

DIRECTORS' LIABILITY IN INSOLVENCY SITUATIONS - MLGTS

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Limits may have been recently established surrounding the liability of Directors in insolvency situations in Portugal but the threat nonetheless remains

Directors of companies in an insolvency situation may find themselves personally liable to the company or its creditors if certain strict criteria are not met, says Filipe Vaz Pinto, litigation and arbitration lawyer with Morais Leitão, Galvão Teles, Soares da Silva & Associados.

"Vis-í -vis the company, liability may arise, in general terms, for breaches of a duty of care or loyalty that cause losses to the company, and although any compensation will revert to the company, legal actions may however be initiated by shareholders or even creditors acting on behalf of the company."

Los Directores Generales de las empresas portuguesas en situación de insolvencia pueden ser responsables respecto a la deuda de la empresa o a sus acreedores si ciertos requisitos no se cumplen, comenta Filipe Vaz Pinto de MLGTS en Lisboa.

With respect to the company's creditors, Directors' liability is narrower as it mostly stems from breaches of specific duties imposed for the protection of creditors with any liability limited to the actual loss directly incurred as a consequence of such a breach.

In the context of insolvency, two potentially conflicting issues are however worth emphasising, says Vaz Pinto. First, after insolvency has been declared, only the insolvency administrator may initiate proceedings, on behalf of the company against the Directors.

"This means that shareholders (or creditors) lose any standing to sue the Directors on behalf of the company, but the administrator has a duty to investigate the actions of the Directors and, if it is the case, to initiate corresponding proceedings against them."

Second, Portuguese insolvency law imposes a duty on companies to submit themselves to insolvency proceedings whenever specific circumstances are met.

"The insolvent company has a legal obligation to present itself to proceedings within 60 days of knowledge of an insolvency situation (ie when it is impossible to fulfil its obligations). Directors may be held personally liable to company creditors for damages directly suffered as a consequence of the company continuing business, if they failed to fulfil the duty of presenting the company to insolvency proceedings in time," adds fellow partner Helena Soares de Moura.

Although in neither case is there strict liability, the consequences of any proven breaches may be severe. "Fault will have to be shown to exist although, in some cases, it may be presumed, thus shifting the burden of proof onto the Directors themselves," he says.