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CHAPTER 18

Commercial Law

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Summary: *1. Introduction 2. Major differences between commercial law and civil law 3. Negotiable instruments 4. Commercial register 5. Insolvency 6.* Estabelecimento comercial *7. Commercial jurisdiction 8. Future trends*

1. Introduction

Portuguese lawyers agree on the existence of a branch of private law called commercial law. As in other countries, there is no agreement on a material definition of this branch of law, but authors' opinions generally converge on the idea that the focus of contemporary commercial law is on economic undertakings. Given that the practical consequences of this disagreement are of very little significance, we can proceed without discussing the definition.

The first Portuguese Commercial Code was published in 1833. It is known as "Ferreira Borges Code" in homage to its author. This Code was influenced by the French Commercial Code of 1807, but it did more than merely adapt the French model. The reasons for some of the specific characteristics of the first Portuguese Commercial Code included the fact that Portugal had no Civil Code at that time (and had none until 1867). The Ferreira Borges Code therefore had no elder brother to relate to, and being alone in the world of Portu-

guese modern Codes was forced to regulate more questions than some similar Codes in other countries.

The second Portuguese Commercial Code (generally known as the "Veiga Beirão Code", after the minister responsible for it) was published in 1888. Less than half of it is still in force.

The Portuguese Commercial Code of 1888 delineates its scope through a mixed system. Article 1 states that commercial law governs commercial transactions, irrespective of whether the persons involved are merchants or not. Nevertheless, Article 2 considers as commercial transactions not only the transactions described in the Code but also the transactions performed by merchants in general, even if they are not described in the Code. Consequently, although the Portuguese system for determining commercial law is *prima facie* "objective", it is in fact half "objective" and half "subjective".

The category of merchant comprises both individuals engaged in commercial activities and commercial companies.

Since 1986, individual merchants may limit their liability by creating a so-called "*estabelecimento individual de responsabilidade limitada*" – which is not a legal entity but a mere separate business property (however this possibility is rarely used, people preferring to incorporate one-person limited liability companies).

Originally, the Veiga Beirão Code was divided into four books: general provisions, specific commercial contracts, maritime commerce and bankruptcy. In 1899, the book on bankruptcy was replaced by a separate Bankruptcy Code. From then on, the Veiga Beirão Code has undergone many amendments. Currently, not only have all its provisions on stock and commodities exchanges, bills of exchange, promissory notes, cheques, registers and companies been replaced, but also very important parts of its provisions on maritime commerce, insurance contract and other subjects have been substituted by different pieces of legislation. This means that the Code is now a small part of commercial law and that its relevance is not very great.

The Veiga Beirão Code was enacted when Portugal already had a Civil Code, forging links between both. As a result, many of the provisions of the Commercial Code, mainly those dealing with contracts, are drafted as deviations from the provisions of the Civil Code which are seen as the standard rules. The replacement in 1966 of the

first Portuguese Civil Code by a new Code has had little impact on this system of linkage.

It may almost go without saying that the concept of commerce underlying Portuguese law is far wider than that used by economists or in everyday language. Indeed, as is also the case in other countries, the Portuguese Commercial Code governs not only commerce in the narrow sense, but also (some aspects of) other economic activities such as manufacturing, banking, insurance and transportation.

2. Major differences between commercial law and civil law

The reasons for the emergence of commercial law were essentially the same in all countries. In those legal systems that have developed a distinction between civil law and commercial law the major differences between these two branches of private law tend to be similar, allowing for a general understanding that commercial law favours expediency in business and the strength of the creditors' position. Let us see how this works in the context of Portuguese law.

In Portuguese civil law, when not otherwise stipulated, co-debtors are severally obliged. In contrast, under commercial law, co-debtors are jointly and severally liable.

The stronger protection of creditors is also apparent in the rules on guarantee (*fiança*). In civil law, unless otherwise established, the guarantor may refuse payment until the creditor exhausts the assets of the debtor unsuccessfully, but in commercial law the guarantor has no such right.

The rules on interest due in the event of late payment also show the same tendency, the interest rate for commercial credits being higher than that for civil credits.

One aspect of the favouring of business expediency is that commercial law has less exigent rules on the formal requirements of contracts. This may be exemplified by the rules on loans: those subject to civil law must consist of a document signed by the borrower if the amount involved is in excess of € 2,000 and must consist of a notarial deed if the amount involved is in excess of € 20,000, whereas those entered into between merchants may be proved by any means.

The degree of protection afforded to the *bona fide* acquirer provides another example of the expediency favoured by commercial law. In contrast to the general tendency in continental Europe, in Portuguese law the principle *en fait de meubles la possession vaut titre* does not prevail. Nonetheless, those who acquire *a non domino* enjoy stronger protection when the seller is a merchant.

Different but convergent examples of the differences between commercial law and civil law can be found in the rules on sale and purchase, *inter alia* in the greater flexibility accorded by commercial law to the sale of goods of which the seller is not the owner.

3. Negotiable instruments

In Portuguese legal literature the main concept in this area is that of *títulos de crédito*, derived from the Italian concept of *titoli di credito*, mainly through the writings of Vivante and Ascarelli. This concept is wider than similar concepts used in other legal literatures, including the English concept of negotiable instruments. Indeed it encompasses a heterogeneous variety of instruments, such as bills of exchange, promissory notes, cheques, shares, debentures, bills of lading and warehouse warrants. The utility of such a concept is more than ever open to discussion. On the one hand, some of these instruments do not need nowadays to take the form of documents. On the other hand, some of these instruments are also securities and this characteristic implies a regime different from that applicable to those instruments that are not securities.

As regards bills of exchange, promissory notes and cheques, it should be noted that Portugal is a party to the Geneva conventions and that the uniform laws approved by these conventions are in force in Portugal.

4. Commercial registration

From an organizational point of view, we may point to the following two characteristics, amongst others, of the Portuguese system for commercial registration: it is the responsibility of the administrative authorities, more precisely of departments of the Ministry of Justice (the "Conservatórias do Registo Comercial"); and it is geographically decentralized.

The law states that individual merchants and companies (as well as other business entities) are subject to registration. Nevertheless, individuals (with the exception of those who have created a "estabelecimento individual de responsabilidade limitada") are not directly penalized for not registering themselves and indeed the large majority of individual merchants are not registered.

Overlapping partly with the commercial register is a national register for legal entities ("*Registo Nacional de Pessoas Colectivas*"), which is responsible *inter alia* for the task of authorizing company names.

5. Insolvency

As we have already seen, in 1899 the provisions on bankruptcy ("*falência*") were detached from the Commercial Code by means of the creation of a specific Code on this matter. In 1905, this Bankruptcy Code was incorporated in a pre-existing Code of commercial procedure. In 1932, an act was passed establishing for the first time in Portugal insolvency for non-merchants (calling it "*insolvência*", so as to underline its difference from bankruptcy of merchants).

In 1935, a new and separate Bankruptcy Code was enacted. In 1939, a Code of Civil Procedure was published incorporating both rules on bankruptcy and on the insolvency of non-merchants. Insolvency law (in a broad sense) then experienced a period of stability until 1986, when an act was passed changing the "philosophy" in this legal field, by creating a "special procedure for the recovery of undertakings and for protection from creditors", with the aim of enhancing the chances of survival of undertakings in a poor financial state, by way either of agreement with their creditors or of reconstruction as determined by these creditors. In 1993, a Code entitled "*Código dos Processos Especiais de Recuperação de Empresa e da Falência*" (Code on the Special Proceedings for Recovering of Undertakings and on Bankruptcy) was published, going further along the same path.

The present regime derives from the "*Código da Insolvência e da Recuperação de Empresas*" (Code of Insolvency and of the Recovery of Undertakings), enacted in 2004, under the influence of the German *Insolvenzordnung* of 1994, of the Spanish *Ley Concursal* of 2003 and naturally of the relevant European Regulations and Directives.

The 2004 Code marks a break with previous concepts and trends, mainly with the idea that this kind of proceeding may serve as "protection against creditors". Indeed, it is no longer feasible to adopt reconstruction measures before a declaration of insolvency. These measures may only take place under an "insolvency plan" agreed by the creditors after such a declaration.

Some of the other most important features of the 2004 Code are the specific provisions on the insolvency of individuals, including non-merchants. These seek to make it possible for the insolvent person to make "fresh re-start" after a five-year period, during which time his income (except the minimum necessary for subsistence) is assigned to a trustee responsible for its distribution among the creditors.

6. Estabelecimento comercial

A very important concept in the context of Portuguese commercial law is that of *estabelecimento comercial* – which corresponds broadly to Spanish, French, Italian and German concepts of *establecimiento mercantil*, *fonds de commerce*, *azienda commerciale* and (in one of meanings of the word) *Handelsgeschäft*.

The reason for this importance is that *estabelecimentos comerciais* as such (*i.e.* as a whole) are often taken as the object of contracts, mainly of sales and of leases. We should pay special attention to two of the factors that determine this way of drawing up transactions. The first results from the conjunction of the fact that many businesses are carried on in leased premises with the rule that the assignment of the contractual position of tenant does not depend upon the consent of the landlord when such position is assigned in the context of the assignment of a business. The second reason derives from a rule on value added tax, whereby the transfers of goods

within the framework of the transmission of a *estabelecimento comercial* are exempted from such tax.

The regime of the *estabelecimento comercial* is not to be found in the Commercial Code, but in other laws, *inter alia* those on leases. Besides the expression *estabelecimento comercial*, the key words in the area are *trespasse* and *cessão de exploração* (or *locação de estabelecimento*). The former designates any kind of *inter vivos* transfer of ownership of a *estabelecimento comercial* and the latter the lease of a *estabelecimento comercial*.

7. Commercial jurisdiction

The traditional commercial courts were abolished in 1932. Insolvency courts were created in 1996 and in 1999 the commercial courts were restored, although only in the judicial districts of Lisbon and Oporto. Their competence includes bankruptcy, internal disputes of companies, competition and industrial property.

8. Future trends

When it entered into force in 1888, the Portuguese Commercial Code comprised rules on companies, negotiable instruments, stock and commodities exchanges and bankruptcy. These subjects are now addressed and dealt with by other pieces of legislation, some of which have been codified.

Whereas almost all the provisions of the Commercial Code that are still in force deal with contracts, the future of the Portuguese Commercial Code is dependant on the decisions to be taken on the legislation on contracts (currently dispersed through the Civil Code, the Commercial Code and many specific acts, as explained in the chapter on contract law).

The increasing fragmentation of commercial legislation has brought about the emergence of new branches of legal studies. It is not clear whether commercial law will survive the development of these new branches. What happens abroad will determine the path taken in Portugal. At the present time, there still seem be a number of

reasons for maintaining commercial law as a living discipline: not only does it enable the joint study of those divisions of the Commercial Code that are still in force, but it is also the appropriate "place" for an introductory and panoramic approach to a very large area of private law.

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CHAPTER 19

Company Law

RUI PINTO DUARTE

1. Introduction

The Portuguese legal concept of *sociedade* is similar to the Spanish, Italian, French and German concepts of *sociedad, società, société* and *Gesellschaft* (less clearly in the last case). It encompasses equivalents of both the partnerships and companies of English law.

On the one hand the idea of *sociedade* refers to a type of contract and on the other hand it refers to a type of legal entity. The purpose of such a contract and of such an entity may be either commercial or civil but, in any case, there must be (unlike, for example, in German law) an economic purpose.

Evolution over the last two decades has caused the concept of the *contrato de sociedade* to be widened, to include also the cases where law admits the creation of a company by a unilateral act.

In this text the word "company" shall be used to translate *sociedade,* although as noted above the English concept of company is different from the Portuguese concept of *sociedade.*

2. Civil companies *versus* commercial companies

As in other countries, Portugal traditionally draws a major distinction between civil companies *(sociedades civis)* and commercial companies *(sociedades comerciais)*. The former are governed by the Civil Code and the latter by the *Código das Sociedades Comerciais* (the Companies Code that in 1986 replaced the part of 1888 Commercial Code dealing with companies, as well as other subsequent legislation).

Outwardly, the crucial difference between civil companies and commercial companies lies in their purpose. Commercial companies must have a commercial purpose and civil companies may not have such a purpose. Nevertheless, it should be stressed that companies with a civil purpose may adopt a commercial form and that in doing so they become subject to the rules on commercial companies.

As the regimes for the various types of commercial companies are quite different from one another, it is difficult and almost irrelevant to make a general comparison between civil companies and commercial companies. The most relevant difference is that all types of commercial companies are legal persons, while ordinary civil companies do not have (according to the majority opinion) legal personality, although they enjoy a certain degree of "patrimonial autonomy". However, besides ordinary civil companies (*i.e.* those governed only by the Civil Code), there are special types of civil companies ruled by other laws (such as, for instance, *sociedades de advogados* – "law firms"), which are legal persons.

3. Types of commercial companies

Commercial companies must adopt one of the types specified by law (they are subject to what in German is called *Typengesetzlichkeit*), these types being:

- *sociedades em nome colectivo*, which correspond to the French, Spanish and Italian types with similar names;
- *sociedades por quotas*, which correspond to the German *GmbH*, to the French *société à responsabilité limitée* and to the Spanish and Italian types with names similar to the latter;

- *sociedades em comandita simples*, which correspond to the French, Spanish and Italian types with similar names;
- *sociedades em comandita por acções*, which correspond to the French, Spanish and Italian types with similar names;
- *sociedades anónimas* – which correspond to the French and Spanish types with similar names, to the Italian *società per azioni*, and to the German *Aktiengesellshaft*, and, less closely, to the UK public company limited by shares.

The name of each company must permit identification of the type to which it belongs. The names of *sociedades anónimas* must end with the expression "*sociedades anónimas*" or with the letters "S.A." and those of *sociedades por quotas* with the word "*Limitada*" or with the abbreviation "*Lda*". The names of *sociedades em nome colectivo* must either include the names of all their members or include the name of one or some of them and a reference that indicates the existence of other members, such as "*e Companhia*". The names of *sociedades em comandita* must include the name of at least one of the members with unlimited liability and the word "*comandita*".

As in other continental European countries, *sociedades em nome colectivo* and *sociedades em comandita simples* have existed at least since the Middle Ages. *Sociedades anónimas* descend from the companies that were created by royal charter, the first law allowing their incorporation without previous authorization having been published in 1867. *Sociedades por quotas* were created in 1901 under the strong influence of the German *Gesetz bettrefend die Gesellschaften mit beschränkter Haftung*.

Sociedades em nome colectivo and *sociedades em comandita* (either *simples* or *por acções*) are currently of little economic significance. That is why this text deals mainly with *sociedades anónimas* and *sociedades por quotas* (hereinafter also *"SA"* and *"SpQ"*).

The differences between the types of commercial companies relate mainly to the rules governing the liability of their members for the debts of the company, to the rules on the transfer of holdings in their capital and to the structure of the company bodies.

4. Companies and other legal forms of carrying out economic activities

According to concepts adopted by Portuguese legal rules, not all legal entities with an economic purpose are companies. Entities with charitable objectives, *i.e.* foundations, clearly lie outside this category. But even among self-interested entities with an economic purpose there are some that Portuguese law does not characterize as companies. This is the case of *cooperativas, agrupamentos complementares de empresas, entidades públicas empresariais* (all of which are types of legal entities) as well as of *estabelecimentos individuais de responsabilidade limitada* (which do not constitute a legal entity).

Until 1980, the *cooperativas* were ruled by the Commercial Code and were characterized as a special type of company, as in other legal systems. In that year a *Código Cooperativo* was adopted that has removed the *cooperativas* from the primary scope of company law – albeit establishing that commercial law, including the law on *sociedades anónimas*, was applicable to them on a subsidiary basis. The second *Código Cooperativo*, which came into force in 1996, has retained these principles, merely replacing the reference to commercial law with a reference to the *Código das Sociedades Comerciais*.

The *agrupamento complementar de empresas* (hereinafter *ACE*) is a type of legal entity created in 1973 under the strong influence of the French *groupement d'intérêt économique*. It is intended as a means for enhancing collaboration among pre-existing undertakings and may not have as a primary goal the generation of a profit in its accounts. Underlying the creation of the *ACE* was the (disputable) assumption that Portuguese law did not allow for non-profit-making companies, namely because the definition of company in the Civil Code (Article 980) sets out – following the definition of the original text of the corresponding article in the French Civil Code (Article 1832) – that the purpose of members of companies is to divide among them profits arising from the activity of companies. The *ACE* is therefore a kind of Portuguese ancestor of the European Economic Interest Grouping.

Undertakings that are entirely owned by the State may adopt the form of a company or the form of *entidades públicas empresariais (EPE)*. The law characterizes this type of entity as "legal persons of public law" with an "entrepreneurial nature". Although their bodies are similar to those of *sociedades anónimas*, we might say that in practical terms they are less autonomous from the State than State undertakings that take the form of a company.

The *estabelecimento individual de responsabilidade limitada* (hereinafter also *EIRL*) was created in 1986, a few days before the publication of the *Código das Sociedades Comerciais*. It is not a company or any other kind of legal entity, but a mere separate undertaking belonging to an individual. The influence of the French *entreprise unipersonnelle à responsabilité limitée (EURL)* may be observed in its name and purpose.

Indeed, although in 1986 some European legal systems, including those of Germany and France, already provided for single-member private limited liability companies as a means to the limitation of the liability of individuals merchants, Portuguese legislation opted to follow a different path, echoing the suggestions made by a number of writers in the early decades of the twentieth century. Most probably it was due to this Portuguese legal device that Article 7 of the 12th European Directive of 1989 allowed Member States the possibility of not providing for single-member companies if their legislation offers individual merchants other means for limiting their liability. Nevertheless in 1996 the *CSC* was amended in order to admit the single-member *SpQ*. The *EIRL* was never embraced by the Portuguese business community, and since the creation of the single-member *SpQ*, it has become almost a dead letter.

5. The *Código das Sociedades Comerciais*

The *Código das Sociedades Comerciais* (hereinafter also "*CSC*") of 1986 was intended to replace old and fragmentary laws, transposing the European Directives on companies in force at the time (*i.e.* the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Directives). Additionally, it took into account the drafts of European Directives then under

discussion, which have not been finally approved (*i.e.* the drafts of the 5th and 9th Directives).

It is divided into eight parts, entitled:

- general part;
- *sociedades em nome colectivo;*
- *sociedades por quotas*;
- *sociedades anónimas*;
- *sociedades em comandita*;
- *sociedades coligadas (i.e.* groups of companies*);*
- provisions on crimes and offences; and
- final and transitional provisions.

The *CSC* contains the most important rules on commercial companies and is the centrepiece of Portuguese company law. However, there are many other pieces of legislation relevant to companies. These include the *Código dos Valores Mobiliários* (Securities Code), worthy of mention because it contains rules on public companies (*i.e.* companies open to public investment).

Since 1986, the *CSC* has undergone several amendments. Taken together, they have materially transformed the contents of the Code, although each one of them has had a limited reach. The most relevant of these amendments was perhaps that brought in by the very recent Decree-Law 76-A/2006, of 29 March 2006, which entered into force on 30 June 2006. This statute introduces changes in different fields, and particularly in the following: formal requirements concerning the *contrato de sociedade* and alterations to it, removing the requirement of notarial deeds; winding-up of companies; merger and division; and, last but not least, management and supervision of SA.

6. Some aspects of the regime applicable to all commercial companies

The general part of the *CSC* consists of 174 Articles. This shows clearly that Portuguese law has many provisions applicable to all companies irrespective of their type. The authors of the Code attempted to draft the largest number of general provisions, including by submitting all types of companies to many of the rules that European Directives only impose upon *SA* and in some cases upon *SpQ*.

In this section we shall outline various aspects of the main rules potentially applicable to all types of commercial companies. In the following sections we shall address some specific aspects of *SA* and *SpQ*.

6.1 *Formation of companies*

All companies result from a legal act known in Portuguese law as *contrato de sociedade* – even when this act is unilateral.

The *contrato de sociedade* comprises that which in English law is divided between the *memorandum of association* and the *articles of association*. For the sake of simplicity however, we shall often translate *contrato de sociedade* as "articles of association".

The minimum number of parties to a *contrato de sociedade* is two in the case of *sociedades em nome colectivo* and of *sociedades em comandita simples*. Single-member *SpQ*s are admitted with the requirement that the company name contains the word *unipessoal*. The main rule on *SA*s (and on *sociedades em comandita por acções*) states that five members are required for incorporation, but an *SA* or *SpQ* wholly owned by another *SA* may be incorporated by a unilateral act.

The principal rules applicable to the formation of all types of companies are:

- the company name must first be authorized by the *Registo Nacional de Pessoas Colectivas;*
- the *contrato de sociedade* must be drawn up in writing and the signatures of the parties notarized (until Decree-Law 76-A/2006 the *contrato de sociedade* generally had to consist of a notarial deed)
- the company must be registered with the relevant Commercial Registry;
- the *contrato de sociedade* must be published on an official internet site as well as in an ordinary newspaper;
- legal personality results from final registration.

The content of the *contrato de sociedade* required by the CSC is very similar to the minimum requirement of the 2nd European Directive.

The cash contributions of the founders of the *SA* and of the *SpQ* must be deposited with a bank prior to the "*contrato de sociedade*". In these types of companies, contributions in kind must be valued by a chartered accountant, according to rules transposing the 2nd European Directive.

The formation of a company is traditionally quite time-consuming and all measures taken so far to speed up the process have enjoyed only limited success. In July 2005, a law was published enabling the formation of the *SA* and the *SpQ* in a single day, provided a number of conditions are met. Under these rules, as long as the parties are willing to adopt a text of a *contrato de sociedade* corresponding to an officially approved model, the powers to carry out all the formalities required lie with the Commercial Registry. Establishing a name for the company under these rules is easy, as pre-approved names are available to those who choose this alternative route. However, these rules do not apply if there are contributions in kind or if the formation of the company (because of its purpose) is subject to any form of authorization.

6.2 *Capital*

All companies must have a fixed capital determined by the articles of association (the sole theoretical possible exception being *sociedades em nome colectivo* without capital contributions).

The CSC extends to all types of commercial companies many of the rules that the 2nd European Directive establishes for the *SA*. It would therefore be pointless to elaborate on this subject and we shall only address some of the particulars of Portuguese law.

First, the minimum capital required. For the *SA* and *sociedades em comandita por acções*, the minimum is € 50,000 and for the *SpQ* it is € 5,000. No similar requirement exists for *sociedades em nome colectivo* or for *sociedades em comandita simples*.

The percentage of the capital that must be paid up on execution of the *contrato de sociedade* is 30% for the *SA* and 50% for the *SpQ*.

Increases and decreases in capital are considered special cases of amendment of the articles of association, subject to the provisions generally applicable to such amendments and to other specific rules.

The capital may be increased by means of new contributions or through capitalization of reserves. The capital may be reduced to adjust it to the actual equity of the company or to pay back to the members a part of their contributions. In the latter case, the operation is subject to a judicial authorization.

In capital increases by means of new cash contributions, the members of the *SA* and the *SpQ* have subscription rights. The exclusion of such rights is feasible through a resolution of the general meeting on the grounds of the "interest of the company".

A curiosity suggestive of Portuguese economic problems is the fact that until January 2005 provisions concerning the transposition of Article 17 of the 2nd Directive (on "serious loss of the subscribed capital") were not in force. After completion of a tortuous path, a rule was adopted on this date corresponding to the softest solution admitted by the European rule.

6.3 *Resolutions of the members*

In its general part, the CSC allows resolutions of the members of the companies to be adopted either at the general meeting *(assembleia geral)* or without such a meeting, if all members agree in writing with the contents of the resolution. This means that not all resolutions of the members of companies are adopted at general meetings. For the sake of simplicity of language, over the following pages we shall speak only about resolutions adopted at general meetings, but these references are to be interpreted as encompassing all kinds of resolutions of company members (except where otherwise indicated or implied).

The formalities for convening the general meeting (*stricto sensu*) vary depending on the type of company. In the case of the *SpQ*, the means of convening is by registered letter (with advance notice of at least 15 days) and in case of the *SA* the means are publication on an official internet site (from 1 January 2006 onwards) as well as in a ordinary newspaper (with advance notice of at least one month). However, if all shares are registered shares, the articles of association may stipulate that general meetings are con-

vened by registered letter or (pursuant to Decree-Law 76-A/2006) even by e-mail (with advance notice of at least 21 days).

The convening formalities may be avoided if all members take part in the general meeting and agree to hold the meeting without observing such formalities.

For the *SpQ*, the *CSC* also allows resolutions to be adopted by circular, but this proceeding is not used in practice.

Other particulars concerning resolutions of the members shall be given in the specific sections on the *SA* and the *SpQ*.

6.4 *Liability of the members of the company for its debts*

Members of the *SA* and of the *SpQ* are not liable for the debts of the company, once the company is registered. However members of the *SpQ* are liable for the payment of the contributions of the other members. Portuguese law also enables that the articles of association of a *SpQ* state that one or more of its members are liable for the debts of the company but this possibility is not used in practice. Members of *sociedades em nome colectivo* and the *comanditados* of *sociedades em comandita* are jointly and severally liable for the debts of the companies – but such liability can only be enforced following enforcement of the liability of the company.

6.5 *Liability of the directors and of other persons entrusted with control of management and with auditing*

The *CSC* rules both the liability of the directors towards the company and liability of the directors towards the creditors of the company.

The main rules of the *CSC* on the liability of directors to the company are (more onerous since Decree-Law 76-A/2006) as follows:

- liability depends on the violation of duties deriving from law or the articles of association;
- liability depends on intention or negligence, the burden of proof (of the non-existence of intention or negligence) falling on the directors concerned;

- there is no liability if the relevant act was performed in accordance with a resolution of the general meeting;
- the directors involved are jointly and severally liable;
- proceedings to enforce such liability may be started by the company, upon a resolution of the general meeting or (for the benefit of the company) by any shareholder owning 5% or more of the capital.

Portuguese authors continue to discuss the extent to which the law imposes a general duty of good management on *administradores* and *directores*.

The main rules of the *CSC* on the liability of directors to the creditors of the company are as follows:

- liability depends of the violation of legal rules or contractual provisions designed to protect the creditors;
- liability exists only when the assets of the company become insufficient to satisfy its creditors;
- liability exists even if the relevant acts of the directors have been performed in accordance with a resolution of the general meeting and may not be excluded by any act of the company.

Members of the boards charged with the auditing are jointly and severally liable with the directors involved, both to the company and to the creditors whenever the damage would not have occurred if they had fulfilled their duties. They can also be independently liable under terms similar to those applicable to the directors.

Chartered accountants are also liable to the company and to the creditors of the company according to rules similar to those applicable to the directors.

6.6 *Right to information*

The right to information is hardly dealt with in the general part of *CSC*, but the Code has provisions on this subject for each type of company. In the *SpQ*, each member has a strong right to demand information. In the *SA*, the contents of this right depend on the percentage of the shareholding. Only shareholders (or groups of shareholders) with 10% or more of the capital may demand information

not disclosed in the financial statements and other documents made public by the company.

6.7 *Amendment of the articles of association*

The *CSC* governs the amendment of the articles of association both in the general part and in each of the parts dedicated to the specific types of companies. Rules included in the general part address mainly the formal requirements for all amendments and general aspects of increases and decreases of capital.

6.8 *Merger and division*

The CSC governs the merger and division of companies, applying to all types of companies the solutions set out by the 3rd and the 6th European Directives for public limited liability companies. Decree-Law 76-A/2006 has simplified the relevant proceedings, which were previously very bureaucratic and time-consuming.

6.9 *Dissolution and liquidation*

Under Portuguese law, the voluntary winding-up of companies consists in principle of three steps: dissolution, liquidation and the division of assets. When the company has no liabilities the liquidation can be avoided and the division of assets may take place simultaneously with dissolution.

The main causes of dissolution are:

- a resolution of the members;
- if the articles of association limit the duration of the company, expiry of the stipulated period;
- a judicial declaration of insolvency

Liquidation is carried out by liquidators, whose main duties are to collect debts, to turn assets into cash, to honour the obligations of the company and to prepare the division of the surplus. The general meeting may authorize the liquidators to continue the business of the company temporarily.

6.10 *Groups of companies*

Portugal belongs to the short list of the countries where groups of companies are governed by private law. As we have already seen, Part VI of the CSC is devoted to *sociedades coligadas*, a (not successful and not commonly used) translation of the German expression *verbundene Unternehmen*.

This concept encompasses different scenarios for affiliated companies, ascribing duties and liabilities, which increase in line with the power of the relevant company over the other. A company that owns 100% of another company is liable for its debts.

7. Sociedades anónimas

As mentioned above, we shall now address some particulars of the *SA*, beginning with their management and supervision, not only because the rules on these subjects are the most relevant from a practical point of view, but also because these rules reveal some degree of originality.

7.1 *Management and supervision*

Prior to the enactment of Decree-Law 76-A/2006, the CSC already permitted more than one management and supervision model for *SA*. One of these models, corresponding to the Portuguese tradition, consisted of a board of directors (or in some cases of a single director) and a board of auditors (or a single auditor). The other model, inspired by the German system of *Aufsichtsrat* and *Vorstand*, consisted of a supervisory board (*conselho geral*) and a board of directors (or in some cases of a single director).

Sometimes the first model was described as a one-tier system of management, contrasting with the second, characterized as a two-tier system of management. Indeed, the first model envisaged the possibility of dividing the directors into "executive" and "non-executive" and could therefore accommodate a two-tier system of management.

Following the enactment of Decree-Law 76-A/2006, the CSC is even more generous in the range of models it offers for structuring the management and supervision of SA. The Code itself says that it offers three models, but in reality the following eight possibilities exist:

- single director (*administrador*) and single auditor (*fiscal único*) – necessarily a chartered accountant;
- single director and board of auditors (*conselho fiscal*) – comprising at least one chartered accountant;
- board of directors (*conselho de administração*) and single auditor – necessarily a chartered accountant;
- board of directors and board of auditors – comprising at least one chartered accountant);
- board of directors, board of auditors and chartered accountant (*revisor oficial de contas*);
- board of directors, auditing committee (*comissão de auditoria*) and chartered accountant;
- executive board of directors, supervisory board (*conselho geral e de supervisão*) and chartered accountant;
- single director, supervisory board and chartered accountant.

Models including a single director are permitted only in companies where the capital does not exceed € 200,000.

Listed companies and companies with "big figures" must adopt one of the models in which there is a chartered accountant acting out of any board of the company. In these companies, some (and in some cases the majority) of the members of the board of auditors, of the auditing committee and of the committee of the supervisory board charged with "financial matters" must be independent from the shareholders.

The main differences between models including *conselho geral e de supervisão* and the others are:

- when there is no *conselho geral e de supervisão*, the *administradores* must be elected by the general meeting, whilst when there is *conselho geral e de supervisão* this power belongs in principle to this board, although the articles of association may ascribe it to the general meeting;
- when there is a *conselho geral e de supervisão*, all directors must be executive, whilst when there is no *conselho geral e de supervisão* the board of directors may be divided into executive and non-executive members;
- the articles of association may give the *conselho geral e de supervisão* powers to intervene in management matters, prohibiting the *administradores* from acting in some matters without the consent of the *conselho geral e de supervisão*, whilst similar powers may not be given to the *conselho fiscal*.

Legal entities may be elected to the *conselho de administração* and to the *conselho geral e de supervisão*, but such entities must designate individuals to hold the office in question, and the persons so designated "hold office in their own name". The members of the *conselho fiscal* must be individuals, with two exceptions: law firms and firms of chartered accountants.

The *conselho de administração* must have a chairman, who is however is a mere *primus inter pares*.

The term of office of all members of the boards of management and supervision is limited to a maximum period of four years, although this term is renewable without limitation.

Pursuant to the amendments carried out by Decree-Law 76-A/2006, meetings of the boards of management and supervision of *SA* may take place with recourse to telematic means.

7.2 *General Meeting*

The main responsibilities of the general meeting of shareholders of *sociedades anónimas* are:

- to amend the articles of association;
- to decide on the allocation of results;
- to approve the annual accounts;

- to make an annual assessment of the management of the company; and
- to elect and dismiss the *administradores* except if there is a *conselho geral e de supervisão*, in which case, as mentioned above, this responsibility may be ascribed either to the general meeting or to such *conselho geral e de supervisão*.

The general meeting may not take decisions on management issues unless the management body requests it to do so.

The general meeting of an *SA* has a kind of permanent subbody, called the *mesa da assembleia geral*, composed of at least a chairperson and a secretary. Convening and conducting meetings falls within the powers of the chairperson. It is also the chairperson who, together with the secretary, drafts and signs the minutes of the meetings.

Pursuant to amendments of Decree-Law 76-A/2006, the general meetings of *SA* may also be held using telematics.

7.3 *Shares and their transfer inter vivos*

The capital of an *SA* is divided into shares *(acções)* with a minimum par value of € 0.01 each.

Shares can be either registered shares or bearer shares and both can be represented by certificates or electronically.

The articles of association may provide for different classes of shares, including non-voting preference shares.

In the absence of any clause on this matter in the articles of association, shares are freely transferable. However, the articles of association may restrict the transfer of shares, *inter alia* subordinating it to the consent of the company or ascribing a right of first refusal to the other shareholders.

The formalities for the transfer of shares vary depending on whether they are represented by certificates or electronically and whether they are registered shares or bearer shares. In any case, these formalities are intended to facilitate the speed of the transactions.

7.4 *Amendment of the articles of association*

The main specific rules on the amendment of the articles of association of the *SA* are as follows:

- powers for amendment lie with the general meeting, but the articles of association may ascribe to the management body authority concurrent with that of the general meeting to increase the capital by contributions in cash, provided that such authority is limited in terms of value and time;
- resolutions on the amendment of the articles of association require two thirds of the votes cast; and
- in principle, the general meeting may only decide on the amendment of the articles of association if the votes of the shareholders participating in the meeting correspond to at least one third of the total votes; such requirement, however is not applicable if the general meeting is convened for a second time for the same purpose.

8. Sociedades por quotas

Moving on to the particulars of the *SpQ*, we shall address the same issues considered above in connection with the *SA*, in order to provide a comparative framework.

8.1 *Management and its supervision*

SpQ have one or more directors *(gerentes)*, entrusted with the management and representation of the company. Only individuals (either shareholders or third parties) may be appointed directors.

The term of the office of the *gerentes* is open-ended, unless otherwise stipulated in the articles of association or in the resolution of election. The articles of association may attribute to the *gerentes* a special right to their office.

The articles of association may provide for the existence of a *conselho fiscal*, to which the rules on the same body in the *SA* are applicable.

Using the possibility presented by Article 51/2, of the 4th Directive, the *CSC* excuses those *SpQ* that do not exceed certain figures for balance sheet total, net turnover and number of employees from the requirement of auditing accounts.

8.2 *General meeting*

The main responsibilities of the general meeting of *sociedades por quotas* are:

- to amend the articles of association;
- to approve the annual accounts;
- to decide on the allocation of results;
- to make an annual assessment of the management of the company; and
- to elect and to dismiss the directors.

Unless the articles of association attribute the relevant powers to the *gerentes*, the general meeting has the power to take decisions on important transactions, *e.g.* transfer of immovable property and acquisition of holdings in other companies.

Powers to convene meetings lie with the directors. The chair of the meetings belongs to the holder of highest stake of capital. The minutes of the meetings must be signed by all the participants.

8.3 *Quotas and their transfer* inter vivos

The capital of an *SpQ* is divided into *quotas* (a concept that corresponds to the German concept of *Anteile).* The minimum par value of each *quota* is € 100,000.

Quotas may not be represented by certificates.

All members of the *SpQ* must have voting rights, which in principle are proportional to the par values of their *quotas. CSC* allows the articles of association to ascribe double voting rights to certain *quotas* on the condition that these do not correspond to more than 20% of the capital (but this possibility is seldom used).

The articles of association may regulate the transfer of *quotas,* making it free or restricting it. In the absence of any clause on this matter in the articles of association, the transfer of *quotas* depends on the consent of the company, to be given by the members in a general meeting, unless it is a transfer between members, a transfer between a member and his spouse or a transfer between a member and a person who belongs to his or her direct family line.

The transfer of *quotas* must be in writing and must be subsequently registered with the Commercial Registry (traditionally the transfer of *quotas* required a notarial deed, but Decree-Law 76-A/2006 abolished this requirement).

8.4 *Amendments of the articles of association*

The main rules on the amendment of the articles of association of an *SpQ* are as follows:

- powers for amendment lie at all times with the general meeting; and
- resolutions on the amendment of the articles of association require the votes of three quarters of the votes corresponding to the total capital (or more if the articles of association so require).

9. Future trends

The future of Portuguese company law will of course reflect the evolution of EU law on the subject. In any case, we can attempt to predict a number of tendencies.

Concern about corporate governance will continue to be reflected in greater regulation of public companies. Globalization will require corporate mobility and the appearance of transnational types of companies (of which the European Company is a mere forerunner). The digital world will require the replacement of formalities. The attempt to render Portuguese rules more "competition friendly" will lead to alterations to the current rules on *SA* and *SpQ*, perhaps through the creation of a simplified sub-type of *SA*, as implemented in other countries and as is currently being discussed at the level of European law.

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CHAPTER 20

Labour Law

José João Abrantes

Summary: *1. Introduction 2. Brief historical background 3. The current crossroads and the outlook for labour law*

1. Introduction

1.1 The scope of labour law focuses on subordinated and remunerated labour.

The basis is the labour contract, "through which a person obliges himself/herself to provide his/her activity against remuneration to another/other person(s) under his/her/their authority and guidance" [Article 10 of the *Código do Trabalho* (Labour Code), hereinafter referred to as LC].

Under this contract the employee concedes the availability of his/her labour against a salary and places himself/herself under the authority and guidance of the employer who may give him/her orders and set out guidelines and instructions concerning the "where, how and when" of the provision of labour. On the other hand, within certain legal constraints (and in particular the contractual objective of the contracted activity) the employee owes obedience to the employer "as regards everything that concerns the execution and discipline of the job", except where these orders and instructions are revealed to be contrary to his/her rights and guarantees (Article 121/1/d of the LC).