LIABILITY OF SHAREHOLDERS FOR CORPORATE DEBT: SEPARATING THE OWNERS FROM THE BUSINESS - BARROCAS SARMENTO NEVES

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Given the current economic climate we have seen an increase in the concerns of shareholders, in particular parent companies or majority shareholders, to limit their liability for the debts of their subsidiaries and to ensure they are not exposed unnecessarily particularly in insolvency situations.

Of the two types of companies in Portugal, Sociedade por quotas (private limited quota company – SQ) and Sociedade Anónima (public company – SA), there is a common liability rule. Shareholders

are liable up to the value of the quota/share held in the Portuguese Company subject to the following specific exceptions:

João Nuno Barrocas, de Barrocas Sarmento Neves, ofrece unas pinceladas sobre la obligación de los accionistas en situaciones de deuda corporativa y la necesidad de distinguir entre las responsabilidades de los dueños de una empresa y la responsabilidad de su negocio. Dada la situación económica actual, el autor confirma que hay un aumento de deseo por las partes involucradas, especialmente las casas matrices y accionistas mayoritarios, por restringir sus obligaciones ante las deudas de sus filiales y para protegerse en caso de forzado concurso de una de estas entidades.
(i) Where a SA has only a sole shareholder that shareholder is jointly and severally liable with the SA for the duties/debts of the incorporated SA.

(ii) In relation to SQs, Article 84 of the Companies Code provides that in cases where the legal provisions governing the proper allocation of the Company's assets in performance of its obligations were not satisfied a sole shareholder may be liable for the liabilities that have arisen during the period when there was only a sole shareholder. It should be noted, however, that this provision has limited impact, since legal commentators take the view that the liability of a sole shareholder only arises if there is a connection between the insolvency and the fact that the sole shareholder managed the Company in a way that its assets were mixed with the shareholders own and not for the Company's own interests.

(iii) Article 491 in conjunction with article 501 of the Portuguese Commercial Companies Code provides that companies which are in a 'group' relationship or '100% controlled' may be liable generally (regardless of insolvency) for the debts of the subsidiary / controlled company. There is, however, an extensive debate whether this applies to shareholders based outside of Portugal.

(iv) Finally, Article 334 of the Portuguese Labour Code (which came into force in 2009) provides for the liability of shareholders (in a group relationship or where the insolvent company is controlled) for the payment of outstanding employment debts that are overdue for more than three months.

Liability under Articles 334 only occurs where it can be established that the shareholder exercised a dominant control over the Portuguese company. In practice we are talking about either clear control via voting rights or the power to appoint directors, and having power to control the day-to-day management of the company, eg through a shadow director.

Share capital and cash contributions (prestaçíµes suplementares) should also be taken into account in insolvency situations, with both considered as net equity (capital próprio) and cannot be reimbursed if insolvency proceedings are commenced.

A shareholder with the power to appoint a director without an approving resolution from the other remaining shareholders is jointly liable with this person, if held legally liable to the company and fault can be attributed in the selection of the person appointed.

Furthermore, a shareholder which is able to elect a director or member of the supervisory board will be held jointly liable with the person elected, where fault can be attributed in the appointment made whenever the latter is held legally liable to the company or its shareholders. But only so long as the resolution passed includes the vote of that partner and with less than half the remaining shareholders present or represented at the general assembly.

A shareholder that has the power to remove a director, or member of the supervisory board, and by using its influence makes that person act or omit to act in a particular manner, is also jointly liable in the circumstances where this person incurs legal liability towards the company or its partners for the act or omission.

A controlling or parent company can also be liable for the obligations of its subsidiary so long as such a dominant position exists, in the following ways:

• The subsidiary is entitled to demand compensation in respect of any annual losses which the former suffers whenever those losses are not met by the affiliate's reserves;

• If the affiliate is declared officially insolvent;

• From the undertaking date and during the undertaking period the parent company, in the event of the affiliate's insolvency, is jointly and without limitation liable for the affiliate's debts provided that it is shown that the legal criteria and duties in relation to managing the subsidiary's assets in good faith have been breached.

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