v. 5, n. 2, 2025

Scientific Journal of Applied Social and Clinical Science

Acceptance date: 30/01/2025

CIVIL LIABILITY OF DIRECTORS OF PUBLIC LIMITED COMPANIES

Silvino Lopes Évora
PhD candidate in Law at the Universidade de Santiago de Compostela (Galiza, Espanha), Assistant Professor with Aggregation and President of the Scientific Council of the University of Cape Verde. He has the following academic qualifications: Aggregation exams in Communication Sciences (Universidade do Minho), Post-doctorate in Communication Sciences (Universidade Fernando Pesso), PhD and Master's in Communication Sciences (Universidade do Minho), Post-graduation in Judicial Journalism (Universidade Católica Portuguesa), Degree in Journalism (Universidade de Coimbra)

Abstract: This working paper, entitled 'Civil Liability of Directors of Public Limited Companies', examines, from a systematic and constitutional perspective, the foundations, duties and limits of directors' liability in the context of public limited companies, taking Cape Verde's legal framework as a reference. Initially, the Cape Verdean Constitutional State and the centrality of private autonomy in the private law subsystem are addressed. Next, public limited companies are analyzed, with an emphasis on administration and the problematization of associated concepts and challenges. The history and foundations of civil liability are discussed, moving on to an analysis of the binding nature of directors' acts and the fiduciary duties attributed to them, particularly the duties of care and loyalty. It also explores the foundations of civil liability, the nature of the damage and the criteria that can exclude the liability of directors. Finally, the study highlights the importance of transparent corporate governance mechanisms, capable of ensuring a balance between the protection of corporate interests and the autonomy of directors, promoting legal certainty in Cape Verdean business law.
Keywords: Civil liability. Directors. Public limited companies. Business Law. Cape Verde.

INTRODUCTION

If we analyze the evolution of legal relations in the field of company administration, we can see that, all over the world, especially in open and competitive markets, there has been a growing professionalization of administrators, which goes hand in hand with the demands of complex business activities and transactions. This observation does not apply exclusively to the analysis of the figure of the administrator *stricto sensu*, but it can be applied to all the people who run the decision-making chains within organizations, whether they are managers, directors or people who exercise delegated powers. What is certain is that, looking at the global panorama of the internal structuring of companies, it can be seen that these changes have demanded a reinterpretation of the responsibilities of managers in relation to the decisions that have to be made at any given time. As a result, the system of accountability has become more robust, demanding specialized skills and knowledge from the individuals who carry out these functions, enabling them to make assertive decisions.

From this point of view, the work of company directors involves making decisions that generate risks. These can, on the one hand, result in productive, allocative or distributive inefficiencies, negatively affecting the company's finances and generating huge opportunity costs; on the other hand, they can have negative implications for the administrator's burden, affecting their reputation and professionalism, or resulting in various types of liability, whether civil, criminal or otherwise. Thus, it is possible to note that the legal systems of Roman-Germanic inspiration have, broadly speaking, in their evolution, recognized the specific nature of business activities, laying down their own rules. In keeping up with the times, they have also sought to undertake more sophisticated administrative acts within companies, in order to come up with appropriate responses to the imperatives of the times they are going through.

With this article, we will try to discuss the civil liability regime of directors, making an incursion into its implications for the success of commercial companies and, in particular, for the conduct of business.

The geographical scope of our study is Cape Verde, so we will be concerned, in terms of *corpus iuris civilis* and *negotia lex corpus*, with the rules of Cape Verdean law.

CONSTITUTIONAL STATE OF CAPE VERDE AND PRIVATE AUTONOMY AS A CENTRAL PRINCIPLE OF THE LAW SUBSYSTEM

Studying the legal regime on the civil liability of directors of commercial companies requires a contextualization of legal and economic systems, insofar as statist economies and monarchical regimes of a castrating nature have different systems with regard to both the organization of the business economy and the structuring of markets. Communist regimes have provided statist economic systems, with a centralized and planned economy, in which the state assumes ownership of the main means of economic production.

The private economy derived from liberal thinking - which marked Europe from the 18th century onwards, with the premises of Adam Smith (1776/1999) and David Ricardo (1817) - gained densification in the United States of America, with the machining of production processes, the industrial revolution and the crystallization of the capitalist system. Therefore, due to the set of rights to which it is attached, the study of the civil liability of commercial company directors is not far removed from what the *legal-constitutional* system itself provides to the market.

Looking at the system of the Constitution of the Republic of Cape Verde , it can be seen that the legislator was concerned, right after the preamble - which explains the need for a new constitutional text as a result of the political changes that took place at the beginning of 1991 and the consequent change from a one-party system to a multi-party system, reporting that, with the approval on September 28, 1990, of Constitutional Law No. 2/III/90, "which repealed Article 4 of the Constitution and institutionalized the principle of pluralism, embodied a new type of political regime" - opening an important catalog, classified Fundamental Principles. In doing so, it showed a concern to protect important legal values. In the field of Constitutional Law, this catalog of values, principles and goods of a fundamental nature can be found in the axiomatic regime of fundamental rights.

In addition to conceiving Fundamental Rights as "instruments for protecting the individual against the actions of the State" and recognizing their foundation in the "principle of the dignity of the human person", Tiago Fachini considers that they "are protective rights, which guarantee the minimum necessary for an individual to exist in a dignified manner within a society administered by State Power" (Fachini, 2022: www.projuris.com.br)[1] . The concern with respect for Fundamental Rights is expressed in Article 2 of the Constitution of the Republic of Cape Verde, under the heading of 'Democratic Rule of Law', which, under the terms of paragraph 1, establishes the foundations of the organization of the State and the principles on which it is based. The concern with the dignity of the human person is based on the first article of the Constitution, which states in paragraph 1 that "Cape Verde is a sovereign, unitary and democratic Republic, which guarantees respect for the dignity of the human person and recognizes the inviolability and inalienability of human rights as the foundation of the entire human community, peace and justice" (National Assembly of Cape Verde, 2019/Art.2, n.º1). This wording represents an evolution in relation to the foundations of the first article of the 1980 Constitution, which came into being five years after national independence and, even so, incorporated the revolutionary undertones that marked the colonial struggles for the liberation of the then Overseas Province of Cape Verde, once a Portuguese colony. Althou-

1. Fachini, Tiago (2024). "Fundamental Rights and Guarantees: Concept and Characteristics https://www.projuris.com.br/blog/o-que-sao-direitos-fundamentais [published 14.12.2024 and consulted 11.12.2024].

gh the constitutional legislator of 1980 had created an initial volume under the heading of Fundamental Principles (the same name appears in the 1992 Constitution), the content differs greatly. Hence, in the scope of Article 1(1) of the Constitution of the Republic of Cape Verde, the legislator established that "Cape Verde is a sovereign, democratic, secular, unitary, anti-colonialist and anti-imperialist republic" (National People's Assembly, 1980/Art.1, no.1). The following article bases sovereignty on the people and article three, which is more restrained than the text of the 1992 Constitution, instead of vehemently proclaiming the principle of the dignity of the human person as the foundation of the legality and legal democratization of the institution of the state, sticks to the idea of creating a society that does not tolerate the 'exploitation of man by man' (People's National Assembly, 1980).

As for the 1992 Constitution, we can see that the principle of the dignity of the human person permeates the entire materiality of the catalog of fundamental rights, finding its foundation not only in the terms of Article 1(1) of the CRCV, but also in various other articles, either in the form of rights to protect essential legal goods such as freedoms, or also in the form of constitutional guarantees that play a crucial role in protecting citizens against abuses and arbitrariness that jeopardize rights enshrined in the legal sphere of a particular guardianship. In this case, by ensuring the protection of the legal assets at their core (the principle of the dignity of the human person), the guarantees assert themselves as fundamental instruments for the realization of fundamental rights, particularly the constitutional rights to freedom of the press and communication, the right to freedom of thought, expression and opinion and other communication rights. This is because, within the scope of the Constitution of the Republic of Cape Verde, guarantees seek to ensure the rights of citizens, establishing a framework for the protection and observance of the principles that underpin the foundation of the Democratic Rule of Law, a matter dealt with under the terms of paragraph 2 of the Cape Verdean Constitution.

With the declaration of fundamental rights in the scope of the first two parts of the Constitution of the Republic of Cape Verde (Part I - Fundamental Principles and Part II - Fundamental Rights and Duties), the concerns of the constituent legislator include the establishment of constitutional sovereignty *with erga omnes* effects, with direct applicability to all public and private entities in matters related to rights, freedoms and guarantees, by virtue of Article 18 of the CRCV

As we can see, the perspective of fundamental rights in the Constitution of the Republic of Cape Verde is not only based on the idea of vertical effectiveness, but also on the thesis of limiting the actions of the state through the need to preserve the sphere of subjective rights of the holders. It is true that in relations between the state and citizens there is this need to ensure the perimeter of individual guarantees, on matters involving essential legal assets, which the government cannot exceed. However, the modern thinking that permeates the Theory of Fundamental Rights goes beyond this reading, which appears to be piecemeal. "Fundamental rights apply not only in relations between the state and the citizen (vertical effectiveness), but also in relations between private individuals, i.e. from one private individual to another, thus establishing relations of horizontal effectiveness." (Júnior, 2016: 1609)

Cross-referencing the nature of the rights catalogued as fundamental in the scope of the CRCV, with the characterization of these rights in theorizing and doctrine, characteristics such as universality, inalienability, indivisibility, imprescriptibility, historicity, non-renounceability, effectiveness and complementarity stand out.

Looking at commercial companies as the main forms of organization in the private sector, we must therefore highlight their framing within the constitutional scope, since, under Article 68 of the Constitution of the Republic of Cape Verde, the legislator stipulated that "private initiative is freely inscribed within the framework defined by the Constitution and the law". The following article reinforces this when it establishes a *jus-constitutional* regime for the right to property, stipulating for Cape Verde that "everyone is guaranteed the right to private property and its transfer in life or by death, under the terms of the Constitution and the law" (Article 69 CRCV/92). We can see here that private property is a constitutionally protected asset, listed under the heading of 'economic, social and cultural rights and duties'. In fact, the constitutional legislator has ensured its transmission, both in 'inter--vivos' legal transactions and in relationships established *mortis-causa*, particularly with the opening of succession. This perspective is consolidated in the Civil Code of Cape Verde which, under the terms of Article 1313, establishes that "the right to property is acquired by contract, succession by death, usucaption, occupation, accession and other means provided for by law

As we pointed out in the title of this point, a very important issue in Civil Law, and also in Business Law, which favors the debate on the civil liability of company directors is the principle of private autonomy, which is widely protected in the Civil Code, with consequences such as 'freedom of form' (Article 219 CC. CV), the voluntariness of the form when there is no legal provision (Article 222 CC.CV), the expression and perfection of the declaration of will and the requirements for its effectiveness (Article 224 CC.CV), the conditions for the public expression of declarations of will as a way of proving their effectiveness (Article 225 CC.CV), the real conditions for establishing the scope of wills in the formation of contracts (Article 232 CC.CV) and the conditions under which its modification can occur (Article 233 CC.CV) and the solutions and mechanisms for overcoming vices of will (Article 240 CC.CV and *ss*.). In this way, we believe that, as a foundation for the study of the civil liability of company directors, a framework is necessary, both in terms of Constitutional Law in correlation with the nature of the state and the organization of systems (in this case, the current economic system), and through Common Law, which establishes fundamental bases for understanding a particular area of law and its corresponding subfields

Let's move on to an analysis of civil liability law, looking for an approximation between theoretical, doctrinal and *jus-positive* axiomatic fields. This is without assuming that we have to come up with a new theory of business doctrine on civil liability, which is not the object defined in the general and specific objectives of our research

PUBLIC LIMITED COMPANIES AND ADMINISTRATION: CONCEPTUALIZATION AND

Before we begin to discuss the civil liability attached to the directors of commercial companies, derived from the administrative function, it is important for this study to conceptualize public limited companies, since the concept is part of the formation of our object of study. Thus, a public limited company is a form of company organization characterized essentially by the limited liability of the shareholders to the capital they subscribe to the company. In Cape Verde, as in many other geographical contexts and legal systems, the public limited company is one of the most popular legal structures for formalizing medium-sized companies, whether of a manufacturing, industrial or commercial nature.

By assuming this organizational form and

complying with all the formalities that the law imposes, public limited companies, even if they are owned by foreign partners, become companies under 'Cape Verdean law' and can operate in the market according to internal rules, obviously bound by the principles of private autonomy and legality. This means that no element of private autonomy should contradict the legal content that regulates the matter, under penalty of liability, which may be of a civil or criminal nature. Public limited companies are characterized by Limited Liability, which means that the partners are not liable for the company's debts with their personal assets in the event of default. They are liable with their assets up to the limit of the capital with which they subscribed to the company, which in the end becomes the company's share capital or the company's own assets. Reversion of the capital endorsed to the company only occurs in situations where there are supply contracts, in which the shareholder lends money to the company with the aim of returning it later. This situation differs from the subscription of the company's capital, since, in this specific case, the funds endorsed to the company are converted into the company's share capital and the shareholder receives dividends at the end of an established period, which is usually one year.

Another fundamental characteristic of public limited companies is the division of the share capital into shares, which are negotiable securities that represent the shareholding of each shareholder in the formulation of the company's share capital. Basically, this division is indicative of the share that each partner has in the company

Also relevant to the characterization of this type of company is the obligation to set up corporate management bodies, generally consisting of a Board of Directors (BoD), which includes a Chairman (PCA) and a number of other members who make up the BoD as directors. In this regard, it is important to look at Article 982 of the Civil Code of Cape Verde, which sets out the conditions for the administration of companies. In paragraph 1, the legislator stipulates that "in the absence of an agreement to the contrary, all shareholders have equal power to administer". Enforcing the principle of private autonomy, based on the freedom to form one's own will, Article 982(2) of the C.C./C.V. leaves it up to the partners to define how they will participate in the administration, which may involve all or some, while safeguarding the right of any of the directors to "oppose the act that another intends to carry out, with the majority deciding on the merits of the decision"

Therefore, we should point out that the number of members on the Board of Directors depends very much on the structure of the company, and must necessarily be odd, since, as a plenary body, decisions are perfected in the form of resolutions, going through the voting process. This is stated in Article 982(4) of the Civil Code of Cape Verde, which stipulates that, "unless otherwise stipulated, a majority decision shall be deemed to have been taken if more than half of the directors vote in favor of it". Public limited companies must be governed by transparent management, considering the tradable nature of their shares and the frequency with which they make use of the capital market. This is a form of company organization that has its advantages, in that they have the capacity to attract significant investments, as well as flexibility in management and the company's subsistence, in addition to the will of the shareholders to continue in the business, since, if they want to, they can sell their share to other potential shareholders, who may be interested in entering that market or investing in the sector.

Considering the dynamics of the markets, the legislator has been attentive to the creation of situations in which responses must be swif-

ter, establishing that, "even if the consent of all the directors, or of the majority of them, is required for the administration in general, or for a certain category of acts, any of the directors is permitted to carry out urgent acts of administration aimed at preventing imminent damage to the company" (Article 982/nº 5 of the C.C./C.V.). This prerogative alluded to in the aforementioned article contributes to underpinning the duty of care that directors have towards the company, which we will address later in this research paper.

It is important to note, however, that the administration of commercial companies is subject to change, and the conditions under which this must occur are set out in Article 983 of the Civil Code.

CIVIL LIABILITY: HISTORICITY, CONCEPTUALIZATION AND AXIOMATIC INCURSION

Looking at the panorama of companies, we can see that throughout the 20th century and the beginning of this century, we have seen an increasing number of concerns related to the civil liability of company managers and directors, particularly due to the many bankruptcies that have occurred, with losses for the state and private individuals. Some of these situations, involving bankruptcies, insolvencies and breaches of capital stocks and the credibility of companies and managers, have become media cases, with great repercussions among the public. For this reason, they have gained relevance, not only as cases that raise social concerns, but also because their implications cover the worlds of politics, economics, the financial market and the capital markets. We shouldn't ignore the fact that these types of cases cause multiple concerns, since, as they arise in the field of business economics, their repercussions cause contagion in different other sectors, not least because microeconomic issues have implications for macroeconomic areas, particularly in the fields of countries' macroeconomic stability and the financial system. Particularly in structurally deficit economies, they have serious implications for the ability to respond to balance of payments flows.

In fact, issues relating to the civil liability of managers and directors of commercial companies have been the concern of jurists and non-jurists alike. If, on the one hand, social sentiment almost always points to the disapproval and accountability of these behaviors, it is true that, in the doctrinal field, there is a concern to highlight excessive punitive measures, as they become factors that induce the removal of the best managers in the leadership of commercial companies. The effects of rigid sanctioning measures can be counterproductive in terms of the efficiency of business administration. Decision-making is always imbued with risks, which, after all, extend beyond commercial activity.

Looking at Cape Verde's Commercial Companies Code, we can see that it is based on a way of thinking about the civil liability of directors that is in line with advanced legal systems in this area, based on a balance between liability and the freedom of managers and directors to act in the performance of their duties. It is true that however evolved, complete and balanced a country's codified system of laws may be in this area, everyday situations always present challenges and, in the most far-fetched cases, there is a need for a reworking of the system itself in terms of practice, which involves reinterpreting socio-legal reality the light of the integration of gaps and analogies *légis* and *iuris*

While the field of law is concerned with integrating norms, rules, customs, jurisprudence and doctrine within the same system in order to make it robust and effective, it is true that social realities are dynamic and life is made up of dialectics that sometimes bring

about situations that are not covered by the solutions constructed by the legal system. So that people don't always live in environments of uncertainty, the law reserves, in highly complex situations, the possibility for the law enforcer to exercise 'exegesis', interpreting and integrating gaps. Thus, we note that the study of the civil liability of company directors has, at its foundation, a concern with the protection of share capital and obligations, taking into account two central elements:

- Legal obligations;
- Realization of the material object.

From a system perspective, the study on the civil liability of company directors incorporates, on the one hand, general principles (involving common private law) and, on the other hand, the subsystem of specific rules, which, in this case, includes the Commercial Companies Code. This study includes a set of general duties incumbent on professionals who look after the interests of commercial companies, in terms of their power of representation, considering the axes such as:

- Principles that should guide the actions of the Administrator;
- Specific Acts are not envisaged here;
- They seek to lead the Directors to pursue the company's interests.

Looking at the civil liability regimes applied to company directors, we can see that, when analyzed from the point of view of their objectivity and subjectivity, they have a plurality of solutions. On the one hand, we can identify solutions in which directors are only liable under the terms of the regulations set out in Commercial Law, for damage caused to commercial companies in the exercise of their duties and due to the exercise of administrative powers set out in the instruments supporting the operation of the respective commercial companies. On the other hand, it is possible to come across situations in which directors are held accountable to the company and also to the company's creditors, shareholders and third parties. The *ratio légis* of such situations is based on the need to triangulate responsibilities, in order to guarantee operational and relational security for all the *players* in the commercial company environment

Another important element in considering the civil liability of company directors is based on the so-called *business judgment rule*, an institute under which directors are considered to be exempt from *judicial* and *administrative* liability when it is proven, on the basis of factual evidence, that their actions within the scope of their business management powers were not motivated by any personal interest or any interest other than that of benefiting the company in the process of its establishment, strengthening and growth. In this way, it is up to the director of the commercial company to demonstrate that his actions in the administration and management of the company are the result of objective criteria of rationality that preside over the management of organizations with commercial purposes

However, it is essential to consider that, in cases where commercial companies are faced with major difficulties in fulfilling their commitments or face historic financial losses, if it is proven that the actions of the directors were guided by criteria strictly based on the procedures experienced in business management, even if this demonstration is valid with regard to their accountability to the company, it is less certain that it has much relevance with regard to accountability to third parties, shareholders and company creditors.

The principles that govern the specific duties of directors oblige them to perform acts in accordance with the law. This difference will have an influence on the defendants' possibilities of proof and defense in liability cases. Therefore, some nuances are listed in relation to the treatment of the civil liability of directors in private law:

- The existence of a systematic model common to the various legislations on the matter, with minor differences;
- Search for safer and faster solutions for good corporate governance;
- The need to ensure legal certainty about the responsibilities to which directors are subject;
- This security is important for the economic analysis of investments, the choice of business formats and the control of abuse of rights.

It can be seen that there is greater legal divergence in the delimitation of specific duties. However, even when they are not prescribed by law, they can be interpreted as existing in various legislations, as they are based on the same general principles. Although Cape Verdean legislation itself points in this direction, there is no substantiated legal formulation in it or in its counterparts that introduces determining elements and implies unidirectional decision-making in concrete cases.

In the debate on the civil liability of directors of commercial companies, we cannot marginalize two factors that endorse elements that deepen the discussions. On the one hand, there is guilt and, on the other, solidarity. It is important to point out that guilt is presumed in a director's liability to the company, and in terms of solidarity, Article 85 of the Cape Verde Commercial Companies Code establishes the civil liability regime of directors towards shareholders and third parties, imposing solidarity between directors when they cause damage to shareholders and third parties in the exercise of their duties

When analyzing the liability of company directors towards shareholders, it is important to note that its elasticity depends essentially on the position adopted in relation to it. In this case, the positions may be of a tortious or obligatory nature, so its definition is based on the commitments made between the shareholders and the directors of commercial companies.

As for the solidarity component, it is important to note that it extends to all directors responsible for the operations of the commercial company. However, in cases where the liability arising from certain actions is attributable to some of the directors, it is up to them to respond by determining the burden. However, in addition to other conditions and requirements, as far as civil liability towards shareholders is concerned, the directors are exclusively liable for the damage their actions have caused to the shareholders' legal sphere. By this we mean that the civil liability of directors towards the shareholders of commercial companies does not derive from the degradation of the company's assets. As we have said, it derives from the objective and concrete damage that can be ascertained in the legal sphere of the shareholders.

Looking at the system that makes the director liable to third parties, it should be noted that it is necessary to establish a dividing line between the responsibility of the director and the responsibility of the commercial company. The burden of each is different. In the case of third parties, the director's civil liability takes shape when concrete and objective situations require disregarding and/or overcoming the organizational context and the surroundings in which the company director's actions took place. As a rule, the company itself is liable to third parties who feel they have been harmed by the company.

BINDING OF THE ACTS OF THE DIRECTORS OF COMPANIES

We must not lose sight of the fact that in a large part of the legal systems of the Roman--Germanic tradition - including the legal systems of Portugal and Cape Verde - company directors are given powers of representation and management. However, these practices

extend beyond this legal family and this conception of the administrative function is repeated all over the world.

Starting from the Cape Verdean legal environment and looking at the closest doctrinal field, it is possible to find densified in Portuguese doctrine the perspective that advocates in favor of these two categories of attributions that enclose the administrative function in the business world: management and representation. In this sense, Luís Manuel Teles de Menezes Leitão points out that "the power of administration has as its content the possibility of exercising the management of the common company, while the faculty of representation comprises the imputation to the company of the acts carried out in its name" (2020: 282 and 2022).

Thus, it is important to note that the directors of commercial companies act with powers of representation, particularly if we consider the executive sphere. This exercise is carried out under the general principle that all executive directors will have the same powers, in the sense that they will all be representatives of the company. The company is bound by the legal acts of its management and representative bodies and it is within the scope of the law that the 'modus operandi' of this representation is determined, including the binding relationship that the company establishes with third parties. Furthermore, the internal decision-making body, the supervisory body or the shareholders themselves may have specific powers of representation. Thus, Article 993 of the Civil Code of Cape Verde sets out the general conditions for the representation of commercial companies, stating in paragraph 1 that they are represented "in or out of court by their directors, under the terms of the contract or in accordance with the rules set out in Article 982". The Code points out, however, that "when they are not subject to registration, resolutions on the termination or modification of the powers of directors shall not be enforceable against third parties who, without fault, were unaware of them at the time they contracted with the company; ignorance shall always be deemed to be fault, if the resolution was given the appropriate publicity" (Article 993/nº 2, C.C./C.V)

As for the binding acts, they can have different formalities and can be written or unwritten. Binding by written acts will depend on the signature of the directors, and may be accompanied by an express reference to the position or the company's link. This broader interpretation tends to avoid formal problems, although there is dissent. In general, credits will be in writing, whether in the form of contracts, credit titles and their respective guarantees.

Therefore, it should be noted that a commercial company may be represented by a single director or by several. In situations where there are more than one, it will be necessary to choose a method of representation, which may be disjoint or joint (the latter may require majority or minority representation).

It should be noted that the form of representation of commercial companies may be prescribed by law or derive from their own bylaws, and the system of delegation of powers is a supplementary form of binding the company. Certain functions can be delegated to specific directors. When a director is assigned a role, it is the responsibility of the others to supervise their actions, to ensure good management of the company, preserving and protecting the general interests of the company, the shareholders and the company's internal and external surroundings.

It should also be noted that, in the context of the delegation of powers, the director who is entrusted with certain responsibilities of the commercial company is presumed to be at fault for the actions taken in this context, if they result in specific damages that can be assessed. This is because, in the act of representation, the duty of care is fundamental, considering that, under the terms of Article 258 of the Civil

Scientific Journal of Applied Social and Clinical Science ISSN 2764-2216 DOI https://doi.org/10.22533/at.ed.2165225200110

Code of Cape Verde, when a legal transaction is carried out in representation of another and the representative acts within the limits of his powers, the legal transaction produces 'its effects in the legal sphere' of the represented subject. Furthermore, it is important to consider the general regime of presumption, which is stipulated in the scope of Articles 349 et *seq*. of the Civil Code of Cape Verde.

Under the terms of Article 1006, after the dissolution of the company, "the directors' powers are limited to carrying out merely conservative acts and, if they have not been appointed liquidators, the acts necessary for the liquidation of the company's assets" (Article 1006/nº 1 of the C.C./C.V.). This situation can generate an obligation regime for the directors, since, under the terms of Article 1006/nº 2, C.C./C.V., the legislator has stipulated that, "for the obligations assumed by the directors against the provisions of the previous paragraph, the company and other shareholders are only liable to third parties if they were in good faith or, in the case of compulsory registration of dissolution, if this has not been carried out; in all other cases, the directors who have assumed those obligations are jointly and severally liable"

OBLIGATIONS AND DUTIES OF COMPANY DIRECTORS

Analyzing the results of the joint research by Maria Bueyo Diez Jalón, Ana Collazo Lugo and Emilio Palomo Balda, it can be seen that "the breach of the duty to administer constitutes the fulfillment of the obligation to perform the office" (2000: 14) . In his work entitled *Civil Liability of Company Directors,* Jorge Manuel Coutinho de Abreu discusses the issue, seeking to build a reading from the roots of the problem, without neglecting its substance. In this context, he establishes that, based on the original premises, the duty to manage is underpinned by the availability of the person exercising the administrative function, as well as technical skills and mastery of the branch of activity in which the company operates. Furthermore, Abreu (2010) recognizes the existence of other elements that form part of the duty to manage companies, particularly those that are embedded in the "obligation of directors to pay attention to the economic and financial evolution of the company and the performance of those who manage it" (2010: 20).

The issue of the obligations of directors of commercial companies is regulated under the terms of Article 984 of the C.C./C.V., which stipulates, in its paragraph 1, that "the rights and obligations of directors shall be governed by the rules of office" and, in its paragraph 2, that "any shareholder may make effective the liability to which the director is subject".

When it comes to the duties of directors of commercial companies, the doctrinal field is divided into two levels, one of which covers general duties and the other specific duties. In the field of general duties, there is the part that does not focus specifically on what the director must do in carrying out his tasks, but rather discusses how he should proceed, with a view to the relationship entrusted to him. As for specific duties, Amândio Novais defines them as those "which leave no margin for discretion or consideration for the administrator: they impose a specific action or omission" (2016: 242).

For Manuel Frada, "the duty to provide that gives individuality, typicality and unity to the administrator's situation is simply the duty to administer" (2007: 66 and 2006). Thus, the author points to this as the main function of the administrator, which opens the door to all the others. The duty to administer manifests itself concretely in the materialization of the administrator's role, giving concrete content to their integration into the company. It concretizes the administrator's action in society and reveals it to us in the materialization of everyday actions that are the mirror of administrative activity.

It should therefore be noted that the directors of commercial companies are also bound by fiduciary duties. Below we highlight some of the duties that fall to the directors of commercial companies:

- Duty of Care: this duty is closely linked to the competence of the director, who must have sufficient knowledge to make decisions relevant to the company in a coherent, prudent and informed manner
- Duty of Information: as part of this duty, it should be noted that the administrator is obliged to be properly informed before making any decision. They are required to adopt the necessary measures to avoid wrong decisions that could cause damage to society and third parties
- Duty of Loyalty: this system of duties permeates the entire legal system applicable to commercial companies, being the fundamental rule and the controlling basis of intra-company relations
- *Business Judgment Rule*: Presumption of care and loyalty "according to which it is estimated that the directors of a company, when making a business decision, do so on an informed basis, in good faith and with the certainty that the action taken is in the best interests of the company". With regard to the concept of the *Business Judgement Rule*, we borrow from Sónia das Neves Serafim the material dimension that makes up its substantive part, embodying the «presumption that, when taking a business decision, the directors of a company acted on the basis of information, in good faith and in the honest belief that the action taken was in the best interests of the company» (2011: 504). The assumption attached to this concept is the duty of care, which falls on the directors of corporate entities, specializing and specifying their position in relation to other citizens who have dealings with the same entities. Thus, the directors of commercial companies are responsible on a very fundamental level, placing themselves in a different position from others, insofar as they are associated with a system of duties that are very relevant to the stability and proper functioning of companies. As such, Sónia das Neves Serafim's ideas support the premise that the *Business Judgement Rule* is "an attempt to balance the autonomy and discretion that should characterize the director's activity (Serafim, 2011: 504)". The author also adds as relevant the fact that the *Business Judgement Rule* translates into "a judgment that the result of the administrator's activity cannot be questioned by the courts, if it is proven that the administrator has complied with certain rules imposed on him in the decision-making process" (Serafim, 2011: 503).

The obligations and duties to which the directors are bound are subject to supervision by the shareholders, which is why the Civil Code establishes, in Article 985(1), that "no shareholder may be deprived, not even by a clause in the articles of association, of the right to obtain from the directors the information he needs about the company's business, to consult the relevant documents and to demand the rendering of accounts". This safeguards the possibility of scrutiny and *accountability of* the activities of commercial companies by their shareholders. This prerogative imposes the need for rigor, transparency and good practice in company management and, to reinforce this, the legislator stipulated in

Article 985(2) of the C.C./C.V. that "the accounts shall be rendered at the end of each calendar year, unless otherwise stipulated in the articles of association or if the duration of the company is less than one year". In any case, although all the elements mentioned above are important, we will focus on the duties of care and loyalty, which are two crucial elements to explore in terms of the civil liability of companies, particularly their directors.

DUTY OF CARE

First of all, we would like to highlight the high place that the duty of care of company directors occupies in the scope of their responsibilities, with the teleology of protecting the interests of the company and its shareholders. This duty is closely related to the principles of diligence and competence, which are expected of any company director.

The duty of care involves the conduct of the administrator, who must act with diligence, prudence and expertise, as a way of instilling a culture of good practice within the organization, making well-informed and well-founded decisions. For this reason, the decision--making process must be based on adequate information, which must be analyzed and referred to in the decision-making process.

The duty of care is pertinent in determining the civil liability of directors of commercial companies, since it implies the justification of strategic guidelines. It should be noted that, in this context, each director of a company has individual responsibilities with regard to fulfilling the duty of care, which does not mean that responsibility falls only on individual action, but also on omissions, responsibilities of vigilance, supervision, monitoring and intervention when necessary. The process includes the entire decision-making chain that is formulated within the commercial company, so that the general guidelines to which companies are subjected are well scrutinized.

As part of the duty of care, directors are still obliged to seek out information that is relevant to the sector, implying a considered analysis when making decisions. It is therefore necessary to consult experts, evaluate the different sources of information and the options available, and analyze their impact on the industry in which the company operates.

However, it is up to the commercial company director to make a careful and diligent analysis, following the dynamics of the market and the circumstances surrounding the internal and external contexts of the commercial company and, whenever necessary, taking measures that respond to the complexity of the situations surrounding the organizations.

It should be noted that, in some countries, there are legal and regulatory norms that establish the duty of care of company directors and, when these do not exist, it is necessary to consider the company's objectives, good management practices, good operating practices, dialogue at the Shareholders' Meeting, the company's internal regulations and good faith in the practice of business administration.

Directors may be held liable in court for failure to comply with their responsibilities under the duty of care, particularly when an act or omission results in damage that is the result of fault or intent. There may be cases in which shareholders themselves take legal action against company directors, if they believe that there has been harmful management, with practices that are detrimental to the company, themselves (the shareholders) or third parties. For this reason, a great deal of prudence is required in company management. The duty of care is a fundamental principle of corporate governance

THE DUTY OF LOYALTY

One of the main duties of the directors of commercial companies is that of loyalty and this stems, among other things, from the fact

that the articles of association are of an *intuitu personae* nature and are based on the demonstration of trust between the parties when they are entered into. Thus, the directors of commercial companies, under the sign of the duty of loyalty, must act in strict compliance with the primary and exclusive interests of the companies and their shareholders, to the detriment of personal or other interests external to the commercial companies. According to Pedro Caetano Nunes, "the *duty of loyalty* (or *duty of fair dealing*) requires directors to act correctly when carrying out their duties" (2001: 23). In the same vein, António Menezes Cordeiro argues for the composition of the duty of loyalty, stating that it is revealed in "the loyalty of shareholders to each other, the loyalty of shareholders to the company, the loyalty of directors to the company and the loyalty of directors to shareholders" (2007: 409 and 2014).

The duty of loyalty to the commercial company is fundamental, its scope being the protection of the company's interests as plausible priority prerogatives. It must be taken into account in all decisions, actions or omissions. The duty of loyalty is therefore based on the interests of companies, which, within the scope of their area of action, must take precedence over the personal and selfish interests of the individual who holds the management position. The duty of loyalty emphasizes the need to place the sustainability, safety, operational and financial health of the company at the top of the concerns of its directors, considering that decisions cause significant impacts, which can be positive or harmful. Here, attention must be paid not only to the interests of the company as an organization and legal entity, but also to the interests of the shareholders and of the players who occupy the organization's surroundings and whose position and levels of trust can determine the success or failure of the company's projects.

When analyzing the duty of loyalty of directors, the conflict of interests does not lose relevance, avoiding situations where the position derived from the office or function is used to obtain personal gain. It should be emphasized that this regime of altruism in administration - which implies renouncing the most primitive desires to obtain personal advantages - should not fall exclusively on the person of the director, but should be binding on third parties when their interests collide with those of the commercial company. In cases of a head-on collision of interests, it is better for directors to abstain from taking part in decision-making, and it is plausible to state this conflict as a reason for withdrawal. This provides clarity and transparency in management, so that the director in question avoids putting himself in a position where he could be accused of disloyalty to the company. In this way, it has been established in the Judgment of the Coimbra Court of Appeal of 09/01/2017 (473/13.1TBOHP.C1), that "not acting in conflict of interest with the protected company is precisely paradigmatically associated with the duty of loyalty

An issue of interest that should be considered in the debate on the director's duty occurs with transactions involving the company (supply contracts, provision of services, sale of assets, among others). These are very sensitive cases in which the administrator must ensure that he is equidistant from the range of interests that surround him in the management of the company, ensuring transparency in the processes, fairness and avoiding suspicion or serious incompatibility of interests. For this reason, the legislator introduced the prohibition of competition in Article 987 of the C.C./C.V., which establishes that "a partner who, without the express authorization of all the others, carries out, on his own account or on behalf of others, an activity equal to that of the company, shall be liable for any damage

caused to it, and may also be excluded under the terms of Article 1000(a)". This regime in Article 987 is aimed at partners, but in an interpretation based on teleological extension, we can even extend it to directors who, because they have access to privileged information that is vital to the life of the company, should not carry out activities that are the same as those of the company they manage in another company in which they are partners.

Information management is fundamental in company administration, to the point where the phrase 'secrecy is the lifeblood of the business' has become popular. This adage is as popular as it is true, so company directors are bound by the company's secrecy and must carefully manage confidential information. From the outset, there is a duty to ensure confidentiality and the appropriate use of such information. It must not be used as a means of pursuing personal gain, nor must it be improperly provided to third parties. In the event of a supply tender, it is necessary to avoid making confidential information available to competitors. If this happens, it results in unequal treatment and creates unfairness and irregularities in the process.

It should not be forgotten that the duty of loyalty is part of the fiduciary responsibility that falls on directors, imposing on them a legal and ethical obligation to act honestly, in good faith and in the interests of the company and its shareholders. There are countries in which laws and corporate regulations objectively specify the duties of directors, including that of loyalty. Where such rules exist, they set guidelines for the standard conduct of directors, creating a legal basis for determining the burden of civil liability when necessary

The concern for an ethical approach to the role of directors is fundamental, and a set of restrictions is attached to it, including the prohibition of establishing business "with the company, while potentially generating conflicts of interest (...)" (Ribeiro, 2012: 639) . In the same way, administrative ethics oblige company directors to refrain from developing opportunistic deals with the company that result from their privileged role as holders of strategic company information. This condition also implies impartiality and impartiality in establishing relationships and legal business with third parties, who deserve equal treatment, and the position of directors must be marked by thoughtfulness, responsibility, impartiality and modesty. Furthermore, they must not provide discriminatory treatment to shareholders, to whom they must provide all relevant information about the business and operation of commercial companies. The same question arises when business is done with company securities.

FOUNDATIONS OF THE CIVIL LIABILITY OF COMPANY DIRECTORS

The basis of the French model for explaining the civil liability of directors of commercial companies - which has made its mark in various parts of the world through derivative models - takes fault as its referential element, establishing its validity, both in terms of its interpretation vis-à-vis the company and vis-à-vis third parties. This gave rise to the concept of "fautè de gestión", coined in France and applied doctrinally to this day. The director of a commercial company can therefore be held civilly liable if he or she commits serious mismanagement, causing damage to the company, the shareholders or third parties. Liability is determined in the face of a real situation of damage, in which civil action for liability becomes feasible when the commission of illicit acts is proven. Article 271 of the Civil Code of Cape Verde considers "a legal transaction subject to a condition contrary to law or public order, or offensive to good customs" to be null and void

The civil wrongdoing that can generate liability for company directors can derive from actions or omissions, such as failing to fulfill an obligation. In this way, the causal link between the behavior and the damage is established, linking (through a link) the act performed that caused damage. Thus, the elements of the civil liability of company directors remain: the wrongful act, the causal link and the damage. In these terms, the Civil Code of Cape Verde establishes, in Article 483, the general principle of Civil Liability, which states that "whoever, through intent or mere fault, unlawfully violates the right of another or any legal provision intended to protect the interests of others shall be obliged to compensate the injured party for the damages resulting from the violation". This general principle also establishes that the obligation to compensate, regardless of fault, only occurs in the cases specified by law.

In turn, the civil liability of the members of the management bodies of companies is joint and several, under the terms of Article 84(1) of Cape Verde's Companies Code, "when, through culpable failure to comply with the legal or contractual provisions designed to protect them, the company's assets become insufficient to satisfy their respective claims. The same article goes on to set out a number of other prerogatives:

> **Paragraph 2, Article 84/CSC_CV:** *Whenever the company or the shareholders fail to do so, the company's creditors may, provided that there is a fair fear of a significant reduction in the guarantee of assets, subrogate to the company the right to compensation that it holds.*
>
> **Paragraph 3, Article 84/CSC_CV:** *The obligation to compensate is not, with respect to creditors, excluded by the resignation or transaction of the company or by the fact or omission being based on a resolution of the general meeting.*
>
> **Paragraph 4, Article 84/CSC_CV**: *In the event of the insolvency of the company, the rights of creditors may be exercised, during the insolvency proceedings, by the administration of the insolvent estate.*
>
> **Paragraph 5, Article 84/CSC_CV**: *The provisions of Article 79 and Article 80(1) shall apply to the right to compensation provided for in this Article.*

When it comes to civil liability resulting from unlawful acts, it is worth noting that Article 995 of the Civil Code states in paragraph 1 that "the company is civilly liable for the acts or omissions of its representatives, agents or representatives, in the same terms as principals are liable for the acts or omissions of their commissioners". Paragraph 2 of the same article also states that, "if the injured party is unable to obtain full compensation either from the assets of the company or from the assets of the representative, agent or agent, he shall be entitled to demand from the shareholders what is lacking, under the same terms as any company creditor". The legislator presents a variety of possibilities for the injured party to be able to recover the damages they have obtained.

We can see that the Commercial Companies Code ends up detailing the responsibilities of the directors of commercial companies. Its Article 79 establishes the following:

> ***Article 79*** Liability of members of the management body towards the company
>
> **Paragraph 1:** *The members of the management body shall be jointly and severally liable to the company for damages caused to it by acts or omissions carried out in breach of legal or contractual duties, unless they prove that they acted without fault.*
>
> **Paragraph 2:** *Members of the management body who did not take part in a collegiate resolution, when their participation was not required, or who voted against it, are not liable for damages resulting from it, in which*

case they may have their declaration drawn up within five days, either in the respective minutes book, or by written communication addressed to the supervisory body, if there is one, or before a notary.

Paragraph 3: *The member of the management body is also obliged to oppose the commission of harmful acts and to eliminate or mitigate the harmful effects of acts already committed, under penalty of being jointly and severally liable for the acts he could have opposed.*

Paragraph 4: *The liability of the members of the management body towards the company does not arise when the act or omission is based on a resolution of the shareholders, even if it is annullable, unless the resolution was taken at the proposal of the said members of the management body.*

Paragraph 5: *The favorable opinion or consent of the supervisory body does not exonerate the members of the management body from liability.*

Article 80 of the Commercial Companies Code deals with null and void clauses and situations of waiver and transaction and, in this regard, makes reference, under the terms of its paragraph 1, to the directors of commercial companies, when it is established that "a clause, whether or not included in the articles of association, which excludes or limits the liability of the founders and members of the management body, or which makes the exercise of the corporate action of liability provided for in article 83 null and void, is null and void" (Article 80/paragraph 1 of the CSC/CV).It also makes the exercise of corporate action dependent on a prior judicial decision on the existence of grounds for liability or the dismissal of the person responsible" (Article 80/nº 1 of the CSC/CV)

While Article 85 of the Commercial Companies Code establishes the civil liability of directors towards shareholders and third parties (solidarity in liability), Article 86 has the power to equate the liability of other persons with administrative functions in the company with that of the directors, establishing that "the provisions relating to the liability of members of the management body apply to other persons entrusted with management functions" (Article 86, CSC/CV).

DAMAGE AND THE CIVIL LIABILITY OF DIRECTORS

Although, in the field of civil liability, there are various doctrinal currents regarding the definition and delimitation of its assumptions, Rui Manuel de Freitas Rangel (2004) highlights Antunes Varela's conception, based on the thesis that the configuration of the concept requires the simultaneous verification of certain elements. These include human behavior, unlawfulness - understood as the violation of a subjective right or of rules intended to protect the interests of others - the imputation of the fact to the agent causing the damage, the presence of fault and the existence of the damage itself. This set of factors leads to the formation of a causal link between the event and the damage. For his part, Rui Cardona Ferreira argues in an article published in 2016 in the Jornal de Negócios that "directors are only liable, under the discipline specifically enshrined in commercial law, for damages produced in the exercise and in reason for exercising management functions" (Ferreira, Jornal de Negócios: www.jornaldenegocios.pt) .[2]

We have already discussed the civil liability of company directors, in which we said that it can be considered when their attitude or behavior can be imputed to guilt or intent, violating the law or bylaws of the commercial company, with clear damage to it. With regard to its determination, it should be noted that

2. Ferreira, Rui Cardona (2016). "The Civil Liability of Directors: An Overview". Jornal de Negócios: https://www.jornaldenegocios.pt/opiniao/detalhe/a_responsabilidade_civil_dos_administradores_uma_visao_panoramica [published on 08.06.2016 and accessed on 18.12.2024].

the damage may be of a pecuniary or non-pecuniary nature and, in this regard, the Civil Code establishes, under the terms of Article 496/nº 1, that "in fixing compensation, account must be taken of non-pecuniary damage which, due to its seriousness, merits the protection of the law"

It should be noted that acting with fault and the unlawful act resulting from non-compliance with the law or the statute are confused, which leads to the conclusion that proof that the unlawful act was committed is sufficient to establish fault and indicate liability. For liability for abuse of rights, there must be proof of fault. In a broad sense, fault is defined by Inocêncio Galvão Telles as "the imputation of an unlawful act to its author, translated into a judgment according to which he should have abstained from that act" (1979: 324). For their part, Pires de Lima and Antunes Varela, in the context of the *Annotated Civil Code* (of Portugal), maintain that "acting with fault means acting in terms of the agent's conduct deserving the reproach or censure of the law: the injured party, by capacity and in view of the concrete circumstances of the situation, could and should have acted differently" (2010: 474).

Starting from the premise that the civil liability of directors is due to intent or fault, it must never be forgotten that good faith is the key to the responsible action of directors. For this reason, the doctrine incorporates the thesis of 'culpa in acceptando', a principle according to which, when accepting the position of assuming responsibilities in the administration of a commercial company, the person must be willing to assume the bonuses and burdens of the position. Furthermore, Article 334 of the Civil Code of Cape Verde states that "the exercise of a right is illegitimate when the holder manifestly exceeds the limits imposed by good faith, good customs or the social or economic purpose of that right"

Thus, it can be seen that the willful action of the administrator, as a rule, is presided over by bad faith and goes against the terms of the aforementioned Article 334 of the CC.CV. Fraud against creditors may be one of the grounds for this liability regime. Similarly, abuse of the power of representation and failure to take care of conflicts of interest can also contribute to this matter, as they violate the duty of loyalty. Article 268 of the Civil Code establishes the appropriate fate of legal transactions carried out by people without the power of representation and, in the following article, the legislator took care to deal with the issue of abuse of the power of representation, importing a regime of legal ineffectiveness carried over from 268 CC.CV for these situations of abusive use of the power of representation without the knowledge of the counterparty, as provided for in Article 269 CC.CV.

Another critical issue in the study of the civil liability of company directors is the process of distributing dividends, in which it is necessary to protect the company's share capital so as not to generate high risks. Article 988 of the Civil Code establishes the regime for the periodic distribution of profits, stating that "if the contracting parties have not declared the destination of the profits for each financial year, the shareholders are entitled to have them allocated to them under the terms set out in the immediate article, after deducting the amounts allocated, by resolution of the majority, to the pursuit of the company's purposes". Good company management practices therefore recommend that it is essential to ensure that the distribution of profits does not touch the core of the share capital, thus avoiding the devaluation of the company itself

Also, in periods when companies are unable to cover all their expenses and are on the verge of insolvency, the director's duty of care is superlative, and he must not fail to protect the real interests of the company. Thus, in ca-

ses of non-compliance with their own responsibilities, directors may face civil proceedings for both direct and indirect damages. The question of solidarity between them in the distribution and allocation of responsibilities comes into the equation. Article 497 of the Civil Code stipulates that when several parties are found to be responsible for damages, civil liability is joint and several, while paragraph 2 of the aforementioned article retains the possibility of establishing a right of recourse between the parties responsible, "to the extent of their respective faults and the consequences arising from them, the faults of the persons responsible being presumed to be equal" (Article 497/nº 2, CC.CV).

Looking at comparative law, it can be seen that, in Portugal, fault is assessed, under the terms of Article 487(2) of the Civil Code, due to the absence of any other legal criterion, using the diligence of a good family man in the face of concrete everyday circumstances as a metric. Mário Júlio de Almeida Costa argues that "it is assessed in the abstract, in the light of the circumstances of each case, by the diligence of an average man in the abstract" (1979: 388).

Still in the Portuguese context, it is important to note the content of the Judgement of March 30, 2004 (Case no. 01613/02), of the Lisbon Supreme Administrative Court, which equates the assumptions of non-contractual civil liability of the state and other public bodies for unlawful acts carried out by their bodies or agents with those of liability under civil law, which are: fact, unlawfulness, imputation of the fact to the injured party, loss or damage, and a causal link between the latter and the fact. Thus, Article 563 of the Portuguese Civil Code "enshrines the theory of adequate causality, in its negative formulation, according to which the causal link between the condition abstractly adequate to the production of the damage and the damage is only removed if it is proven that that condition did not interfere with the damage, that it would have occurred regardless of that condition, that is, that it only occurred due to an extraordinary circumstance for which the abstract condition was indifferent", in the above-mentioned judgment, adding that "the case law of the STA is inclined to the view that the liability of the Administration for material and moral damages resulting from the merely culpable acts of its agents presupposes an action or omission attributable to the exercise of the public function, fault being measured according to the criterion set out in the aforementioned Art. 487 of the Civil Code, taking into account the abstract model of behavior of the so-called average official invested with the functions in the exercise of which the harmful act was carried out (STA ruling of 03/12/96, Rec. no. 39020 of the 1st Subsection of the 1st Chamber)".

EXCLUSION OF CIVIL LIABILITY OF COMPANY DIRECTORS

It should be noted that the exclusion of civil liability for directors of commercial companies is a subject that has gained prominence in business law, particularly with regard to liability regimes and the guarantees that can be established in company statutes and contracts

Particularly in the Cape Verdean system, there is a certain concern to protect the directors of commercial companies, when they act within the scope of legality, the limits imposed by the company's competencies and statutes. Considering that the focus of our article is the civil liability of directors of commercial companies, particularly public limited companies, it should be noted that such liability is limited, and they are not obliged to respond, with their own assets, to the debts or obligations of the company, unless it is proven that they acted with the deliberate intention of harming the company and that this proof is made in the context of intent or fault.

Often, there are protective clauses of a statutory nature, and the articles of association of commercial companies themselves can incorporate clauses limiting the liability of directors in relation to acts carried out in the exercise of their duties. As a result, in circumstances where it is not possible to impute aggravated intent, bad faith or serious fault to directors, when such clauses exist, they cannot be held civilly liable for losses caused to the company.

As a rule, in many legal systems there is the principle that directors of commercial companies are not held liable when it is proven that they have acted in good faith and in strict compliance with their responsibilities, in order to protect the interests of the company, which also includes situations of unfounded civil proceedings or those brought for malicious purposes. When directors act in good faith and seek to achieve the company's social purpose, within the reasonable limits of prudence and good management practices, civil liability is excluded, considering, as we have already said, that their liability is limited. Furthermore, it should be noted that many decisions made by the directors of commercial companies are backed up by decisions made by the company's internal bodies, such as the Board of Directors and the General Meeting of Shareholders. When decisions result from the measures set out in these resolutions, it can be argued that the civil liability of directors arising from the losses or damages resulting therefrom should be waived.

It points out that companies' articles of association may allow certain practices or decisions that could otherwise result in directors being held liable. For example, the articles of association may allow risky operations or specific investments which, if justified and authorized, protect directors from civil liability. There may also be situations in which the specific legislation itself creates a layer of protection against certain forms of civil liability that could be imputed to directors, provided that they comply with the specific legal requirements and inform shareholders of the proceedings in good time, following the duty to inform shareholders of management proceedings.

Directors will be able to increase their instruments of defense if they take certain decisions and these are *subsequently* approved, either by the General Meeting of Shareholders or by another internal company body. The corroboration of the decision when it is approved may mitigate the director's own liability, showing that his decision follows the company's general guidelines.

Thus, the civil liability of company directors can be excluded by certain laws or contracts, which can impose such limitations, based on grounds such as force majeure, unforeseen changes or changes in circumstances that modify the functional metrics of the market or unforeseeable situations beyond the control of the directors themselves.

We cannot fail to note that, despite these causes of exclusion or limitation of liability, directors still have a fiduciary duty to act with diligence, care and loyalty when carrying out their duties. Conduct that proves to be fraudulent, grossly negligent actions or cases of malfeasance in corporate administration are subject to civil liability and it will rarely be possible to argue for the exclusion of civil liability in such circumstances.

CONCLUSIVE NOTES

In Cape Verde, the directors of commercial companies, particularly those of public limited companies, enjoy a great deal of freedom in making decisions, as these can only be reviewed in court in proven cases of illegal, abusive or flawed actions. This is because these directors are vested with a strong power of representation, which also allows them to act on a broad scale in defense of the company's interests, involving the calculation of risks, weighted decisions and a sharp entrepreneurial vision.

Being responsible for their actions and liable to account to the shareholders, the directors of commercial companies could not have a very restricted field of action, since they could not be held accountable in terms of 'performance' if, perhaps, they did not have autonomy in terms of competencies and breadth of attributions. As we know, conflicts of interest are prone to deviating from the core objectives of company management, which is why, even though the law provides for broad freedom of action, it seeks to introduce some mechanisms to mitigate alleged opportunism. For this reason, it establishes the duties and principles to be observed by company directors.

It should be noted here that there is a presumption of guilt on the part of the director in situations where they fail to fulfill their responsibilities and duties, and also in cases where they act outside their areas of competence. The presumption of guilt also covers violations of the law and the internal regulations (bylaws) of the commercial company itself.

On the other hand, administrators are excluded from civil liability in situations where intent or guilt cannot be proven, when there are harmful effects.

Therefore, it should be noted that, from the discussion made so far, it is possible to see that civil liability alerts directors to the care they should take when managing companies, and therefore constitutes an incentive for responsible management and good practices in the administration of commercial companies, since, knowing the responsibilities provided for in the law, directors provide practices that are more in line with the interests of companies and the good practices incorporated into administration. Both the doctrine and the rules show that directors' liability is an important element in the organization and operation of commercial companies because it protects legally plausible interests, not only of the companies and their shareholders, but also of the actors operating in the environment outside the company, such as *stakeholders*, creditors and the community in general, promoting a more balanced and responsible management, taking into account the impact of business decisions and the financial returns on the investments made

Through our research, we have seen that directors must be accountable to shareholders and third parties, and Cape Verde's Commercial Companies Code incorporates a system for rendering accounts and determining responsibilities in these terms. In this way, we stress that when they have to be accountable to shareholders, the competent authorities and regulatory bodies, directors feel more compelled to adopt more transparent governance practices, not only to avoid penalties, but also to strengthen investor and market confidence and promote a culture of corporate responsibility that cooperates with improving management efficiency. The civil liability regime for company directors can therefore help to reduce conflicts between companies, shareholders and company directors, leading to a management environment that is more focused on long-term gains and business sustainability

We therefore conclude that, in the face of a well-established civil liability regime, there is a greater propensity for directors to adopt innovative practices that are adjusted to the challenges of each commercial company, providing effective management, focused on making a profit, promoting the company's sustainability and adapting and incorporating resilient strategies in the face of changes that may occur, both in the economic environment and in the regulatory environment

REFERENCES

Abreu, Jorge Manuel Coutinho de (2010). *Responsabilidade Civil dos Administradores de Sociedades*, 2ª Ed. Coimbra: Almedina.

Ac. Supremo Tribunal Administrativo de Lisboa, 30/03/2004, Processo nº 01613/02, Endereço: https://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/cefa76f45e3db61c80256e7600517be3?OpenDocument [consultado a 20.12.2024].

Ac. Tribunal de Relação de Coimbra, 09/01/2017, N.º do Processo 473/13.1TBOHP.C1, Endereço: https://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/93e0537cf55ab157802580b8003eb129?OpenDocument [consultado a 23.12.2024].

Assembleia Nacional de Cabo Verde. (05 de Setembro de 1980). Constituição da República de Cabo Verde. Cidade da Praia, Ilha de Santiago, Cabo Verde: Boletim Oficial - Suplemento ao Boletim Oficial n.º 41, de 13 de Outubro de 1980.

Assembleia Nacional de Cabo Verde. (2019). Constituição da República de Cabo Verde. Cidade da Praia, Ilha de Santiago, Cabo Verde: Edição da Presidência da República.

Cordeiro, António Menezes (2014). *Tratado de Direito Civil, VIII – Direito das Obrigações: Gestão de negócios. Enriquecimento sem causa. Responsabilidade civil*. Coimbra: Almedina.

Cordeiro, António Menezes (2007). *Manual de Direito das Sociedades – I Das Sociedades em Geral*, 2ª Ed. Coimbra: Almedina.

Costa, Mário Júlio de Almeida (1979). *Direito das Obrigações*, 3ª Ed. Coimbra: Almedina.

Fachini, Tiago (2024). "Direitos e Garantias Fundamentais: Conceito e Características https://www.projuris.com.br/blog/o-que-sao-direitos-fundamentais [publicado 14.12.2024 e consultado a 11.12.2024].

Ferreira, Rui Cardona (2016). "A Responsabilidade Civil dos Administradores: Uma Visão Panorâmica". Jornal de Negócios: https://www.jornaldenegocios.pt/opiniao/detalhe/a_responsabilidade_civil_dos_administradores_uma_visao_panoramica [publicado 08.06.2016 e consultado a 18.12.2024].

Frada, Manuel A. Carneiro (2006). *Direito Civil: Responsabilidade Civil – O método do caso*. Coimbra: Almedina.

Frada, Manuel Carneiro (2007). "A Business Judgement Rule no Quadro dos Deveres Gerais dos Administradores", pp. 241 *in Jornadas Sociedades Abertas, Valores Mobiliários e Intermediação Financeira*, Edições Almedina SA.

Governo de Cabo Verde. (23 de julho de 2019a). Decreto-Legislativo nº 2/2019. Código das Sociedades Comerciais. Cidade da Praia, Ilha de Santiago, Cabo Verde: Imprensa Nacional.

Governo de Cabo Verde. (julho de 23 de 2019b). Decreto Legislativo nº 1/2019. Código Comercial. Cidade da Praia, Ilha de Santiago, Cabo Verde: Imprensa Nacional.

Governo da República de Cabo Verde (2023). *Código Civil*. Edição do Ministério da Justiça / LEGISPalop+TL: Cidade da Praia / CPLP.

Jalón, Maria Bueyo Diez; Lugo, Ana Collazo e Balda, Emilio Palomo (2000). *Responsabilidad de los Administradores, Levantamiento de Velo*. Madrid: Ediciones Francis Lefebvre.

Júnior, M. C. (2016). 'Teoria Geral dos Direitos Fundamentais'. Revista de artigos do 1º Simpósio sobre Constitucionalismo, Democracia e Estado de Direito. 1, pp. 1599-1619. São Paulo: Univem - Centro Universitário Eurípides de Marília. Obtido em 18 de maio de 2024, de https://revista.univem.edu.br/1simposioconst

Leitão, Luís Manuel Teles de Menezes (2022). *Garantia das Obrigações*. Coimbra: Almedina.

Leitão, Luís Manuel Teles de Menezes (2020). *Direito das Obrigações, Contractos em Especial*, Vol. III., 13ª Ed. Coimbra: Almedina.

Novais, Amândio (2016). "A Responsabilidade Civil dos Administradores na Execução de Deliberações dos Sócios", *Revista de Ciências Empresariais e Jurídicas*, Nº 27, (2016), pp. 242.

Nunes, Pedro Caetano Nunes (2001). *Responsabilidade Civil dos Administradores Perante os Accionistas*. Coimbra: Almedina.

Rangel, Rui Manuel de Freitas (2004). *A Reparação Judicial dos Danos na Responsabilidade Civil – Um Olhar sobre a Jurisprudência*, 2ª Ed. Coimbra: Almedina.

Ribeiro, Maria de Fátima (2012). "Dever de Não Apropriação de Negócios dos Administradores Societários". *In Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster*. Coimbra: Almedina.

Ricardo, David (1817). *On The Principles of Political Economy and Taxation*. London: John Murray.

Serafim, Sónia das Neves (2011). "Os Deveres Fundamentais dos Administradores"- *In Temas de Direitos das Sociedades*. Coimbra: Coimbra Editora.

Smith, Adam (1776/1999). *La Riqueza de las Naciones*. Madrid: Alianza Editorial.

Telles, Inocêncio Galvão (1979). *Direito das Obrigações*, 2ª Ed. Coimbra: Coimbra Editora.

Varela, João de Matos Antunes e De Lima, Pires (2010). *Código Civil Anotado*, 4º Ed. Coimbra: Coimbra Editora.