

Directors' Duties, Civil Liability, and the Business Judgment Rule under the Portuguese Legal Framework

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Abstract—The commercial companies' management has suffered an important material and legal transformation in the last years, mainly related to the changes in the Portuguese legal framework and because of the fact they were recently object of great expansion. In fact, next to the smaller family businesses, whose management is regularly assumed by partners, companies with social investment highly scattered, whose owners are completely out from administration, are now arising. In those particular cases, the business transactions are much more complex and require from the companies' managers a highly technical knowledge and some specific professionals' skills and abilities. This kind of administration carries a high-level risk that can both result in great success or in great losses. Knowing that the administration performance can result in important losses to the companies, the Portuguese legislator has created a legal structure to impute them some responsibilities and sanctions. The main goal of this study is to analyze the Portuguese law and some jurisprudence about companies' management rules and about the conflicts between the directors and the company. In order to achieve these purposes we have to consider, on the one hand, the legal duties directly connected to the directors' functions and on the other hand the disrespect for those same rules. The Portuguese law in this matter, influenced by the common law, determines that the directors' attitude should be guided by loyalty and honesty. Consequently, we must reflect in which cases the administrators should respond to losses that they might cause to companies as a result of their duties' disrespect. In this way is necessary to study the business judgment rule which is a rule that refers to a liability exclusion rule. We intend, in the same way, to evaluate if the civil liability that results from the directors' duties disrespect can extend itself to those who have elected them ignoring or even knowing that they don't have the necessary skills or appropriate knowledge to the position they hold. To charge directors', without ruining entrepreneurship, charging, in the same way, those who select them reinforces the need for more responsible and cautious attitudes which will lead consequently to more confidence in the markets.

Keywords—Duty of loyalty, duty of care, business judgment rule, civil liability of directors.

I. INTRODUCTORY CONSIDERATIONS

THE Portuguese Companies' Code presents a whole chapter entirely dedicated to the civil liability regarding the constitution, administration, and supervision of the company. In fact, this legal regime can be found in the Portuguese Companies' Code [in the articles 71st until 84th]. The legal provision mentioned presents us with different recipients according to the implication they had in the decisions of the company, the functions they have, or they had. It is also extremely important the damages they have

provoked, the wrongfulness of the acts in question and the degree of guilt in question.

With this study, we only want to analyse the responsibility due to the guilty and wrongful management of companies and, in particular, of the so-called limited liability companies (private limited companies and limited stock companies). Herein, the company administrators may be responsible for the company, the creditors or other third parties. This regime is regulated in the article 72nd until the article 79th of the Portuguese Companies' Code, and it indicates us, moreover, the situations in which this responsibility appears and the way it can be enforced. Also, in this study, we will dedicate ourselves, specifically, to the understanding of the causes that originate the civil liability of the administrators and the exclusion clauses of that liability.

As it results from the own essence of the companies' by-laws, the corporate object, despite the profitable core, may not be fully accomplished, failing to originate profits and leading to losses that, on most occasions, will absorb the partner's capital contributions. This risk of losing the contributions, which always haunts the partners, is assumed by them and may not arise from a guilty and wrongful management, but solely from the market conditions and rules where the company has its business. That said, a ruinous management does not directly conduct to the administrator's liability since that only occurs when the losses derive from a guilty and wrongful conduct. These two conditions truly are the ones that determine the administrators' liability. In order to consider an administrator liable one needs to analyse, in the first place, if the acts of the administrator were performed under strict obedience to the duties legally and contractually imposed, or if they were violated. Only when the administrator violates the duties and, because of that provokes losses to the company, can a civil compensation claim be issued.

In fact, the article 72nd of the Portuguese Companies' Code really summarizes the idea by indicating that administrators "are liable to the company for the damages caused by actions or omissions in violation of the legal and contractual rules, except if they can prove that acted without guilt". We can also see that the normal management risks are not imputable to the administrators. But even when the administrators are responsible for the damages they can demonstrate and prove that they acted in an informed way, free from any personal interest and under the business rationality criteria. If they can prove all this, they will not be responsible for any damages, like we can see in the article 72nd, paragraph two, of the Portuguese Companies' Code.

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II. THE GENERAL OBLIGATIONS OF THE ADMINISTRATORS

The company administrators have, as main tasks, the management and representation of the company, in order to fulfil the corporate object and, because of that, the law attributes them the so-called powers/duties, being that it delivers them the “necessary duties to promote the company’s interest” [1]. Here are included the necessary powers to assume certain risks. In fact, the management of a company is summarized by nature, in tasks where risks are assumed, since its by assuming those risks that the company can profit greatly. However, the risks cannot be so excessive that the administrator’s conduct surpass the legal and contractual duties [2]. It is precisely because of this that one can state that these duties can be named internal duties, i.e., duties for the company they manage and represent, despite the fact that these duties can also produce external effects for the creditors, workers, stakeholders, among others [3].

In this respect, the law configures some duties in order to guide the way in which the administrators must perform their assigned tasks. In fact, the law defines, respectively, in the subparagraphs a) and b) of the 64th article of the Portuguese Companies’ Code, the duties of care and loyalty. The reduction that is in force has its origins in the Decree-, from June 29th, and expressly refers that the administrators must observe: “a) duties of care, revealing the availability, the technical competencies and the knowledge of the company’s activity that are adequate to the functions, acting as a wise and organized manager”; and “b) duties of loyalty, in the interest of the company, giving the long-term interests of the shareholders and considering the interests of other relevant subjects to the company’s sustainability, like the workers, clients, and creditors”. These duties are, as one can infer from the written rules, “abstract rules of behaviour” and, because of that, they must be substantiated case to case in order to qualify the behaviour of a certain administrator, Managing a company encompasses a great amount of different action (and omissions) and, because of that, we cannot say, concretely, which actions (or omissions) that the administrators must follow in order to fulfil all their legal duties, It fact, it all depends on the actual circumstances the administrator is facing and what was the company’s situation at that specific time. We thus need to situate each act in each specific moment of time. We can also come to the conclusion that the administrators’ actions are (and must be), often (almost every time, perhaps), discretionary.

None the less, it is undeniable that there are some legal and contractual duties specifically imposed by the administrators that do not allow for any discretion and, by that, its violation will certainly lead to a wrongful conduct, probably a guilty one and without the possibility of exemption [4].

We are talking, for instance, about the legal duty that imposes to the administrator the prohibition of actions or signing contracts that can jeopardize the profitable nature of the company [article 6th paragraph 4 of the Portuguese Companies’ Code]; the prohibition of distribution of assets among the company’s partners when those assets cannot be distributed [article 35th]; the obligation of opening an

insolvency procedure when the legal conditions are reunited [articles 18th and 19th of the Portuguese Insolvency Code]; the obligation of business registration [article 29th paragraph 1 of the Portuguese Business Registration Code]; the prohibition of non-execution of null deliberations of the administration body [articles 412th paragraph 4 and 433th paragraph 1 of the Portuguese Companies’ Code], the right to demand payment of the deferred capital contributions [article 203rd and 285th of the Portuguese Companies’ Code] [5].

Concerning the contractual duties, those must be observed by the administrators once and every time they do not violate any imperative legal rule of the Portuguese Companies’ Code or other law.

Thus, the first conclusion we can reach is that the task of administration, the one that normally is performed by the administrators, is a very complex task, materialized in various and different actions. There is, as we can see, a high degree of discretion involved but without surpassing the limits imposed by law. However, pairing with this high degree of discretion, one can identify some duties that do not give the administrators any margin, since they are subdued to legal rules. We must now identify which are the administrators that must obey these rules. The first ones are naturally the ones designated by the partners to manage the company, and identified in the companies’ public records. However, some companies have *de facto* (*in fact*) administrators, i.e. those managers that in fact manage the company, making all the decisions, but cannot be identified in the legal records. Despite the fact that they are not legally administrators, the same rules still apply in terms of liability [6].

III. THE DUTY OF CARE

We have already indicated that the administrators must, during their mandate, observe the general legal duty of care. We must now understand the real meaning of this affirmation.

The duty of care obliges the administrator to act in a very diligent way, regarding the company’s activity, applying to this task the necessary knowledge and the necessary time in order to achieve a favourable outcome that can benefit the company. The rule here in question is the rule of the article 64th of the Portuguese Companies’ Code, and it expressly refers that, in these actions, the administrator must reveal technical skills and knowledge about the company’s activity. It seems that these subjective requirements must be, truthfully, prerequisites before the administrator can assume his/her task. In fact, despite the fact that the administrator may seem diligent and hard-working, if he/her does not demonstrate the adequate knowledge about the company’s activity, that knowledge will not be immediately acquired and, until that happens (we admit that it can happen in the duration of the administration) we will not have the necessary standards demanded by law. The same logical reasoning will apply to the matters of the technical skills. These are also subjective requirements, even called personal virtues, and the administrator must have them already, or if they are just acquired over time, the legal requirements may also be at risk. The verification of these prerequisites or personal virtues is

upon the company's partners, in the first place, or to those who nominate/elect the administrators. In spite of the fact that the law does not impose liability to those who nominate/elect the administrators when they do not fulfil, apparently, these requirements, the truth is the law may consider them liable when the administrator is not dismissed. On the other hand, we can question if it does not substantiate a *venire contra factum proprium* the exigency of liquidated damages by a violation of the duty of care founded on the lack of knowledge and technical competencies when that circumstance was already known and did not prevent the nomination. And we question this precisely because those who nominate/elect to have the responsibility to choose that administrator who fulfils all the prerequisites necessary. We can also state that, in this situation, the administrator will not be blameless, since it has accepted a job he/she already knew was beyond his/her capacities. It seems, therefore, that before the nomination/election, we have a divided responsibility between the ones who nominate/elect and the ones who accept the job, in order to evaluate the administrator capacity. We can also reinforce the idea that these personal qualities must be determined case by case, regarding the size of the company, its activity, and the exact conditions of the company in the moment of the nomination. Regardless, the law does not impose any special technical, academic or professional skills to the prospective administrator.

The duty of care imposes the administrator a series of right attitudes and other minor duties. The administrator must observe, during his mandate, duties of control and monitoring over the company's activities, which implicates a direct or indirect knowledge of the normal management and policies of the company.

Thus, the correct completion of the duty of care encompasses the respect for other minor duties. The doctrine deconstructs the duty of care in a duty of monitoring, a duty of direct intervention, the duty of obtaining information in order to take a correct decision, the obligation of taking rational decisions and that those decisions will lead to a profitable company, and to a one that fulfils the company's by-laws. This duty of monitoring includes the control of the workers, so the administrator can fully understand what is going on.

In this control system all the workers are included: not only the ones that have management positions but also the ones that are below in the hierarchy of the company. In this last situation even when the administrator does not have any direct contact with those workers, information must be asked to their direct chiefs, not only about the contents of their work but also about their performance.

The administrators must pay special attention to the economic evolution of the company, foreseeing problems, and anticipating solutions but, at the same time, they must be particularly careful with the analysis of the economic indexes and their evolution. In fact, only conducting this kind of studies may the administrator conveniently make the adequate decisions, adjusting the company's strategies when needed. In this way, administrators are capable, or may be able to anticipate economic sceneries and, by doing so, being able to

foresee some strategies or policies that allow the company to maintain its sustainability or even a differentiation in the markets. A particularly cautious administrator will not only pay attention to the evolution of the company but will also think about macroeconomic sceneries, attempting, on each step, to understand the way that the company will perform better, may have more projection and a bigger economic impact.

The completion of the above-mentioned tasks involves that the administrator must be a knowledgeable person and must have the availability to perform. As the law puts it, he must have "availability" and "technical skills".

In addition to these tasks, administrators must intervene in two different situations: i) firstly he must intervene to be able to monitor and to correct any problems, seeking for results; ii) secondly, the administrator must act upon those results.

Finally, among the duty of care, the administrators must obtain all the possible and adequate information in order to take decisions. The administrators must decide and decide in the best way possible. The duty of care imposes not less than the best decision. However, we already know and have indicated that every decision carries a certain degree of risk and may translate themselves into bad decisions. As we will see, it is not only the result that matters, or, better said, it is not the most important. What matters the most is to know if the administrators acted upon good information. And, as we know, there are no guidelines to every decision. The important is that the administrators have searched for all available and adequate information in order to make the best decision in the case. Also, the administrators must know how to search for that information, in terms of costs and time, since it is based on that concrete information that the decision will be made. Those decisions, has we have already pointed out, must be reasonable, and that reason is achieved with the adequate information. *Coutinho de Abreu*, Portuguese professor, defends that "the broadness of a duty of taking reasonable information must be analysed according to the business and management commandments, and also according with good practices of corporate governance, reserving the discretionary decisions to the cases where there are no good commandments - discretion that will be surpassed when the corporate assets are dissipated or when unmeasured risks are taken [7], [8].

The Portuguese jurisprudence absolutely agrees with this interpretation. The Portuguese Supreme Court, in a judgement from 01/04/2014, indicates that "article 64th of the Portuguese Companies' Code, before and after the 2006 reform, imposes a duty of care, truly a power/duty of the administrators based on a trust relationship (*fiducia*) between the corporation and the ones that manage it, not only regarding the internal affairs, but also the external relations with third parties, such as creditors, public services, workers or others. The duty of care is enclosed in the actions of the cautious and dutiful administrators and in the due diligence standards that the law imposes." [9]. The American jurisprudence, which has been on the frontline of this particular subject, has already pronounced some judgements in order to punish the administrators that do not follow the duty of care – for

instance, in the prime example of the merger of TransUnion Corporation with a bigger company. In this case, it was proved that the board meeting that decided the merger took only two hours and, because of that, it was considered a hasty decision, since it had major consequences. Following that, the stockholders prosecuted the company, searching for damage compensation. The Court of Chancery first considered that the stockholders had been properly informed, and the civil action did not proceed. However, following an appeal, the Delaware Supreme Court considered that there was a violation of the duty of care since the administrators had not made any previous studies about the price of the operation [10], [11].

But we can also remember that, besides the legal duty of care, the law imposes a duty of loyalty. Remembering the law: “duties of loyalty, in the interest of the company, giving the long-term interests of the shareholders and considering the interests of other relevant subjects to the company’s sustainability, like the workers, clients, and creditors.” This duty is sustained in a particular behaviour of the administrators. At issue, we have the verification of an ethical value that presents, nonetheless, juridical consequences. It is customary to indicate that the administrators’ loyalty is a qualified loyalty, or better saying a more loyal loyalty. This qualification is easy to understand if we think that the management is all about third party assets. The company does not belong to the administrators, but it was entrusted to them and he must, relying on a trust relationship, decide about the company’s destiny. Since it is really the case, it is perfectly understandable that the partners can demand loyalty. One must not forget that the administrators may, very easily, deviate the company’s goals to a very different set of goals that are the ones of the partners. The administrators cannot, because of that, lose sight that the main goal is the company’s and not any personal interest.

The Portuguese Supreme Court stated very clearly, on this matter, in judgement from 30/09/2014, that the “duty of loyalty is inseparable from the principle of trust, not only before the company but also before the partners and third parties. Promoting the company’s interests is not confined just to it, tout court, or saying better, to a profitable activity. The moralization of the law and of company’s life imposes an honest, dutiful and transparent behaviour in order to adequately protect the third parties that can suffer damages because of the actions of those who draw and manage company’s interests – calling, in this case, duties of good faith, trust and the prohibition of abuse of rights [12].

Upon reading the previous words we can extract, from the beginning, a substantial difference between both duties: the duty of care substantiates in a positive action from the administrators; the duty of loyalty is particularly based on a negative behaviour, since it forbids the administration from actions based on their personal interests in detriment of the company’s interests. The Portuguese legislator has not presented any concrete examples of situations that configure violation of the duty of loyalty, [on the subparagraph b) of paragraph 1 of article 64th of the Portuguese Companies’ Code], but the doctrine and jurisprudence are unanimous in

the affirmation of some conducts that indicate the violation of the duty of loyalty. For example, the administrators must abstain to act whenever they are in a situation of conflict of interests before the company; they cannot compete with the company, except with its express authorization [13]; they must not take advantage of the business opportunities of the company or shall not present them to third parties, in a clear conflict with the company, since they only have that inside knowledge because of their position – this situation, known as inside trading, despite the fact that is not expressly referred to the law, is considered as an example of this duty; they must not have business relations with the company, except when express authorization is given, since they would put their personal interests before the company’s [14]; they must not consciously damage the company, regardless of the benefits for themselves or third parties. There are, therefore, three fundamental principles: i) non-competition; ii) the prohibition of taking of corporate opportunities; iii) prohibition of trading with the company, except when done strictly within the boundaries of the law.

The legal article also refers that, on the concretization of the duty of loyalty, the company’s interests must be observed above all and, in particular, the long-term interests of the partners or other relevant subjects to the sustainability of the company, such as workers, clients or creditors. There are, among the doctrine, those who think that the legislator should have gone further and indicated others, such as consumers, or indicating rules of social responsibility, for instance, those related to environmental protection [15]. Despite the fact that we understand that these interests are extremely important, we think they shall not be considered in this duty. In fact, besides the fact that is important to the company to be able to develop consumer protection policies or to present some manifestations of social responsibility, these measures must be discussed with the stockholders and shall not depend on the sole decision of the administration, even if they may and have the duty to present some proposals. When it comes to social responsibility actions, for instance, not so infrequently the capital used to subsidize those actions comes from the stockholders profits. In this sense, it would be a management task the presentation of proposals, but it should be a stockholders decision to promote them, and even determine the amount of profit to support them. It seems to us, saying so, that these aspects do not belong to the duty of loyalty. We shall put into evidence, however, that one thing will be to actively support certain social responsibility activities and other, completely opposite, will be to damage, in general, the civil society. In other words, the administrators’ actions that contribute directly to harm the environment. In this case, the administrator shall not take any action to prevent those damages.

IV. THE BUSINESS JUDGMENT RULE

Before we make a thorough analysis of the Business Judgement Rule presented in the article 72nd of the Portuguese Companies’ Code, in particular in paragraph 2, we shall see what the paragraph one states: “the administrators

and managers are liable to the company for the damages provoked by their actions or omissions in violation of the legal duties and company's by-laws, except if they can prove that their actions were taken without guilt". On the one hand, it states that the relation between the administrators and the company is, in fact, a contractual one and, on the other hand, that the violation of legal duties or by-laws can result in a civil action.

In order to determine the causes of a civil action, the violation of legal duties must be a guilty one. In this aspect, the law establishes a presumption of blame in the final words of this legal provision: "except if they can prove that their actions were taken without guilt". This presumption of blame has a large importance on the grounds of proof. Firstly, because it's because of it that the burden of proof belongs to the administrators. Thus said, the law considers, from the beginning, that the violation of duties is a guilty one, leaving to the administrators to prove otherwise.

There are two preconditions as we have stated: the violation of legal duties and company's by-laws and the guilt, but we have to add two more: damages and a causal link between the guilty actions and the damages provoked. In fact, there will only be a civil liability in the exact measure of the damages and only when they arose from an illicit and guilty conduct.

In resume, the administrators will be liable to the company whenever, with a guilty action, they provoke damages to the company, resulting from a violation of duties.

Nowadays, the administrators, being aware of the risks they take and of its consequences, at least the financial ones, choose take out to insure of their management. Sometimes, taking an insurance is mandatory. That is the case of the administrators of the listed companies and other non-listed companies that present a very high yearly turnover, according to the article 396th of the Portuguese Companies' Code. We are talking, in particular, to the denominated D&O Insurance or Directors' and Officers' Liability Insurance which consists on insurance that allows covering different damages, including the ones resulting from an illicit and guilty conduct of the administrators. It is, thus, the possibility of transference of the risk to a third party, the insurance company, who will assume all the payments that arise from liquidated damages [16], [17].

However the article 72nd, paragraph one, of the Portuguese Companies' Code cannot be read in isolation, but must be paired with paragraph number two. This paragraph two, introduced only in 2006, refers that: "liability is excluded whenever any of the persons referred in paragraph one proves that they acted upon good information, free from any personal interests and based on rational business rules". Here it is the known Business Judgment Rule. It was developed by the American jurisprudence, especially by the State of Delaware. This rule intends to turn the administrators liable only when their decisions didn't respect the strict business criteria, which prevents the judges to pronounce about the merit of the decisions. That said, judges must not decide based upon the consequences of those actions, which were made on a specific context, since it is very easy to judge a posteriori if a decision is good or bad, based on the results. In this case, the analysis

must regard only to the time of the decision and to the business criteria, in order to determine its rationality.

The preconditions to apply this rule are perfectly clear: i) there must have been a decision (doing or not doing) which is the result of many options; ii) the decision was not made based on personal interests; iii) the administrator must have all the information and look for it in order to make an informed decision.

Said so, the Business Judgment Rule only applies when the administrator must choose from many options when it is a discretionary decision. We must, therefore, state that the rule does not apply when the duty of loyalty applies or any other legal duty. In these situations, we do not have any discretion, and so, the administrators do not have to make any decisions,

Indeed, it has to be like this, because otherwise we could not justify the extent of the legal norm. What the legislator intended, like we briefly said before, is to understand if the administrator chose the most rational option, among all of the possible options. In practical terms, as we know, normally more than one decision is possible. The administrator must choose the one that better protects all the interests at stake. It is also normal that the decision that seems better may, in fact, lead to catastrophic results. But then those results do not put the administrator in a liable position since there is no irrationality. This is, in fact, a normal risk on the management functions. It is precisely to safeguard that risk that the Business Judgement Rule exists - to prevent the judges to confuse bad results with irrational decisions. In this sense, *Coutinho de Abreu* states that "however, the court, given the difficulties on the intellectual reconstruction of the circumstances of that decision taking and the knowledge of the consequences, would confuse many times the undesirable results with unreasonable decisions and, consequently, they would consider the administrators liable" [18].

In resume, it is clear that the Business Judgment Rule only serves to move the guilt away whenever we are talking about a violation of the duty of care, present in the subparagraph a) of the paragraph one of article 64th of the PCC, as referred above. The same is not true for the duty of loyalty, mentioned in subparagraph b) of the same article. As we said above, the administrators do not have any alternatives and, therefore, he must not violate this duty, under penalty of not being able to prove that they did not acted guiltless and on personal effects.

Whenever the administrators can prove that they followed every precondition of paragraph 2 of article 72nd of the Portuguese Companies' Code, they will remove the guilt and the illicit. In this case, the administrators cannot be liable to the company.

V. THE SPECIAL CASES OF PARAGRAPHS 3, 4, AND 5 OF THE 72ND ARTICLE OF THE PORTUGUESE COMPANIES' CODE

Beyond the situations referred above, the administrators will not be liable in some specific situations determined by law, with no need for them to prove that they acted lawfully.

We can see one of these situations reflected in the article 72nd of the Portuguese Companies' Code, especially in paragraph 3, when it states that when the damages provoked to

the company originate in a deliberation of the board of administrators, the ones that were not present or, being present, as voted expressly against it (the abstention is not enough), cannot be considered liable, since it has manifested their right of opposition.

The same legal provision, now in paragraph 5, indicates other situation of inexistence of liability when it states that “administrators and managers are not liable before the society when they acted upon a deliberation of the stakeholders, even when that deliberation can be annulled”. However, we may approach this rule carefully, since, on the one hand, every time the administrator believes that the deliberation will be annulled and that its execution will likely result in damages to the company he must not execute it during the time it can be annulled because liability takes place. He must execute it just after. On the other hand, the administrators must confirm if they can execute that specific deliberation, since the law, in certain circumstances, prohibits the execution of deliberations that could be annulled. By rule, the administrators are not liable when they act upon deliberations of the stakeholders, but they must be cautious and confirm if they do not fall in the prohibition we have just indicated.

VI. MAIN CONCLUSIONS

The companies’ activities are, by nature, subjected to risks and may bring losses to its stakeholders, especially of their capital duties.

The administrators have the job to command the destinies of the company and, by doing so, they act upon decisions that cannot always be exempt of risks. However, in this activity, the administrators cannot violate their duties, both legal and induced by the company’s by-laws, which they accept by taking the job, or they will face liability before the company.

The Portuguese law highlights two general legal duties: the duty of care and the duty of loyalty. These duties are then divided in other minor duties that must be observed.

The Portuguese law consecrates a presumption of blame whenever administrators fill in the following preconditions: violation of a legal or contractual duty, damages to the company and a connection between that violation and the damages.

Since it is just a presumption of blame, the administrators must prove that they were not guilty and, by doing that, avoiding a personal liability.

To prove that, the administrators must demonstrate that acted upon good information, free from any personal interests and following rational economic criteria. That is the reason that the Portuguese law established the so-called Business Judgement Rule.

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