than limitation periods applicable to tort liability; (3) in tort liability the court may award compensation lower than the amount of the actual damage (based on the *ex aequo et bono* criterion) with reference to the degree of guilt of the professional, financial status of the parties and further circumstances of the case; and (4) unlike the contractual liability established in the PCivC, joint and several liability is applicable to tort liability (and also to commercial obligations).

1 Adriano Squillacce is a partner and Raquel Cardoso Nunes is an associate at Uría Menéndez – Proença de Carvalho.

2 Article 483 *et seq.* and Article 798 *et seq.*, respectively.

3 Law No. 53/2015 of 11 June 2015 on the legal framework for traditional and multidisciplinary professional corporations regulated by professional public associations and the statutes of professional public associations, etc., and as recently amended by Law No. 12/2023.

Where there is concurrent tort and contractual liability, the majority of case law and legal scholars argue that the claimant is entitled to choose the applicable legal framework and should, therefore, weigh up the pros and cons of each regime – even though this choice is subject to modification by the court.⁴

Unlawful conduct by the professional may consist of a breach of contractual conditions or a specific duty of care (either by act or by omission). In this regard, the claimant will have to prove that the professional acted below the standards of a reasonable and competent professional with reference to the average standards applicable to his or her profession at the time that the relevant facts occurred (for instance, a surgeon who performed surgery without complying with the mandatory sterilisation protocol or a contractor who carried out work contrary to the terms requested by the client or to the conditions of the licence issued by the municipality).⁵

In a number of cases, professional defendants will try to challenge and discuss the level of the relevant professional standard to demonstrate that his or her conduct meets the applicable professional standard. For this purpose, it is common to produce evidence through expert witnesses and experts on the applicable professional standard. In extremely technical disputes, lawyers and judges may be advised by technical advisers during examination and cross-examination of expert witnesses and experts.

From a practical point of view, one of the most significant difficulties that claimants face is proving that the conduct of a professional defendant should be considered a suitable or adequate cause of the relevant losses (causal link), especially in cases of negligence. The burden of proof as to the causal link rests with the claimant, regardless of whether tort or contractual liability is applicable, and the existence and extent of this burden was recently confirmed by the Supreme Court of Justice in a standardisation decision regarding the liability of financial brokers.⁶ The causal link does not require proof that the damage concerned resulted directly from the specific negligent misconduct but, instead, only that a certain act was suitable or adequate to cause the damage.

A professional may have been negligent, but if this negligent conduct was not suitable or adequate to cause the losses borne by the claimant, then the claim should be dismissed.

Regarding professional negligence cases, some case law relates the causal link to the loss-of-opportunity theory.⁷ This theory may reduce the practical difficulty of producing

4 See the ruling issued by the Supreme Court of Justice on 7 February 2017, case No. 4444/03.8TBVIS. C1.S1, www.dgsi.pt (a different understanding was upheld in the ruling issued by the Supreme Court of Justice on 22 September 2011, case No. 674/2001.PL.S1, www.dgsi.pt).

5 See the ruling issued by the Appeal Court of Lisbon on 8 May 2014, case No. 220040/11.OYIPRT.L1-8, www.dgsi.pt.

6 See the ruling issued by the Supreme Court of Justice and published in the Portuguese Official Journal on 3 November 2022, case No. 1479/16.4T8LRA.C2.S1-A (standardisation decision No. 8/2022).

7 See the ruling issued by the Appeal Court of Coimbra on 7 November 2017, case No. 150/15.9T8OHP. C1, www.dgsi.pt: 'Having failed to appraise his client of a decision entirely unfavourable to the claims formulated in the action he was mandated to take to enforce them, thereby preventing the client from appealing (in the absence of which failing to comply with the statutory time limit laid down for that purpose thus allowing the decision to become final), thereby rendering it impossible to attack that decision nor have it reviewed by a higher court, the lawyer's omission is susceptible of giving rise to the separate harm of "loss of procedural chance" or loss of opportunity and, as such, subject to compensation.' See also the ruling issued by the Supreme Court of Justice on 10 September 2019, case No. 1052/16.7T8PVZ. P1.S1, www.dgsi.pt.

evidence regarding the causal link, but compensation should not correspond to the total loss borne by the claimant. In this case, the amount of compensation should be set according to the likelihood of success of the claimant in obtaining a certain profit or avoiding a specific loss, and in respect of which the claimant bears the burden of proof.⁸

Furthermore, professionals may enter into professional liability insurance policies and this type of insurance is actually mandatory for some professionals (for instance, lawyers, notaries, auditors, certified accountants, doctors, insurance intermediaries, gas assemblers and operators, real estate agents, port operators, real estate appraisers for property investment funds, credit intermediaries and credit or financial consultants services and travel agents).

ii Limitation and prescription

Limitation periods for the commencement of professional liability claims depend on the nature or type of civil liability. If a professional liability claim is based on tort liability, the right to compensation generally expires after three years⁹ and, in any event, no later than 20 years from the date of the misconduct.

In cases where the misconduct is considered a crime, the limitation period will be extended to that of the crime in question.

In the case of liability for breach of contract, the general limitation period applies, meaning that any claim to compensation becomes time-barred 20 years after the occurrence of the contractual breach.¹⁰ Specific professionals or acts of misconduct may be subject to special rules on limitation periods, as described below.

The limitation period generally starts to run on the date on which the claimant becomes aware of his or her right to compensation, irrespective of whether he or she has knowledge of the persons liable or the full extent of the damage incurred (which is usually the date that a claimant becomes aware that the requirements for civil liability have been met).

The running of the limitation period may be interrupted or suspended. The PCivC provides for several causes of interruption or suspension. For instance, the limitation period is interrupted by the judicial notification of a writ of summons or of any other act that, directly or indirectly, expresses the claimant's intention to enforce his or her right to compensation.

Interruption of the limitation period renders the time already elapsed without effect and restarts the applicable limitation period.¹¹ The new limitation period does not begin to run until a final decision is issued on the claims submitted to the court (*res judicata*), putting an end to the legal proceedings.¹²

8 See the rulings issued by the Supreme Court of Justice on 5 June 2021, 19 December 2018, 2 November 2017 and 5 February 2013, case No. 34545/15.3T8LSB.L1.S2-A, case No. 1337/12.1TVPR.T1.S1, case No. 23592/11.4T2SNT.L1.S1 and case No. 488/09.4TBESP.P1.S1, www.dgsi.pt. See also Orlando Guedes da Costa, *Responsabilidade Civil Profissional*, March 2017, Centro de Estudos Judiciários, p. 190 *et seq.*

9 Article 498 Section 1 PCivC.

10 Article 309 PCivC.

11 Article 326 Section 1 PCivC.

12 Article 327 Section 1 PCivC.

In this context, it should be noted that the Supreme Court of Justice has considered that in cases where the misconduct is considered a crime, pending criminal proceedings are a continued cause of interruption of the limitation period, which will only start running again once the proceedings are closed.¹³

The PCivC also sets out several causes of suspension of the limitation period, such as the claimant being prevented from enforcing his or her right because of *force majeure*, during the final three months of that period, as well as the claimant not enforcing his or her right because of the fault of the liable party.¹⁴

Claims for damages based on expired rights become time-barred and this may be invoked as a defence in proceedings regarding professional liability.

iii Dispute fora and resolution

Professional liability claims for damages are generally brought in first instance judicial courts with jurisdiction over civil matters.

The Portuguese Civil Procedure Code (PCPC) establishes the criteria for the competence of judicial (i.e., civil) courts.¹⁵ When a claim is brought under the tort liability regime, jurisdiction usually lies where the relevant facts (e.g., the unlawful misconduct) took place.¹⁶ When a claim is related to the performance or breach of contractual obligations, either the court of the location where those obligations should have been performed or the court of the defendants' registered office or place of residence is competent.¹⁷

In certain circumstances, professional liability claims can also fall within the scope of jurisdiction of the administrative courts. This is generally the case for professional liability claims relating to medical practitioners exercising their duties as public health providers. In this case, professional liability claims fall within the jurisdiction of the court where the unlawful misconduct took place.¹⁸

Judicial proceedings are initiated by means of a filed written petition, in which the claimant must argue the material facts constituting the cause of action. Subsequently, the defendant must present his or her defence, either asserting that the facts alleged by the claimant are not true, that they do not produce the consequences claimed by the claimant or

13 See ruling issued by the Portuguese Supreme Court on 22 May 2013, case No. 2024/05.2TBAGD.C1.C1, www.dgsi.pt.

14 Article 321 PCivC. In light of the public health emergency and to prevent and contain the spread of covid-19, limitation and expiration periods for all kinds of proceedings and procedures were suspended from 9 March 2020 to 2 June 2020, and again between 22 January 2021 and 5 April 2021.

15 Pursuant to the PCPC, Portuguese courts are deemed to be internationally competent when: (1) according to the applicable rules on territorial jurisdiction the claim may be filed in a Portuguese court; (2) the facts constituting the cause of action have taken place in Portugal; or (3) the claimant's rights may only be made effective by an action filed in Portuguese courts or initiating the lawsuit in a foreign country may impose significant difficulties for the claimant, provided there is a strong element of connection between the claim and the Portuguese legal system (Article 62 PCPC). Regulation (EU) 1215/2012 (the Recast Brussels Regulation) also applies to the issue of jurisdiction in claims brought against defendants who are domiciled in other EU Member States.

16 Article 71 Sections 1 and 2 PCPC.

17 Article 80 PCPC.

18 Article 18 of the Portuguese Administrative Courts Procedure Code.

that the claimant's petition must be dismissed because of some other circumstance, such as a legal objection. The claimant and the defendant must file their requests for evidence along with their pleadings.

The pleadings phase is usually followed by a preliminary hearing in which procedural matters are discussed by the parties and decided upon by the judge. Witnesses and experts are examined at the trial hearing. Subsequently, the parties present their closing arguments and the court renders its decision. In litigation involving sums exceeding €5,000, the decision may be appealed to the court of appeal and cases exceeding €30,000 may be appealed from the court of appeal to the Supreme Court of Justice.

In cases where civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims generally have to be brought within the criminal proceedings and will be decided by the same court deciding the criminal issue. The claimant either files his or her damages claim within the deadline for submission of the indictment by the public prosecutor when the claimant is a party to the criminal proceedings or within 20 days of the claimant or the perpetrator being notified of the indictment. Subsequently, the defendant must present his or her defence. The pleadings phase is followed by the trial hearing and subsequent decision by the court. The above-mentioned rules on appeals also apply here.

When civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims can only be filed separately and in civil courts in limited circumstances.

Professional liability claims can also generally be submitted to arbitration.

iv Remedies and loss

Under Portuguese law, the general principle is that compensation should place the injured party in the position that he or she would have been in but for the event causing the damage,¹⁹ including for pecuniary and non-pecuniary or moral damage (restitution *in natura*).

Whenever this is not possible, does not fully repair the damage or is excessively costly, the injured party is entitled to claim the equivalent monetary compensation for all damage caused by the unlawful misconduct, including actual loss, loss of profit and future damage, if its occurrence can be predicted.²⁰

Pursuant to Article 566 Section 2 of the PCivC, pecuniary compensation for damage should compensate the difference between the claimant's financial status 'at the most recent date that may be considered by the court' and the financial status he or she would be in were it not for the damage.

A claimant seeking compensation for damage is not required to specify the exact amount of the damage in the initial written petition and may formulate a generic claim in this respect when it is not possible to assess the full extent of the damage on the date the lawsuit is filed or if the claimant warrants that it is not possible to specify the exact amount of the compensation.²¹ If, in the course of the proceedings, the claimant concludes that the existing damage is of an amount greater than previously claimed, he or she may review the claim accordingly. If it is not possible for the claimant to specify the exact amount of the damage in advance of the issuance of the decision, the costs can be quantified in a subsequent procedure.

19 Article 562 PCivC.

20 Article 564 PCivC.

21 Article 569 PCivC and Article 556 Section 1(b) PCPC.

In cases based on tort liability, the court may award compensation determined on grounds of equity for an amount lower than the amount of the existing damage when the professional's liability, based on the degree of guilt, financial status of the parties and further circumstances, justifies this option.²²

Compensation for non-pecuniary or moral damage may also be awarded. The amount of this compensation is determined on grounds of equity.²³

Punitive damages are not provided for in Portuguese law,²⁴ but there is no cap on the amount of damages that can be awarded.

II SPECIFIC PROFESSIONS

i Lawyers

The practice of the legal profession as a lawyer in Portugal is regulated by the statutes of the Portuguese Bar Association,²⁵ which state that lawyers must, *inter alia*, act with honesty, probity, uprightness, loyalty, courtesy, sincerity and independence.

The Portuguese Bar Association is the public professional association representing professionals who are practising lawyers acting in accordance with the Association's statutes. It regulates the profession and takes disciplinary action against lawyers and trainee lawyers.

To practise as a lawyer, it is necessary to be registered with the Portuguese Bar Association. The practice of law without registration is considered a crime of usurpation of functions under the Portuguese Penal Code and is punishable with a prison sentence of up to two years or a fine of up to 240 days.

Lawyers' liability is determined on the basis of their own disciplinary rules, and a breach of these may lead to the lawyer incurring disciplinary or administrative liability, depending on whether the breaches are ethical or administrative and regardless of how the profession is practised (i.e., whether in terms of an individual, professional association, in-house counsel or multidisciplinary association).

Lawyers' liability to clients is generally considered to be based on contractual liability, although it can be based on tort liability when it arises out of ethical breaches. In any case, it should be noted that, generally, the obligation assumed by a lawyer in relation to a client is only a best-efforts obligation and not a results obligation, meaning that the lawyer assumes the obligation to use the most suitable means and knowledge in his or her power in

22 Article 494 PCivC.

23 Article 496 PCivC.

24 Ruling issued by Supreme Court of Justice on 25 February 2014, case No. 287/10.0TBMIR.S1, www.dgsi.pt.

25 Approved by Law No. 145/2015 of 9 September 2015, as amended.

conducting the client's matter in accordance with the law.²⁶ In other words, for a professional negligence claim to be successful, the claimant will have to demonstrate, inter alia, that the lawyers' conduct did not comply with the *lege artis* (best practice in the profession).²⁷

Under the statutes of the Portuguese Bar Association, lawyers are mandatorily required to have professional liability insurance.

ii Medical practitioners

The practice of medicine is regulated by the statutes of the Portuguese Medical Association, approved by Law No. 282/77 of 5 July 1977, as amended.

The Portuguese Medical Association is a public professional association representing medical doctors in Portugal. To practise as a doctor, it is necessary to be registered with this body. The practice of medicine without registration is considered a crime of usurpation of functions under the Portuguese Penal Code. Professional misconduct by medical practitioners may also raise disciplinary issues (which are addressed by the relevant disciplinary body).

Medical professional liability proceedings may be brought under the rules of tort liability or contractual liability, depending on the public or private nature of the medical practice. In any case, similarly to lawyers, medical practitioners are not assumed to have a results obligation in relation to their patients but only a best-efforts obligation. Nonetheless, medical practitioners undertake to use the most suitable means in their power in treating their patients in accordance with the advances of medical science. For a professional negligence claim to be successful against a medical practitioner, the claimant will have to demonstrate that the medical practitioner's conduct did not comply with the *lege artis*.

Medical practitioners in public hospitals and practices are generally subject to tort liability proceedings brought against them under Law No. 67/2007 of 31 December, which approved the Regime of Civil Liability of the State and Other Public Entities.

Under the Regime of Civil Liability of the State and Other Public Entities, state and other legal entities governed by public law are exclusively liable for damages arising from unlawful actions or omissions committed negligently by medical practitioners in the performance of their administrative duties and resulting from that performance. Medical practitioners are only liable when their acts or omissions are caused wilfully or when their diligence and care is significantly lower than that expected for the position they hold, with the public healthcare provider remaining jointly and severally liable. If the medical practitioners working for the healthcare institution act with the expected level of diligence and in accordance with the technical rules of medical science, they cannot be held liable, regardless of the outcome.

Medical practitioners in private healthcare providers are, in the absence of specific legislation, generally subject to the general rules of contractual liability set out in the PCivC, although the rules of tort liability may also apply.

26 Ruling issued by the Supreme Court of Justice on 10 September 2019, case No. 1052/16.7T8PVZ.P1.S1, www.dgsi.pt.

27 See the ruling issued by the Appeal Court of Coimbra on 7 November 2017, case No. 150/15.9T8OHP.C1, www.dgsi.pt: 'In the execution of a mandate, a lawyer must put all his knowledge and commitment in the defence, in the interests of the client, although having a significant margin of freedom or technical autonomy. As a rule, the obligation to win the case is not included in the execution of a mandate, rather only the obligation to defend those interests diligently, according to the *lege artis*, with the aim of overcoming the dispute. Hence the obligation arising from the exercise of this activity is assumed as an obligation of means, not of result.'

Other medical practitioners such as dentists and nurses are all also regulated professions that require prior registration with a public association and are subject to the above-mentioned rules.

Private healthcare providers are required to enter into mandatory professional liability insurance policies. Although public healthcare providers are not required to do so, the Portuguese Medical Association currently offers professional liability insurance to all doctors validly registered with the Portuguese Medical Association.

iii Banking and finance professionals

Liability of banking and finance professionals is currently governed by the RGICSF²⁸ and the Portuguese Securities Code, together with other specific regulations on these matters (for instance, Decree-Law No. 81-C/2017 of 7 July 2017 on the rules for credit intermediary activities and for providing credit consulting services) and, supplementarily, by the general legal framework established in commercial and civil law (such as the Portuguese Companies Code and the PCivC).

Banking professionals (including directors, managers and employees) must act with scrupulous and thorough professional diligence, neutrality and loyalty.²⁹ Credit institutions must ensure that all their professionals comply with a high level of technical expertise.³⁰ The prudential assessment of the reputation of banking and finance directors is also guided by high standards for the expertise and skills required.³¹ The above-mentioned Decree-Law No. 81-C/2017 sets similar rules on the duties of care of the professionals in these areas.³² This Decree-Law also sets out the mandatory requirement for professional liability insurance for these professionals.

The Portuguese Securities Code contains several legal provisions on the high standard of the duty of care of finance professionals. The Portuguese Securities Code states that financial intermediaries and their professionals should act according to high standards of diligence, loyalty and transparency.³³

Specifically with regard to the personal liability of banking and finance directors, the business judgement rule is applicable and, as mentioned above, exempts directors from liability. In this respect, the burden of proof of the relevant facts lies with the directors, as also mentioned above.

Unless the relevant misconduct is considered a crime, directors' professional liability is subject to a five-year time limitation from the date of the unlawful misconduct (or from the disclosure of the misconduct if it has been covered up) and the causing of damage, regardless of whether the full extent of the damage has already occurred (regarding the liability of directors towards the company itself, the limitation period does not start to run before the end of the term of office).³⁴

28 In late 2020, the Bank of Portugal submitted for public consultation a proposal for a Code of Banking Activity, which is intended to replace the RGICSF, with a view to systematising and updating the regulatory framework in light of the challenges faced by the national banking system. The public consultation closed in early 2021. However, to date, the proposal has not been submitted to Parliament.

29 Articles 74 and 75 of the RGICSF.

30 Article 73 RGICSF.

31 Articles 30-D and 31 RGICSF.

32 Articles 45 and 66.

33 Articles 304 and 306-A of the Portuguese Securities Code.

34 Article 174 of the Portuguese Companies Code and Article 318(d) PCivC.

Additionally, the Portuguese Securities Code contains several provisions on professional liability, such as the liability of specific professionals resulting from the preparation and approval of prospectuses,³⁵ investment advisers,³⁶ financial intermediaries and directors.³⁷

Regarding the liability of professionals resulting from the preparation and approval of prospectuses (e.g., directors, supervisory board members, auditors and any professionals that have assessed or certified financial statements used in the prospectus), their conduct is also assessed with reference to a high standard of professional diligence and they are jointly and severally liable for damage caused by inaccurate or false content.³⁸ If liable professionals prove that the relevant damage was also caused by reasons other than the lack of information or forecasts contained in the prospectus, the amount of compensation will be reduced accordingly.³⁹ The right to compensation resulting from a breach of the rules applicable to the prospectus must be exercised within six months of the knowledge of the fault in the prospectus content, and expires, in any case, within two years of the end of the effective term of the prospectus or its disclosure or amendment, as applicable.⁴⁰

Beyond contractual liability cases, the guilt of financial intermediaries is also presumed (and rebuttable) in pre-contractual liability disputes and also when information duties have been breached.⁴¹ Except for fraud or serious misconduct, liability is subject to a two-year time limitation from the date on which the client becomes aware of the conclusion of the business transaction and its terms.⁴² In the event of fraud or serious misconduct, a 20-year time limitation is applicable to contractual liability.⁴³

Furthermore, investment advisory professionals,⁴⁴ real estate appraisers that render services for banking, insurance and finance institutions and pension funds⁴⁵ must enter into mandatory professional liability insurance policies.

Executive or remunerated directors appointed for companies that issue securities admitted to trading on a regulated market and companies that fulfil certain minimum requirements on business operations and number of employees must be secured by means of a proper security for an amount of at least €250,000. This security may be replaced by a directors' and officers' liability insurance policy.⁴⁶

Similarly, financial entities that provide home banking and similar services should ensure they have in place appropriate information technology (IT) protection to prevent

35 Article 149 *et seq.*

36 Article 301.

37 Article 294-C, 304-A and 324.

38 Articles 149 Section 2, 151 and 152 of the Portuguese Securities Code.

39 Article 152 Section 2 of the Portuguese Securities Code.

40 Article 153 of the Portuguese Securities Code.

41 Article 304-B Section 2 of the Portuguese Securities Code.

42 Article 324 Section 2 of the Portuguese Securities Code; see also the ruling issued by the Supreme Court of Justice on 17 March 2016, case No. 70/13.1TBSEI.C1.S1, and the ruling issued by the Appeal Court of Porto on 23 January 2020, www.dgsi.pt.

43 See the ruling issued by Appeal Court of Guimarães on 29 January 2015, case No. 275/10.7TBPTB.G1, www.dgsi.pt. See also Gonçalo André Castilho dos Santos, *A Responsabilidade Civil do Intermediário Financeiro perante o Cliente*, CMVM – Estudos sobre o Mercado de Valores Mobiliários, Almedina, 2008, p. 256.

44 Article 301 Section 39(c) and Section 4 of the Portuguese Securities Code.

45 Law No. 153/2014 of 14 September 2014.

46 Article 396 of the Portuguese Companies Code.

cyberattacks and damage to clients using these services. Otherwise, inadequate provision of IT protection in home banking and similar IT tools may trigger liability for the financial entities providing these services.⁴⁷

Lastly, specific professional misconduct of banking and finance professionals may be considered an administrative infraction pursuant to the RGICSE, Portuguese Securities Code and other specific legal regulations, with the relevant proceedings being subject to the jurisdiction of the Bank of Portugal and the Portuguese Securities Market Commission (CMVM), as applicable. Administrative infractions may be punished, *inter alia*, by warnings, fines and ancillary sanctions; for example, a prohibition against providing banking and financial activities for a certain period (applicable to both companies and individuals). Administrative infractions are subject to specific time limitations.

iv Computer and information technology professionals

There are no specific rules under Portuguese law governing the professional liability of computer and information technology professionals, thus the liability of these professionals is generally subject to the general rules of contractual liability set out in the PCivC.

Rules of tort liability may also apply when there is not a contract in place between the professional and the injured party (e.g., when there is an accidental disclosure of personal data of an individual who has not entered into a contract with the computer and information technology professional).

In this regard, while not specifically directed at computer and information technology professionals, the new General Data Protection Regulation (GDPR) (with effect from 25 May 2018) specifically provides for the right of any person who has suffered material or non-material damage as a result of an infringement of the GDPR to receive compensation from a data controller or processor.⁴⁸ Furthermore, Law No. 58/2019 of 8 August, which implements the GDPR in Portugal, provides for such a right to a compensation for damage suffered as a result of an infringement of either this Law or the GDPR.

Without prejudice to the above, because of the significant number of cyberattacks during the pandemic, the approval and implementation of appropriate IT policies and protection against hacking, viruses, malware, spyware and ransomware, and correct training on the use of IT devices (including in teleworking scenarios) are deemed absolutely essential. If IT professionals fail to advise on the design and implementation of these policies and prevention mechanisms, they may be held liable.

Notably, in this context, insurance companies provide insurance policies to cover several types of damage resulting from cyberattacks (including ransomware attacks).

v Real property surveyors

In Portugal, the taking up and pursuit of business by real property surveyors who render services for banking, insurance and finance institutions and pension funds is governed by specific rules defined by the CMVM and approved by Law No. 153/2015 of 14 September 2015.

These professionals are liable towards the contracting entity, its shareholders or participants in collective investment entities, banking clients, insurance policyholders,

⁴⁷ See the ruling issued by the Court of Appeal of Guimarães on 9 June 2020, case No. 51/18.9T8PRG.G1.

⁴⁸ Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

insured persons and beneficiaries of insurance contracts, and towards members, participants and beneficiaries of pensions funds for any damage arising from errors or omissions contained in evaluation reports attributable to them.⁴⁹

Real property surveyors must take out mandatory professional liability insurance policies.

Lastly, real property surveyors are subject to the oversight and disciplinary action of the CMVM.

vi Construction professionals

The execution of public works in Portugal is governed by Decree-Law No. 18/2008 of 29 January 2008, which enacted the Public Contracts Code, as amended. Construction works procured by private entities are governed by the PCivC.

Construction activities are governed by several legal instruments, such as: (1) Law No. 41/2015 of 9 January 2015, which establishes the framework applicable to the undertaking of construction activities; and (2) Decree-Law No. 555/99 of 16 December 1999 as amended, which sets out the legal framework for urbanisation and building.

The contractor may be liable to the party who commissioned the works or to the purchaser of a building for losses caused by and arising from: (1) the collapse of the building due to problems with the land or the construction; (2) repairs carried out or changes to the construction; (3) faults during the construction; or (4) defects in the building that appear within five years of completion of the works or any repairs. The collapse or defects in the construction must be notified to the contractor within one year of the date of the collapse or the defects becoming known, and any indemnity must be claimed within the subsequent year.

The liability of construction professionals can fall under contractual liability, for breach of the construction contract, as well as under tort liability, for breaching the rights of third parties.

Except for the limitation period of five years regarding claims for defects, the general limitation period of 20 years applies.

With respect to construction activities, only work accident insurance is mandatory, pursuant to Law No. 41/2015. Notwithstanding this, it is usual for parties who commission works to request the existence of a more comprehensive insurance policy.

Furthermore, Law No. 31/2009 of 3 July 2009 establishes the framework for technicians responsible for: coordinating, drafting and underwriting projects; inspection of public and private works; and management of such works. It is also mandatory for these technicians to take out professional liability insurance policies.

vii Accountants and auditors

Regarding the performance of duties in connection to the public interest (for instance, audit companies and the issuance of relevant legal audit reports), auditors are liable towards audited companies and third parties in accordance with the terms and conditions set out in the Portuguese Companies Code and other relevant corporate legal provisions. Except

⁴⁹ Article 16 of Law No. 153/2015 of 14 September.

for these services in connection to the public interest, auditors' liability for minor acts of negligent misconduct may be excluded under the terms and conditions set out in civil law (the exclusion of liability for gross negligent professional misconduct is void).⁵⁰

Auditors should act independently and in accordance with best practice, in accordance with national and international auditing rules (including the International Standards on Auditing (ISA)) and maintain professional scepticism.⁵¹

Auditors are also bound to duties of disclosure and whistle-blowing resulting from their monitoring duties.⁵² In the event of failure to comply with these duties, and where the general requirements on auditors' liability are met (e.g., serious or negligent misconduct), auditors will be held liable.

Auditors' liability towards audited companies falls under contractual liability for damage caused by their serious and negligent misconduct.⁵³ Regarding companies that are issuers of securities, Article 10 of the Portuguese Securities Code expressly states that auditors will be jointly and severally liable for shortcomings in their audit reports and opinions.

If an audited company proves that there were errors in audit proceedings (which would represent a contractual default), an auditor may rebut the legal presumption of his or her guilt by proving that he or she acted in accordance with best professional practice and auditing standards.⁵⁴

Auditors will be liable towards creditors of audited companies for serious or negligent breaches of legal or contractual provisions intended to protect creditors only if corporate assets become insufficient to pay corporate debts as a result of this breach.⁵⁵ In this regard, the legal regime on directors' liability is applicable to auditors *mutatis mutandis*. Directors may be exempt from liability on the basis of proof of the application of the business judgement rule. However, this rule should be applicable to auditors on a mitigated basis because auditors are subject to technical and legal criteria rather than rational business logic. Nevertheless, it should be considered that auditing requires a wide scope of professional judgement in several cases without prejudice to criteria of best professional practice.⁵⁶

In any case (professional liability in relation to audited companies, their creditors or third parties), auditors are not subject to strict liability. Therefore, auditors cannot be held

50 Article 115 of the Statutes of the Statutory Auditors Association and Article 82 of the Portuguese Companies Code.

51 Articles 61 and 70 of the Statutes of the Statutory Auditors Association and ISA 200 on the overall objectives of the independent auditor and the conduct of an audit in accordance with the ISA.

52 Article 304-C of the Portuguese Securities Code, Article 420-A of the Portuguese Companies Code, Article 79 of the Statutory Auditors Association and Articles 4 Section 1(e), 11 Section 1(c) and 43 *et seq.* of the Law on the Prevention of Money Laundering and Terrorist Financing.

53 Article 82 Section 1 of the Portuguese Companies Code.

54 Gabriela Figueiredo Dias, *Fiscalização de Sociedades e Responsabilidade Civil*, Coimbra, 2006, pp. 93–94.

55 Articles 78 and 82 Section 1 of the Portuguese Companies Code.

56 Gabriela Figueiredo Dias, *Fiscalização de Sociedades e Responsabilidade Civil*, Coimbra, 2006, pp. 70–73, and Tiago João Estêvão Marques, *Responsabilidade Civil dos Membros de Órgãos de Fiscalização das Sociedades Anónimas*, Almedina, 2009, pp. 173–176).

liable for all failures (for instance, shortcomings in the financial statements) regardless of wilful or negligent misconduct.⁵⁷ Furthermore, it is common for auditors to argue that they were not provided with the relevant financial information during auditing proceedings.

Unless an act of misconduct is considered a crime, auditors' professional liability is subject to a five-year time limitation from the date of the unlawful misconduct, or from the disclosure of this misconduct if it has been covered up, and the causing of damage, regardless of whether or not the full extent of the damage has already occurred.⁵⁸

Auditors may also be held liable for prospectuses according to the terms described above regarding finance professionals.

It is mandatory for auditors to take out professional liability insurance policies. Usually, these insurance policies are taken out through the Auditors Association.⁵⁹

Lastly, professional misconduct by auditors may raise disciplinary issues (which are addressed by the Statutory Auditors Association) and may be considered administrative infractions that should be addressed in the scope of administrative infringement proceedings to be conducted, for instance, by the Supervising Authority for Insurance and Pension Funds (ASF), the Bank of Portugal or the CMVM, as applicable. Administrative infractions are subject to specific time limitations.

Accountants' professional duties and liability are governed by the statutes of the Chartered Accountants Association and, supplementarily, by Law No. 53/2015 of 11 June 2015 on the legal framework of professional corporations regulated by professional public associations and statutes of professional public associations.

Chartered accountants must act in accordance with best professional practice and independent criteria, and are subject to whistle-blowing obligations on public crimes and money laundering.⁶⁰ In the event of failure to comply with these duties, where general requirements on liability are met, chartered accountants will be held liable.

Whether chartered accountants render consultancy services when they undertake the obligation to prepare clients' financial statements is a controversial issue; in any case, it is undisputable that chartered accountants should prepare financial statements in the most favourable way to meet the client's needs.⁶¹

Finally, the professional misconduct of auditors may also raise disciplinary issues (which are addressed by the Chartered Accountants Association).

57 Gabriela Figueiredo Dias, *Fiscalização de Sociedades e Responsabilidade Civil*, Coimbra, 2006, p. 57, and Ezagüy Martins, 'A Responsabilidade Civil dos Revisores Oficiais de Contas e dos Técnicos Oficiais de Contas', *Responsabilidade Civil Profissional*, March 2017, Centro de Estudos Judiciários, p. 223.

58 Article 174 of the Portuguese Companies Code.

59 Article 87 of the statutes of the Statutory Auditors Association and Article 10 of the Portuguese Securities Code.

60 Articles 70, 76 and 121 of the Statutes of the Chartered Accountants Association; Articles 2–4 of the Code of Ethics; and Articles 4 Section 1(e), 11 Section 1(c) and 43 *et seq.* of the Law on the Prevention of Money Laundering and Terrorist Financing.

61 See the ruling issued by the Supreme Court of Justice on 10 July 2012, case No. 5245/07.0TVLSB.L1.S1, and the ruling issued by the Supreme Court of Justice on 26 April 2012, case No. 417/09.5TBVNo. L1.S1, www.dgsi.pt.

viii Insurance professionals

Insurance activities in Portugal are regulated and insurance professionals are subject to the oversight of the ASF, the competent authority for the regulation and prudential and behavioural supervision of insurance, reinsurance, pension funds (and corresponding managing entities) and insurance and reinsurance intermediation activities.⁶²

The pursuit of the insurance and reinsurance business is governed by Law No. 147/2015 of 9 September 2015, which implemented the Solvency II Directive, whereas insurance and reinsurance intermediation activities are mainly governed by Decree-Law No. 144/2006 of 31 July 2006 as amended (which implemented the Insurance Mediation Directive into Portuguese law).

It is mandatory for insurance and reinsurance intermediation professionals, such as intermediaries, agents and insurance brokers, to take out professional liability insurance policies.⁶³

III YEAR IN REVIEW

Since the application of a bank resolution measure to Banco Espírito Santo, SA by the Bank of Portugal in August 2014, professional liability cases in Portugal involving banking and finance professionals have been, and continue to be, a constant feature, largely prompted by biased media coverage.

Although a significant number of cases have already been dismissed because legal requirements were not properly met, or for lack of proof of unlawful conduct or evidence of the required causal link, several civil liability proceedings are still pending.

In addition, the 2008–2011 financial crisis and its subsequent impact on financial investment returns has led to an increase in the number of cases regarding the mis-selling of financial products and the professional liability of financial brokers (both individuals and financial institutions). While this topic of discussion, and litigation, is still relatively new, consistent case law is beginning to emerge indicating that the professional liability regime is not intended to compensate investors for unsuccessful investments.

Moreover, several cases of alleged medical negligence have recently been reported in the media and new rulings have since been issued, finding against medical professionals. In April 2023, an intern at Faro Hospital filed both disciplinary and criminal complaints against two of the unit's surgeons alleging wilful and negligent practices in 11 different cases since January 2023 (three of which resulted in the death of patients and the others in lasting harm). The case has received extensive media coverage, leading to the preventive suspension of the two surgeons by the Portuguese Medical Association. The matter is currently under investigation and disciplinary and criminal proceedings pending.

Portugal has also witnessed several high-profile cyberattacks recently, mostly since the pandemic, with targets ranging from newspapers to governmental entity websites. Furthermore, the number of these attacks has grown markedly since the beginning of the Russia–Ukraine conflict. According to data made available by the Public Prosecution

62 The CMVM also has some supervisory powers in respect of rules of conduct relating to unit-linked life insurance products and transactions.

63 Decree-Law No. 144/2006 of 31 July 2006.

Service, cyberattacks increased by 73.58 per cent from 2021 to 2022, with 2,124 cybercrime complaints made between 1 January and 31 December 2022, and these are certain to give rise to future litigation.

IV OUTLOOK AND FUTURE DEVELOPMENTS

In light of the recent above-noted high-profile cyberattacks, and without prejudice to the liability of the hackers themselves, we expect to see an increase in litigation based on professional negligence stemming from inadequate IT policies and insufficient protection against hacking, viruses, malware, spyware and ransomware, as well as incorrect use of IT devices through lack of training. In this regard, insurance companies are already providing insurance policies to cover several types of damage resulting from cyberattacks (including ransomware attacks) and, in turn, these may also give rise to professional liability litigation regarding mis-selling of insurance policies.

Moreover, the covid-19 pandemic created new challenges for businesses, heightening the urgent need to digitise business operations and adapt to an operating model in which remote working has become the ‘new normal’. Ultimately the significant increase in businesses’ reliance on IT systems to support remote working may reveal weaknesses in these systems. Indeed, where businesses have neglected cybersecurity risks or vulnerabilities in IT systems and verification procedures, leading to systems failures, backup and information losses or data breaches, and negative impacts on business operations overall, new litigation will certainly arise.

Equally, we expect the practical implications of remote working to have a corresponding impact on professional negligence cases, especially with regard to lawyers, medical practitioners, accountants and auditors, and banking and financial professionals, for whom face-to-face advice is still the norm.

Finally, as financial measures to mitigate the financial effects of the pandemic and the recent rise in inflation start to be rolled out to companies and families, a new wave of mis-selling claims can be expected, like those witnessed following the 2008–2011 financial crisis.