THE ROLE OF D&O INSURANCE IN A LIABILITY-ORIENTED LEGAL REGIME

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1. Directors' Internal and External Liability Risks

1.1. The Company, Corporate Creditors, Shareholders and Third Parties as Potential Claimants

The Portuguese Companies Code[2] (*Código das Sociedades Comerciais*, hereinafter "CSC") establishes both the internal liability of directors vis-à-vis the company and their external liability towards corporate creditors, shareholders and third parties. Conceived as a legal mechanism for controlling directors' discretionary powers, directors' civil liability is enforced through the action *ut universi*, the shareholder action *ut singuli*, and the civil actions that creditors, shareholders and third parties are statutorily entitled to file.

The CSC is primarily focused on the accountability of directors rather than with the protection of their personal assets. Accordingly, it prohibits contractual provisions excluding or limiting directors' liability (Article 74, 1, CSC), adopts a particularly restrictive approach

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[2] The Portuguese Companies Code was enacted by Decree-Law n. º 262/86 of 2 September 1986.

to settlement agreements and waivers of compensation by the company (Article 74 CSC), and remains silent on both the taking out of Directors' and Officers' (D&O) liability insurance by the company and the corporate indemnification arrangements.,

The distinctive features of the company law regime governing directors' civil liability, as compared with the general law of civil liability, lie in the concepts of fault and wrongfulness[3]. Directors' fault is assessed by reference to the objective and professional standard of the careful, diligent and orderly manager ("*gestor criterioso e ordenado"*) laid down in Article 64, 1, *a*), of CSC[4]. The conduct of individuals entrusted with supervisory functions is, in turn, evaluated against the benchmark of high standards of professional diligence, as prescribed by Article 64, 2, of CSC.

As regards liability towards the company, Article 72, 1, of CSC imposes a statutory presumption of fault upon directors. By virtue of this reversal of the burden of proof (Article 350, 2, of the Civil Code), it is for the directors to demonstrate that they acted without fault (Article 72, 1, of CSC). By contrast, in the case of external liability under Articles 78, 1, and 79, 1, CSC, the burden rests on the injured party - whether a corporate creditor, shareholder or third party - to prove the directors' fault[5]. Generally, shareholders and third parties bringing claims against directors pursuant to Article 79, 1, of CSC do not benefit from any presumption of fault.

This regime governing directors' fault likewise applies to the civil liability of members of supervisory bodies pursuant to Article 81, 1, of CSC.

For the purposes of internal liability, the wrongfulness of directors' conduct consists in the breach of statutory or contractual duties (Article 72, 1, of CSC). Irrespective of the corporate form concerned, directors are subject to statutory duties of care (Article 64, 1, *a*), of CSC) and duties of loyalty (Article 64, 1, *b*), of CSC), which are owed primarily to the company whose affairs they are entrusted to manage[6].

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3 On this regime, see J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigos 72º a 79º", *Código das Sociedades Comerciais em comentário*, coord. de J. M. Coutinho de Abreu, vol. I, 2ª ed., Coimbra: Almedina, 2017, p. 892, ff.

4 On this regime, see J. M. Coutinho de Abreu and Maria Elisabete Ramos, "Artigos 72.º a 79.º", in J. M. Coutinho de Abreu (ed.), *Código das Sociedades Comerciais em Comentário*, vol. I, 2nd ed., Coimbra: Almedina, 2017, pp. 892 ff.

5 A statutory presumption of fault may, however, arise in particular circumstances (Article 149(1) CSC). For a comprehensive analysis, see J. M. Coutinho de Abreu and Maria Elisabete Ramos, "Artigo 72.º – Responsabilidade de membros da administração para com a sociedade", in J. M. Coutinho de Abreu (ed.), Código das Sociedades Comerciais em Comentário, vol. I, 2nd ed., Coimbra: Almedina, 2017, p. 974.

6 J. M. Coutinho de Abreu, "Deveres de cuidado e de lealdade dos administradores e interesse geral", in Reformas do Código das Sociedades, Coimbra: Almedina, 2007, pp. 17 ff. For a different view, see Manuel Carneiro da Frada, "A business judgment rule no quadro dos deveres gerais dos administradores", in *Jornadas em Homenagem ao Professor Doutor Raúl Ventura. A Reforma do Código das Sociedades Comerciais*, Coimbra: Almedina, 2007, pp. 61 ff.

The direct liability of directors towards corporate creditors is grounded in the breach of statutory or contractual provisions intended for the protection of such creditors (Article 78, 1, of CSC). The identification of those statutory or contractual provisions designed to protect corporate creditors is essentially a matter of legal interpretation. Statutory provisions intended for the protection of corporate creditors are those which, although not conferring subjective rights upon creditors, are designed to safeguard interests that are, wholly or in part, theirs[7].

Directors' direct liability towards corporate creditors is predicated upon the insufficiency of the company's assets to satisfy creditors' claims (Article 78, 1, CSC). Asset insufficiency exists where the company's liabilities exceed its assets[8]. This concept does not entirely coincide with that of insolvency under Article 3, 1, of the Insolvency and Corporate Recovery Code (*Código da Insolvência e da Recuperação de Empresas*). It is nevertheless to be expected that claims against directors by corporate creditors will frequently be pursued in the context of insolvency proceedings.

In the event of insufficiency of the company's assets, there is a direct loss to the company's assets, consisting in the diminution of its patrimony, and a corresponding indirect loss to its creditors, who are unable to obtain full satisfaction of their claims from the company's assets. Since the loss suffered by corporate creditors is derivative of the loss sustained by the company, creditors cannot recover from the directors an amount exceeding the loss caused by the latter to the company's assets[9].

Article 79 of CSC governs the direct civil liability of directors towards shareholders and third parties. In this context, "shareholders" are protected in their capacity as holders of a shareholding, and of the rights and obligations arising from membership of the company. They are not protected in their capacity as third parties holding contractual claims or proprietary rights deriving from legal transactions entered into with the company, a position that could equally be occupied by non-shareholders[10].

For the purposes of Article 79, 1, of CSC, "third parties" are persons other than the company itself, its directors and its shareholders acting in their capacity as shareholders. The

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[7] See J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 78.º - Responsabilidade para com os credores sociais", *Código das Sociedades Comerciais em comentário*, coord. de J. M. Coutinho de Abreu, vol. I, 2.ª ed., Coimbra: Almedina, 2017, p. 958-959.
[8] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 78.º - Responsabilidade para com os credores sociais", p. 960, 961.
[9] J. M. Coutinho de Abreu and Maria Elisabete Ramos, "Artigo 78.º – Responsabilidade para com os credores sociais", pp. 960–961
[10] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", *Código das Sociedades Comerciais em comentário,* coord. de J. M. Coutinho de Abreu, vol. I, 2.ª ed., Coimbra: Almedina, 2017, p. 968-978.

category of third parties encompasses the company's employees, suppliers, customers, corporate creditors who do not fall within the scope of Article 78 CSC, shareholders acting in a capacity other than that of shareholders, and the State[11].

Although Article 79, 1, of the Portuguese Companies Code places shareholders and third parties under the same liability regime, many of the factual circumstances giving rise to directors' liability towards each category differ significantly. The liability in question must arise from acts or omissions (which are wrongful, attributable to fault, and causative of loss) committed by directors in the performance of their functions, that is, in the course of and by reason of the company's management and/or representation[12]. In this sense, it is also a form of liability attaching to the exercise of a corporate office[13].

Article 79, 1, CSC provides that directors are liable to shareholders and third parties for loss directly caused to them "under the general rules of law". This reference to the general rules has generally been understood as referring to Articles 483 et seq. of the Civil Code[14]. Directors are therefore liable only where their conduct is both wrongful and attributable to fault. Such conduct will be wrongful where directors infringe: (a) the absolute rights of shareholders or third parties; (b) statutory provisions intended for their protection; or (c) specific legal duties[15].

1.2. Injured Parties Benefit from Mandatory Rules Unaffected by the Corporate Form

The regime governing the civil liability of members of the company's management and representative bodies, as well as of officeholders entrusted with supervisory functions, is *mandatory in nature*. Accordingly, any provision purporting to exclude or limit the civil liability of directors or supervisors - whether contained in the company's constitution or arising from any other contractual arrangement - is *void* (Articles 74, 1, and 81 CSC)[16].

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[11] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", cit., p. 970.

[12] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", cit., p. 970, ff.

[13] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", cit., p. 970-971.

[14] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", cit., p. 971.

[15] . M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 79.º - Responsabilidade para com os sócios e terceiros", cit., p. 971

[16] J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 74.º - Cláusulas nulas. Renúncia e transação", *Código das Sociedades Comerciais em comentário,* coord. de J. M. Coutinho de Abreu, vol. I, 2.ª ed., Coimbra: Almedina, 2017, p. 924, ff. See also Rui Pereira Dias, *Pactos de jurisdição societários*, Coimbra: Almedina, 2018, p. 473, ff.

Part of the Portuguese legal scholarship has nevertheless argued that directors' liability may be excluded or limited in cases of ordinary negligence, although not where the conduct is intentional (*dolus*)[17].

Regardless of the corporate form adopted by the company, the waiver or settlement of the company's claim for damages is subject to approval by the shareholders' meeting (Article 74, 2, of CSC). Such a resolution must not only be passed by a majority of the validly cast votes - excluding the votes of shareholder-directors who are potentially liable - but must also not be opposed by shareholders representing 10 per cent or more of the total voting rights. Furthermore, the resolution must be express, that is, it must directly record the intention to waive the right to compensation arising from specified acts or omissions, or to authorise a settlement on specified terms.

Directors who may be liable and who are also shareholders are statutorily precluded from voting on such a resolution (Article 74, 2, of CSC). This regime applies, *mutatis mutandis*, to members of supervisory bodies (Article 81, 1, of CSC). It does not, however, apply to the waiver of claims for damages vested in corporate creditors under Article 78, 1, CSC, or in shareholders and third parties under Article 79 CSC.

The enforcement by the company of internal liability claims against directors and members of supervisory bodies is contingent upon a shareholders' resolution adopted by a simple majority and must be brought within six months of the adoption of that resolution (Article 75, 1, of CSC). Failure to approve the resolution authorising the derivative action deprives the claimant company of procedural standing and, consequently, prevents the company from pursuing the enforcement of civil liability. The company's management and representative body lacks competence to decide on the initiation of liability proceedings against directors[18]. The same applies to the supervisory body, which is likewise not competent to make such a decision.

The Portuguese Companies Code reflects a legislative choice to entrust the shareholder majority with a significant degree of control over the enforcement of directors' liability. The majority that elected the directors may possess sufficient voting power to prevent the

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[17] See João Calvão da Silva, "Responsabilidade civil dos administradores não executivos da comissão de auditoria e do conselho geral e de supervisão", in *Jornadas em Homenagem ao Professor Doutor Raúl Ventura. A Reforma do Código das Sociedades Comerciais*, Coimbra: Almedina, 2007, pp. 103 ff. In the insolvency context, advocating the validity of clauses excluding or limiting directors' liability for ordinary negligence in connection with the company's insolvency, see Alexandre Libório Dias Pereira, "Cláusulas de exclusão e de limitação de responsabilidade do administrador em caso de insolvência", *Revista de Legislação e de Jurisprudência*, vol. 155, n.º. 4057, March–April 2026, pp. 235 ff.

[18] For a detailed analysis, see J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 75.º - Ação da sociedade", cit., pp. 937 et seq. See also Rui Pereira Dias, *Pactos de Jurisdição Societários*, cit., pp. 501 et seq

company from pursuing liability claims against those same directors. To achieve this result, it is sufficient for the majority to withhold approval of the resolution authorising the company to bring a derivative action for damages under Article 75, 1, CSC.

Admittedly, this protective effect of the majority does not arise where the *actio ut singuli* is brought by minority shareholders, since Article 77 CSC allows minority shareholders to proceed independently of any resolution adopted by the shareholder majority[19]. Nevertheless, the effectiveness of the *actio ut singuli* under Article 77 CSC remains limited, as the procedural regime fails adequately to protect minority shareholders from the financial risks associated with litigation[20].

Claims by the company against directors and members of supervisory bodies are subject to a five-year limitation period running from the events specified in Article 174, 2, CSC. Pursuant to Article 318, *d)* of the Portuguese Civil Code, limitation periods neither commence nor run between legal persons and their directors in respect of liability arising from the exercise of their office for as long as those directors remain in office. The Portuguese Companies Code adopts a unitary approach to the liability of directors and members of supervisory bodies. As a result, the relevant liability regime applies irrespective of the company form concerned.

1.3. The directors of the controlling company are liable to the controlled companies

Within the framework of corporate group relationships, the Portuguese Companies Code establishes an exceptional liability regime governing the management of corporate groups formed pursuant to a subordination agreement (*contrato de subordinação*), which, by virtue of Article 491 of the CSC[21], is likewise applicable to the directors of groups constituted through a relationship of total control (*domínio total*). This exceptional group-law regime applies exclusively to relationships established between private limited liability companies (*sociedades*

[19] See J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 77.º - Ação da sociedade", *Código das Sociedades Comerciais em comentário,* coord. de J. M. Coutinho de Abreu, vol. I, 2.ª ed., Coimbra: Almedina, 2017, p. 947, ff.

[20] See J. M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 77.º - Ação da sociedade", *cit.*, p. 947, ff.

[21] Article 504 of the CSC, entitled "Duties and Liability", applies: (a) to companies forming part of a group established by means of a subordination agreement; and (b) by virtue of the cross-reference contained in Article 491 of the CSC, to group relationships based on total control. For these purposes, the expression "controlled company" (sociedade dominada) encompasses both the subordinated company and the wholly controlled company, whilst the expression "controlling company" (sociedade dominante) encompasses both the managing company in a group formed under a subordination agreement and the wholly controlling company in a group based on total control.

por quotas), public limited companies (*sociedades anónimas*) and partnerships limited by shares (*sociedades em comandita por ações*) (Article 481 of the CSC)[22].

Pursuant to Article 504, 1, of the CSC, the members of the management body of the directing company[23] are required, in relation to the group, to exercise the degree of care required by law in the management of their own company. Under Article 504, 2, of the CSC, the directors of the controlling company (*sociedade dominante*) are civilly liable to the controlled company (*sociedade dominada*) "under the terms of Articles 72 to 77". Accordingly, proceedings for directors' liability against the directors of the controlling company may be brought by the controlled company itself pursuant to Article 75 of the CSC.

Furthermore, by virtue of Article 504, 2, of the CSC, any shareholder of the controlled company has standing to bring a liability action on behalf of the controlled company. Accordingly, any legal costs incurred in such proceedings will be borne by the assets of the controlled company. Article 504 of the CSC does not refer to Articles 78 and 79 of the CSC. It has nevertheless been argued in the academic literature that, where the requisite conditions are satisfied, the directors of the controlling company incur civil liability towards the creditors and shareholders of the controlled company, as well as towards third parties having some connection with that company. [24]

2. Director protection is not a priority under the CSC

The Portuguese Companies Code of 1986 approaches directors' liability as a legal mechanism for monitoring those entrusted with the management and representation of the company. In line with a legal tradition common to several European jurisdictions, the protection of the personal assets of directors and supervisory officers occupies a marginal position within the Portuguese Companies Code. The liability paradigm underpinning the CSC embodies a legislative policy preference for the imposition of directors' liability rather than for shielding corporate officers from litigation-related losses.

Four decades later (from 1986), there are grounds to wonder whether the Portuguese Companies Code has become more receptive to measures aimed at protecting directors against financial losses resulting from civil liability claims. The 2006 reform of the CSC introduced the current wording of Article 72, 2, which, drawing inspiration from the U.S.

[22] On the scope of application of the provisions of company law governing group relationships, see Rui Pereira Dias, "Artigo 481.º - Âmbito de aplicação deste título", Código das Sociedades Comerciais em comentário, coord. de J. M. Coutinho de Abreu, vol. VII, 2.ª ed., Coimbra: Almedina, 2021, p. 15, seq.

[23] For the purposes of groups formed under a subordination agreement, "directing company" refers to the company vested with the power to direct and issue binding instructions to the subordinated company.

[24] See J. M. Coutinho de Abreu, "Artigo 504.º - Deveres e responsabilidades", cit., p. 313.

business judgment rule, provides for the exclusion of liability (primarily *vis-à-vis* the company) where directors demonstrate that they acted on an informed basis, free from personal interests, and in accordance with standards of business rationality[25].

This provision has been understood as incorporating the *business judgment rule* into Portuguese law or, at the very least, as producing director-protective effects[26]. A minority view, however, maintains that Article 72, 2 of the CSC intensifies directors' civil liability by establishing an unusual presumption of unlawfulness[27]. The considerable uncertainties surrounding the interpretation and application of this provision prevent it from being regarded as an effective "safe harbour" for directors facing the financial consequences of civil liability claims[28].

Following the amendment to Article 396 of the CSC, the insurance market developed a specific product designed to serve in lieu of the statutory security required of directors, commonly referred to as "security-substitute insurance" ("seguro substitutivo da caução")[29]. Under Article 396, 2 of the CSC, each director of a public limited company ("sociedade anónima") and of a partnership limited by shares ("sociedade em comandita por ações") is required to provide security against potential liability arising from the performance of his/her duties[30].

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[25] See J. M. Coutinho de Abreu, Responsabilidade Civil dos Administradores de Sociedades, Coimbra: Almedina, 2007, pp. 36 ff.; J. M. Coutinho de Abreu and Maria Elisabete Ramos, "Artigo 72.º – Responsabilidade de membros da administração para com a sociedade", in J. M. Coutinho de Abreu (ed.), Código das Sociedades Comerciais em Comentário, vol. I, 2nd ed., Coimbra: Almedina, 2010, pp. 903 ff.

[26] Portuguese scholarship on this issue is extensive. See, *inter alia*, Maria Elisabete Ramos, *O Seguro de Responsabilidade Civil dos Administradores: Entre a Exposição ao Risco e a Delimitação da Cobertura*, Coimbra: Almedina, 2010, pp. 155 ff.; J. M. Coutinho de Abreu and Maria Elisabete Ramos, "Artigo 72.º – Responsabilidade de membros da administração para com a sociedade", in J. M. Coutinho de Abreu (ed.), Código das Sociedades Comerciais em Comentário, vol. I, 2nd ed., Coimbra: Almedina, 2010, pp. 903 ff.; Ricardo Costa and Gabriela Figueiredo Dias, "Artigo 64.º – Deveres fundamentais", in J. M. Coutinho de Abreu (ed.), Código das Sociedades Comerciais em Comentário, vol. I, 2nd ed., Coimbra: Almedina, 2010, pp. 757 ff.

[27] See Pedro Pais de Vasconcelos, "*Business judgment rule*, deveres de cuidado e de lealdade, ilicitude e culpa e o artigo 64.º do Código das Sociedades Comerciais", *Direito das Sociedades em Revista* 2 (2009), pp. 41-79.

[28] On these uncertainties, see Maria Elisabete Ramos, *O Seguro de Responsabilidade Civil dos Administradores*, cit., pp. 155 ff.

[29] See, for example, the designation *Seguro de Responsabilidade Substitutivo da Caução Legal de Administradores, Membros do Conselho Fiscal ou Conselho Geral e de Supervisão*, marketed by Markel Insurance SE (Spanish branch). On this type of insurance, see Margarida Lima Rego, "A quem aproveita o seguro de responsabilidade civil de administradores celebrado para os efeitos do art. 396.º CSC", *I Congresso Direito das Sociedades em Revista*, Coimbra: Almedina, 2011, pp. 415 ff.; Maria Elisabete Ramos, "Um seguro que substitui a caução dos administradores. Que seguro é este?", *Revista Julgar*, n.º. 43, 2021, pp. 115-131; Maria Elisabete Ramos, "Artigo 396.º – Caução", in J. M. Coutinho de Abreu (ed.), *Código das Sociedades Comerciais em Comentário*, Vol. VI, 2nd ed., Coimbra: Almedina, 2019, pp. 318 ff.

[30] Failure to provide the required security entails the "immediate termination of office" of the corporate officer in default. On the uncertainties raised by this consequence, see Maria Elisabete Ramos, "Artigo 396.º – Caução", cit., pp. 318 ff.; Paulo Olavo Cunha, "O incumprimento dos deveres de organização e de outras obrigações legais das sociedades", *VIII Congresso Direito das Sociedades em Revista*, Coimbra: Almedina, 2025, p. 47.

Security-substitute insurance constitutes one of the legally permitted means of complying with the statutory security requirement. Although serving as an alternative means of complying with a statutory requirement, such insurance remains *voluntary insurance*. In terms of its substantive coverage, it is essentially a form of *directors' liability insurance*, covering liability for damages that directors may incur in connection with the performance of their duties[31].

The minimum insured sums are set at EUR 250,000 for large public limited companies and listed companies, and EUR 50,000 for all other public limited companies (Article 396, 1, of the CSC). The premium corresponding to these statutory minimum coverage amounts must be borne by the insured directors themselves (Article 396, 2, of the CSC). This does not, however, preclude the company from procuring the insurance on behalf of its directors and paying the premium, provided that the directors ultimately bear the portion of the premium attributable to the statutory minimum coverage requirement[32]. The legal consequences of non-compliance with this allocation of costs remain unaddressed by the CSC.

In order to comply with the requirements of Article 396, 2 of the CSC, security-substitute insurance provides cover for liability arising from the insured directors' wilful misconduct (*dolo)*[33]. Within the limits of the insured amount, both legal scholarship[34]and the Portuguese Insurance and Pension Funds Supervisory Authority (ASF) have treated this insurance as a form of *mandatory liability insurance*[35].

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[31] Coverage may also extend to defence costs and legal expenses incurred by the insured director in responding to claims asserted against him or her.

[32] See the Position Statement of the National Council of Financial Supervisors (*Conselho Nacional de Supervisores Financeiros*) concerning Article 396 of the CSC, available at: https://www.cnsf.com.pt/sites/default/files/nota%20conjunta%20art.%C2%BA%20396%20CSC%202018.pdf (last accessed 8 July 2026).

[33] See Entendimento do Conselho Nacional de Supervisores Financeiros sobre o art. 396.º do CSC, available at https://www.cnsf.com.pt/sites/default/files/nota%20conjunta%20art.%C2%BA%20396%20CSC%202018.pdf.

[34] Margarida Lima Rego, *Contrato de seguro e terceiros. Estudo de direito civil*, Coimbra: Almedina, 2010, p. 160, nt. 340. On these topics, see Maria Elisabete Ramos, *Seguro de responsabilidade civil dos administradores* (*entre a exposição ao risco e a delimitação da cobertura*), Coimbra. Almedina, 2010, p. 323, ff; "Artigo 396º-Caução", *Código das Sociedades Comerciais em comentário*, coord. de J. M. Coutinho de Abreu, vol. V, 2.ª ed., Coimbra: Almedina, 2019, p. 318, ff.; "El seguro D&O y el "seguro sustitutivo da caução" previsto en la legislación portuguesa", *Revista Española de Seguros*, 162 (abril-junho), 2015, p. 211-243; "El deber de afianzar la responsabilidad civil de los administradores. Praxis empresarial portuguesa y la influencia del D&O Insurance (seguro de responsabilidad de administradores", in Ángel Fernández-Albor Baltar/Elena Pérez Carrillo (dirs), *Actores, actuaciones y controles del buen gobierno societario y financiero*, Madrid/Barcelona/Buenos Aires/São Paulo: Marcial Pons, 2018, p. 387-403. V. também Alexandre de Soveral Martins, *Administração de sociedades anónimas e responsabilidade dos administradores*, Coimbra: Almedina, 2020, p. 290, ff.; Margarida Lima Rego, "A quem aproveita o seguro de responsabilidade civil de administradores celebrado para os efeitos do art. 396º CSC?", *I Congresso Direito das Sociedades em Revista*, Coimbra: Almedina, 2011, p. 415-446.

[35] See https://www.asf.com.pt/w/seguros-obrigat%C3%B3rios-de-responsabilidade-civil-dos-membros-do-conselho-de-administra%C3%A7%C3%A3o-e-dos-membros-do-conselho-fiscal.

The application of the legal regime governing compulsory liability insurance to security-substitute insurance for directors and supervisory officers points towards a *protective rationale centred on injured claimants* as the holders of the underlying right to compensation. It further supports the view that security-substitute insurance is conceptually and functionally distinct from D&O insurance[36].

Unlike several foreign legal systems[37], Portuguese company law has not adopted statutory provisions expressly addressing the procurement and funding of D&O insurance by companies, nor has it imposed mandatory deductible requirements as a means of aligning managerial incentives with shareholder interests[38]. In this respect, both the CSC and the Portuguese Securities Code are silent, leaving the admissibility and structuring of D&O insurance to be determined in the absence of specific corporate law guidance.

The absence of specific rules governing D&O insurance is also reflected in the realm of corporate governance soft law. The Corporate Governance Code[39] issued by the Portuguese Institute of Corporate Governance contains no recommendations concerning the procurement, design, or governance implications of D&O insurance. Likewise, no dedicated regulatory framework, supervisory guidance, or interpretative position appears to have been adopted by the ASF in relation to D&O insurance[40].

The Portuguese legal system lacks industry-wide model terms and conditions governing directors' and officers' liability insurance. This contrasts with the German experience, where the GDV (*Gesamtverband der Deutschen Versicherungswirtschaft*) has developed standard D&O policy conditions (AVB D&O[41]), which serve as an important point of reference for the structuring and interpretation of D&O insurance contracts.

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36 See Margarida Lima Rego, "Adelanto de los costes en los seguros "D&O", *Dimensiones y desafios del seguro de responsabilidad civil*, Abel B. Veiga Copo (diretor), Miguel Martínez Muñoz (coordenador), Civitas/Thomson Reuters, 2021, p. 219.

37 See § 93(2), sentence 3, *Aktiengesetz* (German Stock Corporation Act).

38 In the United Kingdom, section 233 of the *Companies Act 2006* provides that: "Section 232(2) (voidness of provisions for indemnifying directors) does not prevent a company from purchasing and maintaining for a director of the company, or of an associated company, insurance against any such liability as is mentioned in that subsection." In the United States, see, within the framework of soft law, § 8.57 of the *Model Business Corporation Act* and § 7.20 of the *Principles of Corporate Governance*.

39 Available at: https://cgov.pt/base-de-dados/codigos-de-governo (last accessed 30 July 2026).

40 By contrast, in Brazil, SUSEP Circular No. 553 of 23 May 2017 establishes the general framework applicable to directors' and officers' liability insurance (*seguro de RC D&O*). Article 2 provides that insurers wishing to underwrite D&O insurance must submit a specific insurance plan to SUSEP for review and filing, including policy terms and the corresponding actuarial memorandum, in compliance with the Circular and applicable legislation. On the Brazilian experience with D&O insurance, see Ilan Goldberg, *O Contrato de Seguro D&O*, São Paulo: Thomson Reuters/Revista dos Tribunais, 2019, pp. 303 ff.

41 Allgemeine Versicherungsbedingungen für die Vermögensschaden-Haftpflichtversicherung von Aufsichtsräten, Vorständen und Geschäftsführern (AVB D&O), available at: https://www.gdv.de/gdv/neu-strukturierte-haftpflichtbedingungen-ab-2014--5962 (last accessed 6 July 2026).

Given the relative paucity of judicial decisions concerning D&O insurance[42], insight into the Portuguese experience with this insurance product must be derived primarily from market practice and the contractual models employed by insurers operating in Portugal. The Portuguese D&O market appears to mirror the internationally recognised social typology of D&O insurance[43]: it commonly provides Side A and Side B coverage, defence costs coverage, and claims-made protection; it is typically structured as voluntary insurance procured and financed by the company for the benefit of directors and senior executives; it is generally written for the account of the insured officers, whether directly or through group-wide programmes arranged by a parent company[44], it may extend protection to de facto directors, and it generally, though not invariably, qualifies as large-risk insurance[45].

Although Portuguese law does not require the use of pre-contractual questionnaires (Article 24, 1, RJCS) market practice in the field of D&O insurance reveals that insurers routinely use such questionnaires to obtain information material to the assessment and acceptance of risk.

Four decades after its adoption, the Portuguese Companies Code remains anchored in a liability-based model of corporate governance. Given the mandatory character of the applicable rules, contractual mechanisms purporting to limit or exclude the liability of directors and supervisory officers are generally impermissible. Against this background, neither the business-judgment defence embodied in Article 72(2) of the CSC nor security-substitute insurance can be regarded as providing directors with a genuine safe harbour against the financial exposure generated by litigation connected with the exercise of corporate office.

3. D&O Insurance and Protection against Directors' Liability Risks

3.1. *Legal Basis for the Incorporation of International D&O Standards*

42 As discussed *infra*, the Portuguese Supreme Court of Justice, in its judgment of 24 May 2022 (Justice Ricardo Costa), addressed this issue.

43 Maria Elisabete Ramos, "*D&O Insurance*: um estrangeirado entre a tipicidade social e a atipicidade legal», *Liber Amicorum Pedro Pais de Vasconcelos*, vol. II, organizador Pedro Leitão Pais de Vasconcelos, Coimbra: Almedina, 2023.

44 Regarding the spanish legal regime, see Elena Pérez Carrillo, "Aseguramiento D&O en España. De una póliza residual importada, a un instrumento estratégico de gestión de riesgos", *Temas atuais de direito dos seguros*, Ilan Goldberg/Thiago Junqueira (coordenadores), Brasil: Thomson Reuters/Revista dos Tribunais, 2020, p. 384.

45 In most cases, D&O insurance qualifies as large-risks insurance within the meaning of Law nº. 147/2015. D&O insurance will not invariably qualify as large-risks insurance, in certain circumstances, it will instead be classified as mass-risk insurance.

The largely non-mandatory nature of Portuguese insurance contract law (Article 11 RJCS[46]) constitutes the principal legal basis for the incorporation of internationally recognised D&O insurance standards into Portuguese insurance practice. This trend is reinforced by the special regime governing large-risk insurance, which affords contracting parties an even greater degree of contractual autonomy. Accordingly, where a D&O policy falls within the category of large-risk insurance, the parties may derogate from provisions that would otherwise be mandatory, including the no premium, no cover rule and the requirement that claims-made liability policies provide a one-year extended reporting period (Articles 59 and 139, 3, RJCS).

The prohibition on insuring risks arising from criminal, administrative-offence ("responsabilidade contraordenacional"), or disciplinary liability applies equally to large-risk D&O insurance policies (Article 14,1, of RJCS). As a result, policy provisions derived from international practice that provide cover for fines imposed for administrative offences are unenforceable under Portuguese law. Portuguese law does, however, permit the insurance of civil liability associated with criminal, administrative-offence, or disciplinary proceedings (Article 14, 2, of RJCS).

Under Portuguese law, voluntary liability insurance may, in certain circumstances, extend to liability arising from the insured's wilful misconduct (*dolo*) (Article 46, 1, RJCS). As a matter of market practice, however, D&O insurance policies generally exclude coverage for losses resulting from the wilful misconduct of insured directors.

Policy limits, deductibles, excess insurance arrangements, policy periods, exclusions, and claim definitions are matters governed by the principle of freedom of contract (Articles 11 and 49 RJCS). Accordingly, their content and design are determined primarily by insurance market practice rather than by mandatory legal rules.

3.2. *How Side A Coverage Protects Insured Directors?*

The practical and legal significance of Side A coverage for directors of Portuguese companies is explained by the confluence of several features of Portuguese company law: *a*) the irrebuttable statutory character of the presumption of fault applicable in actions for directors' liability brought by the company pursuant to Article 72, 1, of CSC; *b*) the prohibition on contractual arrangements with the company aimed at limiting or excluding directors' liability, as set out in Article 74, 1, of CSC; *c*) the particularly onerous liability

46 Portuguese Insurance Contract Act ("Regime Jurídico do Contrato de Seguro"; hereinafter, the "RJCS") was enacted by Decree-Law n.º. 72/2008 of 16 April 2008.

framework governing directors of parent companies within corporate groups under Articles 481, 491 and 504 of CSC; *d*) the comparatively narrow and uncertain scope of protection afforded, in the context of internal corporate liability, by the business judgment rule codified in Article 72, 2, of CSC; *e*) the general inapplicability of the business judgment rule to claims grounded in directors' liability towards third parties (external liability); *f*) 10% blocking minority, which may prevent the approval by the shareholders' meeting of resolutions concerning settlements or waivers of the company's right to damages against directors (Article 74, 2, of the CSC); *g*) the availability of the derivative action (*actio socialis ut singuli*), which may be brought by shareholders holding at least 5% of the share capital or, in the case of listed companies, at least 2% of the share capital (Article 77, 1, of the CSC); *h*) in the context of internal corporate liability, the company, as the injured party, is legally precluded from funding or indemnifying the defence costs incurred by the director(s) against whom liability is alleged (Article 74, 1, of CSC); and *i*) the principle of joint and several liability applicable to directors (Article 73 of CSC).

Under Portuguese law, several factors converge to make the corporate reimbursement risk insured under Side B of a D&O policy comparatively less significant: *a*) the invalidity of any reimbursement granted to directors in respect of expenses incurred as a consequence of breaches of duties owed to the company; *b*) the absence of a statutory framework for corporate indemnification under Portuguese law; and *c*) the availability of Side A coverage for directors' defence costs. Nevertheless, as will be shown infra, the possibility of corporate reimbursement claims cannot be disregarded.

In the Portuguese market, the company ordinarily acts as the policyholder, bearing the insurance premium in its entirety. In relation to Side A coverage, directors and officers acquire the status of insured persons and are, accordingly, entitled to coverage under the policy.[47] Side A coverage under a D&O insurance policy aims to protect the director's or officer's interest in the preservation of his or her personal assets where liability claims or proceedings arise out of the management of the company. In many instances, the insurance contract extends insured status to additional persons as co-insureds, including directors of subsidiaries of the policyholder and other categories of individuals, notably de facto directors[48].

D&O insurance typically constitutes a policy written for the benefit of directors and officers who are not parties to the insurance contract, thereby qualifying under Portuguese

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[47] Margarida Lima Rego, "O seguro por conta de outrem", cit., p. 247.
[48] On the concept of de facto directors, see J. M. Coutinho de Abreu / Maria Elisabete Ramos, "Artigo 72.º – Responsabilidade de membros da administração para com a sociedade", cit., pp. 901 ff.

law as insurance for the account of another (Article 48 RJCS)[49]. Accordingly, the insured director is not a party to the insurance contract. The company, in its capacity as policyholder, does not act as the insured director's representative and, accordingly, the insurance contract cannot adversely affect the insured director's legal position[50].

The procurement of Side A coverage by the company is not solely motivated by a desire to protect the personal assets of directors and officers. As policyholder, the company also pursues a range of distinct corporate interests through the arrangement of such insurance[51]. These include: *a*) enhancing the company's ability to attract and retain qualified individuals for board positions; *b*) facilitating the appointment of independent directors; *c*) reducing excessive managerial risk aversion; *d*) encouraging directors to undertake value-enhancing risks consistent with the company's interests and thereby promoting managerial dynamism; *e*) reducing the reputational costs associated with directors' liability claims; *f)* strengthening the monitoring function exercised over directors; and *g*) indirectly safeguarding corporate assets where the insurance coverage extends to directors' liability towards the company itself.

3.3. Can a Policyholder Company Qualify as an Injured Third Party?

For the purposes of Side A coverage, the insured event will typically be constituted by a claim made against the insured director or officer. This raises the question whether the policyholder company may, notwithstanding its status as policyholder, be characterised as the injured third party asserting the claim against the insured director and, consequently, as the party ultimately benefiting from the insurer's indemnity payment.

To date, no reported Portuguese case law appears to have addressed this issue[52]. The academic literature has, however, taken the view that the company acting as policyholder under a D&O policy, and more specifically under Side A coverage, may simultaneously qualify as a third party vis-à-vis the insured director or officer[53]. In such circumstances, the company, in its capacity as the injured third party, does not enjoy a direct right of action

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49 On D&O insurance as a form of insurance for the account of another, see Maria Elisabete Ramos, *O Seguro de Responsabilidade Civil dos Administradores*, cit., p. 311, and the literature cited therein.

50 Margarida Lima Rego, *Contrato de Seguro e Terceiros*, cit., pp. 734 ff.; idem, "O seguro por conta de outrem", in *Temas de Direito dos Seguros*, ed. Margarida Lima Rego, 2nd ed., Coimbra: Almedina, 2016, p. 249.

51 J. M. Coutinho de Abreu / Elisabete Ramos, "Responsabilidade civil de administradores e de sócios controladores", *Miscelâneas* n.º 3, Coimbra: IDET / Almedina, 2004, p. 41.

52 Noting that Spanish case law has reached the opposite conclusion, holding that the policyholder company cannot be characterised as an injured third party for the purposes of a direct action against the insurer, see Elena Pérez Carrillo, *"Aseguramiento D&O en España. De una póliza residual importada, a un instrumento estratégico de gestión de riesgos"*, cit., p. 398.

53 Margarida Lima Rego, Contrato de seguro e terceiro, cit., p. 651, nota 1786.

against the insurer, since a statutory direct action is recognised under Portuguese law only in the context of compulsory liability insurance[54].

4. Coverage of Directors' Defence Costs and Cost-Inclusive Clauses

From a contractual perspective, the risks associated with defence costs and investigation costs constitute ancillary risks to the principal risk insured, namely directors' and officers' civil liability[55]. From a *commercial standpoint*, however, coverage for defence and investigation costs represents one of the most significant considerations underpinning the decision to procure Side A D&O insurance[56].

The concept of a "cost-inclusive clause" is reflected in the policy wordings commonly found in D&O insurance policies issued in the Portuguese market. A predictable consequence of cost-inclusive clauses is that the policy limits may be substantially eroded, or even entirely exhausted, by the payment of defence costs. Where no separate sub-limits have been established for defence and investigation expenses, the full amount of the insured limit may be depleted by such costs, with the result that no insurance proceeds remain available to satisfy claims brought by injured third parties[57]. This risk of exhaustion may be amplified by the drafting architecture of D&O policies, which typically provide a single aggregate limit shared among a fluctuating and, in many cases, unidentified class of insured directors and officers.

Pursuant to Article 110, 1, of the RJC, an insurance contract automatically terminates where the aggregate limit of indemnity applicable to the policy period has been exhausted and no reinstatement provision has been agreed. The exhaustion of the policy limits thus brings the contractual coverage mechanism to an end[58],without, however, affecting the subsistence of the insured's underlying civil liability. This explains the practical importance of providing for distinct limits of indemnity in respect of defence costs and liability exposure, thereby reducing the risk that the policy limits are depleted before compensation claims can be satisfied.

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54 Margarida Lima Rego, *Contrato de Seguro e Terceiros*, cit., p. 651, note 1786.

55 Maria Elisabete Ramos, *O Seguro de Responsabilidade Civil dos Administradores: Entre a Exposição ao Risco e a Delimitação da Cobertura*, Coimbra: Almedina, 2010, pp. 477 ff.

56 See Maria Elisabete Ramos, "*D&O Insurance* e o projeto dos Princípios do Direito Europeu do Contrato de Seguro", *Direito das Sociedades em Revista*, n.º 4, 2012, p. 175; Margarida Lima Rego, "Adelanto de los costes en los seguros 'D&O'", in Abel B. Veiga Copo (ed.), *Dimensiones y Desafíos del Seguro de Responsabilidad Civil*, Miguel Martínez Muñoz (coord.), Civitas/Thomson Reuters, 2021, p. 213.

57 See also Elena Pérez Carrillo, "Aseguramiento D&O en España. De una póliza residual importada, a un instrumento estratégico de gestión de riesgos", Temas atuais de direito dos seguros, tomo II, Ilan Goldberg/Thiago Junqueira (coordenadores), São Paulo: Thomson Reuters/Revista dos Tribunais, 2020, p. 382.

58 See Maria Elisabete Ramos, *O Contrato de Seguro entre a Liberdade Contratual e o Tipo*, cit., p. 122.

Whether the policy deductible extends to defence costs is ultimately a matter of policy interpretation.

5. Advancement of Defence Costs, Multiple Insured Directors and Insufficiency of Policy Limits

Clauses governing the advancement of defence costs by the Side A insurer are intended to provide insured directors and officers with immediate access to the financial resources required for their defence. The operation of such clauses entails the insurer advancing funds to the insured before the issues in dispute have been conclusively determined by a court. However, given the "functional dependency" [59] of defence-cost coverage upon liability coverage, defence costs will ultimately fall outside the scope of insurance protection where the underlying claim is found not to be covered under the policy.

D&O policies typically contain provisions requiring insured directors and officers to repay amounts advanced in respect of defence costs where it is subsequently established that the relevant facts fall outside the scope of insurance coverage. This may occur, for example, where a court ultimately determines that the insured's conduct falls within an exclusion clause, such as fraud or wilful misconduct. In the absence of such a repayment obligation, the insured director or officer would obtain an unjustified benefit at the insurer's expense, thereby resulting in unjust enrichment, and the indemnity principle enshrined in Article 128 of the Portuguese Insurance Contract Act would not be respected[60].

With respect to the allocation of limited insurance proceeds among multiple insured directors and officers, international D&O insurance practice has traditionally relied on two competing models: proportional allocation and the first come, first served rule. Pursuant to the latter, the insurer satisfies covered claims as and when they are submitted, with the consequence that later claimants may find the policy limits partially or entirely exhausted. The former seeks to distribute the available policy limits on a proportionate basis among competing claimants. Portuguese law recognises the principle of proportional distribution in Article 604 of the Civil Code. However, that principle is traditionally confined to situations involving a concurrence of creditors ("concurso de credores").

Article 138, 1, of the RJC allows the sum insured to be defined on a per-claim, per-policy-period, or per-injured-party basis. It therefore becomes necessary to ascertain, through an

[59] Margarida Lima Rego, "Adelanto de los costes en los seguros "D&O", cit., p. 214.
[60] Margarida Lima Rego, "Adelanto de los costes en los seguros "D&O", cit., p. 214.

interpretation of the policy wording, whether the parties have contractually regulated the allocation of the policy limits among multiple co-insured directors and officers.

In the absence of contractual provisions addressing the allocation of policy limits, it has been suggested that the available limits should be distributed pro rata among competing insureds. The principal objection to this solution is that it would effectively paralyse the operation of the insurance cover[61]. Indeed, the insurer would be unable to make a definitive allocation of the policy limits until all pending claims had been finally resolved, since only then would it be possible to determine the amount attributable to each claim and the corresponding share of the policy limits available to each co-insured director or officer[62].

An alternative approach advocates the application of the rules governing plural obligations, specifically in the form of a plurality of creditors, thereby allowing the policy limits to be divided into equal shares among the various co-insured directors and officers[63]. This solution has the advantage of avoiding any paralysis of the insurance cover and enabling each insured to access directly the amount allocated to fund his or her defence. It does not, however, resolve all difficulties. It leaves unanswered the question of how to proceed where the defence costs incurred by certain insureds exceed their allocated share of the policy limits, while other insureds fail to exhaust, or even make use of, their respective shares. Portuguese law contains no statutory rule specifically addressing this issue[64].

6. Side B Coverage and the Corporate Reimbursement Risk

Coverage for corporate reimbursement also forms part of established European D&O insurance practice, as illustrated by § A.3. of AVB D&O[65]. As regards Side B coverage, the company simultaneously assumes the status of policyholder and insured. The insurer's payment is therefore made to the company, whose assets have been depleted as a result of the corporate reimbursement granted to insured directors and officers. For this reason, Side B cannot readily be characterised as liability insurance. The insured loss does not arise from any civil liability incurred by the company towards the directors and officers; instead, it

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[61] Margarida Lima Rego, "Adelanto de los costes en los seguros "D&O", cit., p. 221.
[62] Margarida Lima Rego, "Adelanto de los costes en los seguros "D&O", cit., p. 221.
[63] Margarida Lima Rego, "Adiantamento de custos de defesa nos seguros *D&O*", cit., p. 90.
[64] Margarida Lima Rego, "*Adiantamento de custos de defesa nos seguros D&O*", cit., p. 91. The author argues that, in the absence of express contractual provisions, such reallocations between insureds should be permitted, at least in the majority of cases where the policy consists of standard-form terms drafted by insurers and the clause governing the policy limits is ambiguous.
[65] Available at https://www.gdv.de/gdv/neu-strukturierte-haftpflichtbedingungen-ab-2014--5962 (last access the 6th July 2026).

consists in the patrimonial detriment sustained by the company because of having indemnified or reimbursed them in respect of covered liabilities or defence costs.

Under Portuguese law, Side B is qualified as "seguro de danos", a class of insurance governed by the indemnity principle[66]. Within the regulatory taxonomy, derived from European Union law, which distinguishes between life and non-life insurance classes, Side B coverage falls within the non-life insurance sector and, more specifically, is classified in Portugal as insurance against miscellaneous financial loss[67].

At first sight, it is not immediately apparent that Portuguese companies are exposed to the types of risk ordinarily covered by Side B. From a company law perspective, the question is a legitimate one.

From the standpoint of insurance law, the decisive issue is whether the company is exposed, independently of the insurance arrangement[68], to a genuine risk of corporate reimbursement. Portuguese insurance law requires the existence of an insurable risk both at the inception of the insurance contract and throughout its subsistence[69]. Where the risk has ceased to exist, or never came into existence, at the time the contract is concluded, the contract is *void* under Article 44, 1, of RJCS. If the risk subsequently disappears during the policy period, the contract terminates pursuant to Article 110 RJCS.

In Portuguese corporate practice, Side B coverage plays a less prominent role than Side A coverage. This does not mean, however, that corporate reimbursement coverage is without practical significance. Portuguese companies remain exposed to the risk of financial loss resulting from the reimbursement of directors and officers[70].

Consider, for example, proceedings brought by shareholders, corporate creditors or other third parties against directors pursuant to Articles 78, 1, and 79 of the CSC, in which the defendant directors are ultimately exonerated. Assume further that those directors have borne all or part of their defence costs out of their own assets, either because such costs were not covered under Side A, or because, although covered, the sub-limits applicable to defence costs proved inadequate. In such circumstances, one or more directors may seek reimbursement of those expenses from the company.

A similar issue may arise where the D&O policy is structured on a first come, first served basis and the policy limits have been exhausted through the payment of defence costs

[66] See Article 123 of RJCS.
[67] Article 8.º, *p*), of Law n.º 147/2015, of 9 September.
[68] Margarida Lima Rego, *O contrato de seguro e terceiros*, cit., p. 67.
[69] See Margarida Lima Rego, "O risco e as suas vicissitudes", *cit.,* p. 390; Maria Elisabete Ramos, *O contrato de seguro entre a liberdade contratual e o tipo*, Coimbra: Almedina, 2021, p. 86, 87.
[70] Maria Elisabete Ramos, *O seguro de responsabilidade civil dos administradores*, cit., p. 341, ff.

incurred by one or more directors, leaving the remaining members of the board without the benefit of insurance protection. In such cases, directors who are unable to obtain indemnification under the policy may seek reimbursement from the company, thereby creating precisely the type of financial exposure that Side B coverage is intended to address.

In the Portuguese legal framework, corporate reimbursement may be triggered by, *inter alia*[71]: *a*) circumstances in which the company is legally required to bear directors' defence costs; and *b*) contractual arrangements under which the company agrees to bear or to reimburse such costs.

Although not expressly provided for under Portuguese law, a legal duty on the part of the company to reimburse directors for expenses arising from unfounded allegations of unlawful conduct may be derived from[72]: *a*) the general principle that a person entrusted with the management of another's affairs is entitled to reimbursement of expenses necessarily incurred and to compensation for losses suffered in the discharge of those functions; *b*) by analogy with Article 1167, *c*), and *d*) of the Portuguese Civil Code; and *c)* on an organic-functional rationale, namely that defence costs arising from acts that are legally attributable to the company, because they were performed by individuals acting within the scope of their corporate authority, should constitute expenses chargeable to the company[73].

It is likewise permissible for a company to agree, *ex post*, to reimburse a director's defence costs, provided that those costs are not attributable to unlawful and culpable conduct. Such corporate reimbursement arrangements cannot be characterised as agreements excluding or limiting directors' liability and are therefore not subject to the prohibition laid down in Article 74, 1, of the CSC.

Where the company is legally bound to reimburse a director insured under Side A and has in fact done so, account must be taken of the need to prevent unjust enrichment on the part of the insured director. Such a result would occur if the insurer were to make payment to the director notwithstanding the fact that the company had already made good the relevant loss. Model Clause A-3 of the *AVB D&O* deals with this issue by shifting the benefit of the defence-cost coverage available under Side A (Model Clause A-1) to the company, which is the entity that has ultimately sustained the financial detriment. The transfer of the entitlement

[71] See Maria Elisabete Ramos, *O seguro de responsabilidade civil dos administradores*, cit., p. 350, ff.; 93; Maria Elisabete Ramos, "Reembolso societário", *II Congresso de Direito das Sociedades em Revista*, Coimbra: Almedina, 2012, p. 377, ff.

[72] Maria Elisabete Ramos, *Seguro de responsabilidade civil dos administradores*, cit., p. 341, ff.

[73] See Maria Elisabete Ramos, *O seguro de responsabilidade civil dos administradores*, cit., p. 350, ss; J.M. Coutinho de Abreu/Maria Elisabete Ramos, "Artigo 77º - Ação de responsabilidade proposta por sócios", *Código das Sociedades Comerciais em comentário*, coord. de J. M. Coutinho de Abreu, vol. I, 2.ª ed., Coimbra: Almedina, p. 2017, p. 982, ff.

to coverage is conditional upon the reimbursement or indemnification obligation being legally valid both in principle and *in quantum*.

A view advanced in Spanish legal scholarship is that corporate reimbursement operates by way of subrogation. Under this approach, where the policyholder company advances a director's defence costs, it becomes subrogated to the insured director's rights and may assert against the insurer, within the limits of the policy, the director's rights to insurance coverage[74].

7. A judicial decision concerning pre-contractual duty of disclosure in a D&O policy

Portuguese judicial decisions concerning D&O insurance are scarce. The judgment delivered by the Supreme Court of Justice on 24 May 2022 deserves particular attention[75]. It concerned the question whether an insured director had complied with the duty of pre-contractual disclosure of risk and whether the defendant insurers had legal grounds to seek the annulment of the D&O insurance contract.

The proceedings arose from several D&O insurance policies concluded in December 2013 between several insurers, led by Zurich, and Banco Espírito Santo, S.A. (BES) and Espírito Santo Financial Group, S.A. (ESFG), under which the directors and officers of those entities were included among the insured persons.

The claimant, a former director and member of the Executive Committee of Banco Espírito Santo (BES), brought proceedings seeking reimbursement of the legal defence costs he had incurred in regulatory enforcement proceedings initiated by the Bank of Portugal and in civil litigation arising out of the collapse of the Espírito Santo Group.

The defendant insurers disputed the claim, arguing that the D&O policies had been validly annulled by reason of a fraudulent breach of the duty of pre-contractual disclosure of risk under Articles 24 and 25 RJCS. The insurers alleged that, upon renewal of the policies, facts material to their assessment of the risk had been omitted from the disclosure made to them.

The central issue before the Court was whether the policyholder or the insured had duly complied with the duty of pre-contractual disclosure of risk, or whether the facts as established amounted to a non-disclosure of material circumstances sufficient to entitle the insurers to seek the annulment of the insurance contracts.

[74] See Elena Pérez Carrillo, "Asseguramiento D&O en España. De un póliza residual importada, a un instrumento estratégico de gestión de riesgos", cit. 394

[75] Judgment of the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*) of 24 May 2022, Case nº. 7459/16.2T8LSB.L1.L1.S1, delivered by Justice Ricardo Costa.

The Supreme Court of Justice fully upheld the decisions of the lower courts and found in favour of the director who had brought the proceedings against the insurers. Among other matters, the Court refused to engage in a retrospective assessment of the facts. It held that it had not been established that BES, ESFG or the claimant himself had deliberately concealed facts which, at the relevant time, could reasonably have been regarded as material to the insurers' assessment of the risk.

The Court made it clear that, for the purposes of the duty of pre-contractual disclosure of risk, only facts existing prior to, or contemporaneously with, the conclusion of the insurance contract are relevant, since Article 24 RJCS is concerned exclusively with the pre-contractual stage. Accordingly, subsequent events, later aggravations of risk, or the subsequent deterioration of the group's financial position cannot serve as a basis for the annulment of the contract on grounds of a breach of the duty of pre-contractual disclosure of risk. Such matters fall instead within the distinct legal regime governing aggravation of risk under Articles 91 and 93 RJCS.

The Court further stressed that the underwriting process itself entails an element of risk on the part of the insurer. It observed that the legal regime governing the initial assessment of risk at the contract-formation stage does not guarantee the insurer access to all facts or to all information potentially relevant to the evaluation of the risk. Rather, the insurer bears responsibility for employing appropriate investigative and informational mechanisms so as to make an informed underwriting decision.

The Supreme Court also placed considerable weight on the policy clause providing that coverage could not be avoided as against an insured person who had neither made any misrepresentation nor possessed knowledge of any fraudulent omission in the insurance proposal.

Accordingly, the Supreme Court of Justice held that the insurers had failed to establish grounds for the annulment of the D&O insurance contract and, consequently, upheld the insured director's entitlement to defence-cost coverage under the policies.

Main conclusions

The Portuguese Companies Code establishes a mandatory regime of directors' civil liability, under which liability arising from the management of the company may be enforced by the company itself, by corporate creditors, by shareholders, and by third parties. Directors and officers, understood here in a broad sense, are regarded as potential wrongdoers vis-à-vis the company, its creditors, its shareholders and third parties and are therefore not viewed, under the logic of the Portuguese Companies Code, as persons whose personal assets should be protected against losses resulting from civil liability. This policy is reflected, on the one hand, in the nullity of contractual provisions purporting to limit or exclude directors' liability (Article 74, 1, of the CSC) and, on the other, in the 10% blocking minority mechanism, which enables a qualifying minority of shareholders to prevent the company from waiving or settling compensation claims to which it is entitled (Article 74, 2, of the CSC).

More than forty years after its enactment, the Portuguese Companies Code remains firmly committed to a paradigm of managerial accountability and largely unconcerned with measures designed to protect directors and officers. The insurance policy that may be provided in lieu of the statutory security requirement, while *functionally operating as a form of compulsory insurance*, is primarily intended to protect those who suffer loss as a result of directors' conduct (Article 396, 2, of the CSC). The protective effect of Article 72, 2, of the CSC, commonly regarded as the Portuguese codification of the business judgment rule, remains uncertain. Legislative drafting shortcomings leave uncertain the extent to which the provision protects directors facing liability claims.

Although the prevailing view in Portuguese legal scholarship is that Article 72, 2, of the CSC is intended to protect directors by excluding liability in certain circumstances, a contrary view maintains that the provision is intended to intensify directors' accountability. Finally, the provision has not yet been sufficiently tested in Portuguese case law. For these reasons, it is difficult to regard Portuguese law as offering directors any meaningful "safe harbours" against patrimonial losses resulting from civil liability.

D&O insurance is available in the Portuguese market through coverage structures based on the Side A and Side B model, reflecting insurance standards shaped in international insurance markets. The incorporation of these transnational insurance practices into Portuguese insurance market is made easier by the predominantly default nature of the Portuguese law of insurance contracts, particularly where D&O insurance falls within the category of large risks.

The Portuguese legal framework therefore accommodates a number of features commonly found in international D&O insurance practice, including: *a*) the discharge of the duty of pre-contractual disclosure of risk by means of a questionnaire prepared by the insurer; *b)* the procurement of D&O insurance by the company for the benefit of the entire board of directors; *c*) the payment of the insurance premium in its entirety by the company; *d)* the availability of Side A coverage, including defence costs functionally connected with directors' liability, as well as Side B coverage*; e)* in the case of large-risks insurance, the non-mandatory character of the *premium no cover* rule, allowing the parties to determine contractually the terms governing payment of the premium; and *f)* the application of the principle of freedom of contract to deductibles, policy limits and sub-limits, there being no mandatory statutory rules specifically governing such matters in the context of D&O insurance; *g)* provisions for the advancement of defence costs by the insurer; *h*) the validity of cost-inclusive clauses. In addition, Portuguese legal scholarship accepts that the company acting as policyholder under Side A D&O insurance may, at the same time, be regarded as the injured third party for the purposes of claims against the insured director or officer.

Conversely, the compatibility of *first come, first served* clauses, particularly in relation to the advancement of defence costs, is open to question under Portuguese law. Where the policy contains no express mechanism for allocating the policy limits among multiple co-insured directors, legal scholarship is divided between a proportional allocation of the available limits and an equal division of those limits among the co-insured directors.

Portuguese insurance law draws a clear distinction between criminal, administrative-offence and disciplinary liability, on the one hand, and the civil liability that may arise from the same conduct, on the other. Pursuant to Article 14, 1, RJCS, the former cannot validly be insured, whether in the context of mass-risk insurance or large-risks insurance. By contrast, Article 14, 2, RJCS expressly permits insurance cover for the civil liability associated with criminal or administrative-offence proceedings. It follows that D&O insurance may not provide cover for criminal penalties, administrative fines or disciplinary sanctions imposed upon directors and officers but may extend to the civil liability consequences arising from the same facts.