

MEMORANDUM

CNSP Resolution nº 451,
of 19/12/2022

English version



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MEMORANDUM - CNSP RESOLUTION No. 451, 19/12/2022

Published on the December 21st, 2022, the CNSP Resolution No. 451 of 19/12/2022 ("CNSP Resolution No. 451/22"), provides for the (i) operations of cession and acceptance of reinsurance and retrocession and their intermediation, (ii) coinsurance operations (iii) operations in foreign currency and (iv) insurance contracted abroad.

Its publication was in conjunction with Circular SUSEP No. 683 of 18/12/2022 ("Circular SUSEP No. 683/22"), regarding operational procedures, all of which are stated in the Complementary Law nº. 126 of 2007, as follows: (i) the preferential offer of risks to local reinsurers, (ii) proof of insufficient offer of capacity of local and foreign reinsurers for the purposes of transferring risks with reinsurers not authorized to operate in Brazil and (iii) the contracting of insurance abroad, meaning that both are intertwined and effective as of the same date: January 1st of 2023.

The edition of CNSP Resolution No. 451/22 aimed to consolidate, modernize and compatibilize the various regulations that dealt with the theme (25 CNSP Resolutions and 2 Circulars SUSEP) in a single normative act, in addition to presenting an extremely relevant change to the global assignment limit, thus aligning it with SUSEP's strategic objectives. This change will be seen below.

The process of drafting the regulation was subject to public consultation marked by the participation of the insurance market's *most relevant stakeholders*¹ in addition to representing the adoption of several measures recommended by the *International Association of Insurance Supervisors* (IAIS), an entity that brings together insurance supervisory and regulatory bodies in more than 200 jurisdictions, with the objective of aligning Brazilian market practices to the ones observed in countries with higher regulatory maturity on reinsurance matters.

The normative is structured in nine chapters, the first of which presents the necessary definitions for the proper understanding of the Resolution, in addition to adapting it to the most recent regulations, since CNSP Resolution No. 168, the main act that previously dealt with the theme, dated from 2007 and lacked updating. In this sense, we emphasize the consolidation of the term "foreign reinsurer" to unify the definition of occasional and admitted reinsurers, as it had already been adopted in CNSP Resolution No. 422/21.

In the second chapter, there are three highlights. The first is the introduction of a rule applicable to reinsurance and retrocession transactions between companies linked to or belonging to the same financial conglomerate: the proof of compliance to the adoption of "balanced conditions of competition" will be borne by these companies whenever required by SUSEP (article 4, § 2).²

¹ The following players participated in the Resolution's preparation: National Federation of Insurers - FENSEG; National Confederation of Insurers - CNSEG; National Federation of Private Pension and Life - FENAPREVI; National Federation of Reinsurance Companies - FENABER; and National Association of Local Reinsurers - AN-Re.

² "Art. 4th [...] § 2 - Reinsurance and retrocession transactions carried out between companies linked to or belonging to the same financial conglomerate, under the terms of the regulations in force, should be carried out under balanced conditions of competition, and the parties involved should be responsible for proving, when applicable, that such conditions were carried out under terms and conditions prevailing in the market between independent parties."

The second relates to suppression of the provision expressed in the normative regarding the percentage of preferential offer of reinsurance assignment to local reinsurers, which was previously limited normatively by article 15, *caput* and single paragraph, of CNSP Resolution No. 168/07.

Pursuant to paragraph 1 of Article 5 of the CNSP Resolution No. 451/22, the limitation shall be that provided for by law, which is Article 11, item II, of Complementary Law No. 126/07, whose percentage remains unchanged, but whose possible legal change in the future will not imply the need to adjust the norm. In practical terms, the need to observe the percentage (40%) predicted in Complementary Law No. 126/07 remains as an obligation.³

The last, and main highlight of this chapter, is the rule change regarding the global assignment limit to be observed by local insurers and reinsurers, which is now stated in accordance to principles – as has been the keynote of the most recent regulations – and with emphasis on the qualitative *evaluation* of reinsurance programs adopted by the supervised, replacing the fixed limit of assignment, which was previously provided for in Art. 16, *caput* and paragraphs, of CNSP Resolution No. 168/07.⁴

The amendment aims to operational and financial unburden the technical area of the regulatory entity, which had its operation affected by a large number of requests to overcome the percentage delimited in the previous standard, as authorized by the second paragraph of Article 16 of CNSP Resolution No. 168/07, mainly by the supervised companies who acted in large risks or started the operation in other insurance lines, whose expertise and financial capacity of the reinsurer is extremely welcome.

With the change, SUSEP intends to reduce the complexity and costs related to compliance with regulatory standards, and to value the management of reinsurance and retrocession by the supervised entities, as has already been observed with the structure of cyber risks (Circular SUSEP No. 638/2021), internal controls and risk management (CNSP Resolution No. 416/2021). *Thus, the paragraphs of § 2 of Article 6 start to present minimum guidelines to be adopted, whose deadline for adaptation is until 12/31/2023.*

The regulatory approach becomes, therefore, less prescriptive and more based on the strategy and business model adopted by the supervised entities, with the structuring of a *reinsurance program, and insurers no longer have a limit for cession and the reinsures and local reinsures are limited to 70% (seventy percent), when both were previously limited to 50% (fifty percent, as provided for in Art. 16, caput, of Res. CNSP No. 168/07).*

³ Complementary Law No. 126/07. "Art. 11. In compliance with the rules of the insurance regulatory body, the transferor will hire or offer preferably to local reinsurers to at least: [...] II - 40% (forty percent) of its reinsurance assignment, after three (3) years of the entry into force of this Supplementary Law."

⁴ Art. 16. Insurance companies and local reinsurers may not yield, respectively, in reinsurance and retrocession, more than fifty percent of the premiums issued relative to the risks that have been subscribed, considering the overall number of its operations, in each calendar year. § 1 For the purpose of the provisions of the caput of this article shall not be considered the relevant provisions to the following branches: I - insurance guarantee; II - export credit insurance; III - rural insurance; and IV - internal credit insurance. § 2 SUSEP may authorize decations in a percentage higher than provided for in the caput of this article, provided that for technically justifiable reasons. § 3 SUSEP is authorized to impose additional rules on other branches or insurance arrangements for which the limit set in the caput of this article does not apply.'

In addition, insurers that cede a percentage higher than 90% must present a viable justification (art. 6, §4), while local reinsurers may exceed the 70% limit, provided they also present technical justification (art. 6, § 3).

In chapters III to IX, the focal points are:

- Art. 10, *caput* – The deadline for the contractual formalization of reinsurance operations has been reduced to 180 (one hundred and eighty) days from the beginning of the validity period of the cover, when it was previously 270 (two hundred and seventy) days, in accordance with the provisions of art. 7 of Circular SUSEP No. 683, of 12/19/2022.
- Art. 10, § 1 – The express authorization for use of remote means on contractual formalization and signing of the reinsurance contract, in the form of CNSP Resolution No. 408/2021.
- Art. 11 – The following provision: *"reinsurance contracts aimed at the protection of risks located in the country, should include clause determining the submission of any disputes to Brazilian law and jurisdiction, subject to cases of arbitration clause, which will comply with the legislation in force"*.
- Art. 12 – The possibility of predicting the *"participation of the reinsurer in the regulation of claims, as well as the provision in the reinsurance contracts of the claim control clause, without prejudice to the insurer's liability to the insured"*.
- Art. 13 – After mentioning that the clauses of reinsurance contracts will be freely agreed between the Contracting Parties, this article states the following provisions: *"I - the beginning and termination of the rights and obligations of each party, including how these responsibilities will cease in the event of cancellation; II - the criteria for cancellation; III - the risks covered and the risks excluded; and IV - the coverage period, identifying the beginning of liability of the reinsurer and the exact moment when the losses find coverage in the contract"*.
- Art. 15, *caput* – The requirements that reinsurers unauthorized to operate in Brazil must meet to transfer risks. In general terms, were adopted the terms required by occasional reinsurers to operate in Brazil.
- Art. 15, § 2 - The insertion of a rule that disciplines the transfer of risks with foreign reinsurer specialized in risks constituted in the form of pool or mutual association.
- Art. 20 – The exclusion of the provision which allowed companies to accept in retrocession, exceptionally, up to 3% (three percent) of the premiums issued for insurance related to the risks that have been subscribed, as made possible by Art. 7, single paragraph, of CNSP Resolution No. 350/2017. Thus, the limit of 2% (two percent) is maintained since this exceptionality was rarely used by the market.
- Art. 24 – The duty of reinsurance brokers to keep in record, in the form established in specific regulations, the supporting documents of reinsurance operations and retrocessions mediated by them, which contain the acceptance of reinsurers, as well as: I - business communications; II - proof of reinsurance and retrocessions III - statements of the flow of premiums and indemnities; and IV - statements of the current accounts of which article 23 of the Resolution.

- Art. 25 – The definition of coinsurance operations, which "*are freely agreed by two or more insurance companies, with the consent of the insured, their legal representative or intermediary, and there is no joint and several liability between the insurance companies*". It confirms the coinsurers have no joint and several liability and innovates on the consent of the insured or his legal representative for the coinsurance operation. At this point, it is important to monitor how SUSEP will deal with this requirement, in other terms, it will be important to understand if SUSEP will demand only a generic agreement of the insured or a special agreement, in analogy to what is required for the arbitration clause, for example.
- Art. 27 – The stipulation that, in coinsurance, the "*policy and individual certificate should contain, in addition to others defined in the legislation, specific information available about: I - the leading insurer and its attributions; and II - the inexistence of joint and several liability among insurance companies*".
- Art. 30 – The permission for the contracting of reinsurance and retrocession in foreign currency in the country in any situation, as was already allowed for insurance, making it more flexible in article 19 of CNSP Resolution No. 168/07; and
- Article. 33, § 5 - The provision that the issue of a contractual endorsement related to the insurance contracted abroad, provided that the original conditions offered to Brazilian insurance companies and contracted abroad are maintained, does not characterize a new contract. Thus, it is no longer necessary to consult Brazilian insurance companies and the insurer abroad.

Finally, the regulation, which repealed twenty-five resolutions⁵, provides that the "*[r]einsurance and retrocession cessions and their intermediation, coinsurance operations, operations in foreign currency and insurance contracts abroad signed on a date prior to the entry into force of this Resolution should adapt to this norm upon their renewal*" (art. 40).

Chalfin, Goldberg & Vainboin's insurance and reinsurance team is at your disposal to clarify the mentioned topics, as well as to advise the adequacy of the operation of the supervised entities in line with the new regulatory framework.

⁵ They are: (i) CNSP Resolution No. 68 of December 3, 2001; (ii) CNSP Resolution No. 168 of December 17, 2007; (iii) CNSP Resolution No. 173 of December 17, 2007; (iv) CNSP Resolution No. 189 of October 8, 2008; (v) CNSP Resolution No. 191 of December 16, 2008; (vi) CNSP Resolution No. 194 of December 16, 2008; (vii) CNSP Resolution No. 197 of December 16, 2008; (viii) CNSP Resolution No. 203 of April 27, 2009; (ix) CNSP Resolution No. 206 of December 17, 2009; (x) CNSP Resolution No. 209 of December 6, 2010; (xi) CNSP Resolution No. 210 of December 6, 2010; (xii) CNSP Resolution No. 225 of December 6, 2010; (xiii) CNSP Resolution No. 241 of December 1, 2011; (xiv) CNSP Resolution No. 245 of December 6, 2011; (xv) CNSP Resolution No. 322 of July 20, 2015; (Xvi) CNSP Resolution No. 324 of July 30, 2015; (XVII) CNSP Resolution No. 325 of July 30, 2015; (XVIII) CNSP Resolution No. 350 of September 25, 2017; (xix) CNSP Resolution No. 353 of December 20, 2017; (Xx) CNSP Resolution No. 363 of October 11, 2018; (xxi) CNSP Resolution No. 366 of October 29, 2018; (xxii) CNSP Resolution No. 379 of March 4, 2020; (xxiii) CNSP Resolution No. 380 of March 4, 2020; (xxiv) CNSP Resolution No. 394 of October 30, 2020; and (xxv) CNSP Resolution No. 418 of July 20, 2021.