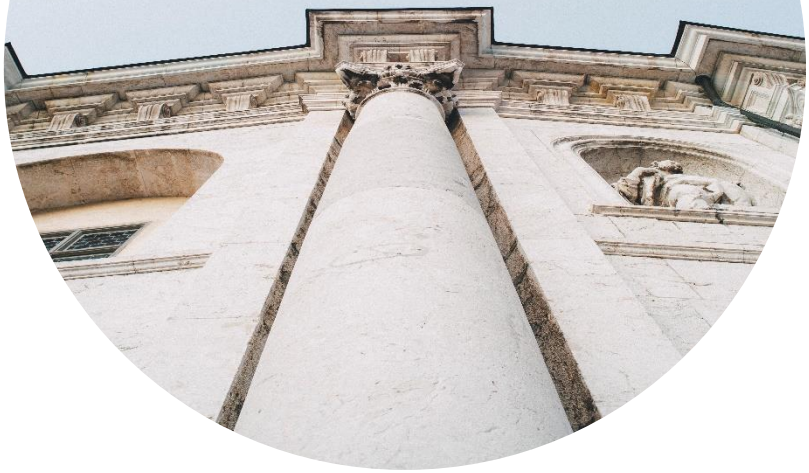
Legal insight

Credits Arising From Employment Contracts: what changes in the joint and several liability of companies?

info@abreuadvogados.com
abreuadvogados.com



In the context of a process of abstract and successive inspection of constitutionality, triggered following the Judgment no. 227/2015, of the 1st Section, and the Summary Decisions no. 363/2015 and no. 434/2019, of the 1st Section, the Constitutional Court declared the unconstitutionality, with mandatory general force, of the combined interpretation of the rules contained in article 334 of the Labour Code and article 481, no. 2, introductory wording, of the Commercial Companies Code, in the part that prevents the joint liability of a company with its head office outside the national territory, in a relation of reciprocal participations, domain or group with a Portuguese company, for credits arising from the employment relationship established with the latter, or from its rupture. he Constitutional Court summarizes the question as a problem of comparison, namely since two employees with an employment contract subject to Portuguese law, and who have as employers companies with head offices in Portugal, will have different patrimonial guarantees, depending on whether the head office of the associated company is, or is not, in Portugal. Furthermore, the Constitutional Court considers that the question of comparison also arises between economic groups, since foreign companies that wish to enter into association with Portuguese companies may do so, under the

same terms as companies with their registered office in Portugal, , without their assets being liable for salary claims arising from an employment contract entered into on national territory under the same terms as the latter.

In point 16. of the Judgement under analysis, three justifications are mentioned that the Constitutional Court considered as potential reasons, in the sense of opposition to the discretion, for the spatial self-limitation of the rule of 334 of the Labour Code.

Those are: 1) the protection of the personal status of the company with head office abroad, 2) reasons related to the regulation of international private situations, avoiding the mobilization of the adaptation and mobilization institutes, and 3) the attraction of foreign investment. All of these reasons were considered insufficiently persuasive to justify the different guarantees granted to labour credits held by companies' employees.

In particular, the Constitutional Court considered that:
1) The requirement that both companies have their head offices in Portugal only determines that this regime, with which Portuguese law specially guarantees the satisfaction of labour credits, cannot be applied outside this limit, not ruling out the application of Portuguese law to the multi-located inter-company relationship. This is so because a spatial self-limitation rule does not exclude the application of the substantive rule to the specific case, as a conflict of laws rule would do, but only excludes its own application. Therefore, in the understanding of the Constitutional Court, the argument that refers to the protection of the personal status of the company does not hold. Moreover, it adds that "*in terms of the legal security of labour credits' guarantees, any expectation that the dominant foreign company might have in having its liability fully governed by the personal law of the respective head office not only is not an expectation in itself protectable but would always be an expectation less worthy of protection than the expectation of an employee employed by a Portuguese company associated with that company – association that may even have taken place after the employment relationship was established – to benefit – or continue to benefit in the event of the relocation of the dominant company's head office – from the special guarantees of salary protection provided by the law of the forum*."

2) This understanding is not valid either, since the Constitutional Court considers that, since private international law has the tools to solve the problem, there is no difficulty of its application, which is even facilitated by the instruments of European Union law.

3) Finally, even framing the issue of raising foreign investment as a possible purpose of the policies to increase well-being and economic growth, under the terms of paragraph a) of article 81 of the Constitution of the Portuguese Republic, and as such making the issue worthy of constitutional protection, it "*does not have sufficient weight to justify that employees in the same position and with the same social dignity be given different salary guarantees. This conclusion is all the more evident since, in the implementation and conformation of these guarantees, the legislator does not move in «constitutionally neutral ground, but rather in a field informed by the «constitutional relevance of retribution» and by the «concern of the Constitution to protect the autonomy of the less autonomous in the employment relationship»*", further protected by article 59, no. 3 of the Constitution of the Portuguese Republic.

As such, and because it understands that the rule gives rise to this sort of imbalance, the Constitutional Court considers that the rule violates the principle of equality, in the sense of the prohibition against arbitrariness, enshrined in article 13 of the Constitution.

By rejecting the conjugated interpretation of the norms contained in article 334 of the Labour Code and article 481, no. 2, introductory wording, of the Commercial Companies Code, in the part that prevents the joint liability of the company with head office outside national territory, **the employee can now demand from a foreign company, in or outside Europe, in a relation of reciprocal participations , domain or group relationship with a Portuguese company, liability for credits arising from the subordinated labour relationship established with the latter, or from its rupture, regardless of**

the provisions of the law of the personal statute of the company with head office abroad.

The Judgement had five dissenting votes, whose positions are summarized around two arguments, as summarized in the joint dissenting vote of Maria José Rangel de Mesquita, Maria de Fátima Mata-Mouros and José António Teles Pereira: "*The path followed in the previous decisions, from which the two votes attached to the Judgement no. 227/2015 diverged, ended up contaminating the interpretative path of the present Judgment, giving rise to a situation that is – as it has always been – innocuous, in relation to Member States of the European Union – where self-limitation does not apply – but which will have considerable inconveniences (ruling out a legitimate and rationally justified option of the national legislator) in relation to jurisdictions outside the European Union*."

In fact, under the terms of the dissenting votes, situation regarding which the Constitutional Court expressly decided not pronounce itself in paragraph 7, this self-limitation was no longer applicable in the European Union, where, by application of Article 8 of Regulation (EC) no. 593/2008, (Rome I), which governs the determination of the law applicable to the regulation of individual employment contracts and, thereby, the upstream determination of the law applicable to the regulation of the individual employment contract – that is, whatever the Member State of the head office of the employing company and its associated companies may be – the determination of the law applicable to the individual employment contracts implies the determination of the specific legal regime applicable with regard to liability for credits arising from employment contracts, which has the effect of excluding companies head office in another Member State, from the spatial self-limitation rule (provided for in article 481, no. 1, introductory wording, of the Commercial Companies Code) of joint and several liability of article 334 of the Labour Code.

A different situation is the application of this national regime beyond European borders, with no real executive scope; it is briefly argued on this point that "*it is in this sense that the spatial self-limitation established by the national legislator – concerning the space outside the European Union – has effective meaning, realistically recognizing the constraints of the "environment" in which, in the absence of such option, the claim would have to project itself, which is sufficient reason for the Court to have accepted it – in that specific space, however different from the one regarding which Judgment no. 277/2015 ruled*."

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Carmo Sousa Machado - Partner
carmo.s.machado@abreuadvogados.com

Patrícia Perestrelo - Professional Partner
patricia.perestrelo@abreuadvogados.com