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Corporate litigation in Portugal – business judgment rule and challenges against board of directors' resolutions

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Introduction

In recent years, Portugal has experienced a rise in corporate and restructuring litigation – notably, litigation regarding corporate control, restructuring and directors' and officers' liability. The rise in the number of court cases relating to corporate and restructuring matters can essentially be explained by:

- the financial and economic crisis at the beginning of the 2010s;
- the recent covid-19-related economic crisis;
- foreign investment; and
- the activism of investment funds.

The number of first-instance commercial courts has increased and specialised chambers in appeal courts have been created. For some years now, the Supreme Court of Justice has had a chamber (chamber number six) that specialises in corporate litigation, restructuring and insolvency.

This chamber has already rendered decisions that are now landmarks in Portuguese case law. One such case is a decision that was rendered on 9 January 2018 that regarded a judicial challenge against a board of directors' resolutions.

Background

The Companies Code allows shareholders to bring an out-of-court challenge against the board of directors' resolutions to the board of directors and to the shareholders' general meeting. However, it does not clarify whether shareholders are also entitled to challenge such resolutions in court, either directly or following an out-of-court challenge. Portuguese doctrine and case law are not unanimous on this issue.

Facts

In its 9 January 2018 decision, the Supreme Court concluded that it is possible to challenge a board of directors' resolution in court without a prior complaint to the board of directors or to the shareholders' general meeting. The Court based its decision on the constitutional principle of access to the courts and to justice.

The Court's decision also established that the right of shareholders to challenge a board of directors' resolution also includes access to injunctive relief. This means that shareholders can apply to the court for an injunction to suspend the effects of a board of directors' resolution.

Comment

Although the Supreme Court decision was correct, it is noteworthy that challenging a board of directors' resolution, particularly by seeking injunctive relief, requires the courts to be sensitive to business issues and to exercise a certain level of judicial self-restraint.

In 2006, the Portuguese legislature modified the Companies Code by introducing the business judgment rule, under which a "director's liability is excluded if it is proved that they acted in an informed manner, free of any personal interest and according to criteria of business rationality".

According to its wording, this legal provision concerns only directors' liability. However, it can be argued that the business judgment rule should also be applied in cases of judicial challenge against board of directors' resolutions, particularly applications for injunctive relief. The rule must protect the business decision itself, allowing entrepreneurial risk and avoiding business activity being constrained, thereby enhancing the development of companies and the economy.

It is highly likely that the business judgment rule will have an increasingly preponderant effect on corporate litigation in Portugal.

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