

Considerations on the Enforcement of the Doctrine of Piercing the Corporate Veil in Romania

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Abstract

The subject of the analysis circumscribes to the possibility of applying the principles of the doctrine *piercing the corporate veil* in the Romanian legal system, which has not yet met a unified legislative approach regarding the extension of shareholders' liability. Starting from the legal personality the manner it is understood by the Anglo-American law, as the legal liability of shareholders in certain company forms provided with legal personality, it is argued that the latter and the liability are diluted within the actual perspective of the doctrine, which in fact prioritizes the protection of corporate creditors. Such approach in the Romanian law still acknowledges a limited applicability, generated by an insufficient normative framework, yet the theory of flagrant abuse could explain the regulation of extending the shareholder's limited liability, to the extent to which this abuses of these limitations, while preserving the corporate personality.

Keywords: Piercing The Corporate Veil, Corporate Personality, Limited Liability, Creditors' Protection, Abuse

JEL: K12, K20

Introduction

The relevance of the analysis of the various forms of development of the industrial activity within international legislations resides in the necessity to acknowledge the concrete expression of the liability to the third parties, derived from the particularity of the regulation

in matter in different Member States, given that the internationalization of markets have been generating different forms of accomplishment of investments, which may cause notional confusions in terms of understanding the relationship existing between legal personality and liability.

In what regards the companies without legal personality, these are subject to national law, yet it is imposed the clarification of common regulatory aspects, so that it can be approached a mutual recognition of the legal frameworks. At the same time, the liability of the legal person and its authorities to the third parties is subject, in compliance with the New Romanian Civil Code, to the law applicable to its organic statute (art. 2.581 letter f).

The extent of the legal person's liability or of its authorities to the third parties, with reference to the law of its organic statute, establishes that the legal person is liable to the third parties with its own patrimony or if the third parties beneficiate from a right of general pledge also over the patrimony of the shareholders/the authorities of the legal person, so that whether and in what circumstance it can be brought into discussion the possibility of applying the doctrine *piercing the corporate veil*, particular to the American Law (Oprea 2011), according to which, as a general rule, the liability to the third parties is limited in the case of companies with legal personality (except for the unlimited company) and unlimited in the case of companies without legal personality (simple partnership and joint venture).

From this comparative perspective, it can be argued that the legal personality and the limited liability are diluted within the actual doctrinary conception, which prioritizes the protection of corporate creditors. The doctrinary positions were assimilated by the jurisprudence, but the normative reception of the extension of the limited liability to the creditors is yet in an incipient phase.

1. The legal personality and the liability to the third parties in the Anglo-American law

The limited liability represents, in doctrine, a significant characteristic which distinguishes between the companies with legal personality and partnerships. The limited liability offers protection to the goods pertaining to the shareholders against the claims of the corporate creditors, while the legal personality confers protection to the corporate goods against personal creditors' claims of the shareholders.

In the American doctrine (Hansmann et al. 2005), it was further argued that, considering that these may have the significance of an asset partitioning: "*Entity shielding and limited liability are forms of asset partitioning, in that they allocate claims to the assets of a firm and claims to the personal assets of the firm's owners to different groups of creditors*".

In the British Law, there are three forms of partnership, governed by three distinct normative instruments, as follows: the *business partnership* or the *ordinary partnership* (the traditional form of partnership, regulated by the Partnership Act 1890), the *limited partnership* (regulated by the Limited Partnership Act 1907) and the *limited liability partnership* (regulated by the Limited Liability Partnership Act 2000), the distinctions between these being very certain, as shown in Table 1 below.

Having as model the British Law, the legislation in Greece, by means of The Partnership Law, Chapter 116, elaborated in 1928 (and adjusted in 1977), acknowledges two forms of partnership, both being without legal personality: the *general partnership*, in which the partners are interdependently liable for the partnership's obligations, and the *limited partnership*, in which the general partner is liable for all the obligations, personally and unlimitedly, while the other partners are limitedly liable for the submission.

Table 1. Partnership forms and characteristics, UK

Name	Registration	Representation	Liability
Partnership (PA) PA 1890	No/no legal personality	All	Unlimited
Limited liability partnership (LLP) LLPA 2000	Yes/legal entity	All	Limited, even if the shareholders are involved in the management of the company, this particularity representing the one making the distinction between the LLP and the LP (Wild and Weinstein 2009)
Limited partnership (LP) LPA 1907	Yes/legal entity by option of the shareholders (Andenas and Wooldridge 2009)	General	Mixed/general partners are unlimitedly liable for the debts and obligations of the partnership, while having the power of administration and representation; finally, limited partners are limitedly liable for the established contribution stipulated in the contract of association

The differences of legal system between these forms of development of the industrial activity must not be neglected, the partnership's legal differing from one state to another. For instance, under the Scottish law, the partnership is a legal person, yet the partners are unlimitedly liable to those signing agreements while having a good-will obligation, such under the British law. Among these forms, the closes to the legal system of the company is the LLP.

It is acknowledged that in the USA, although the denominations are similar, the legal system of the partnership is different. Thus, under the American law, the partnership is considered "*an entity distinct from its partners*". At the same time, under the American law, by means of Section 201 of the Revised Uniform Limited Liability Company Act (RULLCA), it was provided that a new form of development of the industrial activity is the limited liability company (LLC), which, such as the corporations, represent a "*legal entity distinct from its members*", this form accomplishing a relationship between partnership and corporation (Cahn and Donald 2010).

Consequently, the standardization of these form in the Anglo-American law emphasizes the fact that the legal personality and the limited liability are not indissolubly connected, the manner this topic is traditionally approached in the Romanian law, where exists only one form of company with legal entity and unlimited liability of the shareholders, the unlimited company.

Additionally, the Romanian law acknowledges the principle of limited liability to the third parties as a rule in the case of companies with legal personality, which, in our opinion, has as effect the division of assets, already shown by (Hansmann et al. 2005) and which, in practice, affects on many occasions the debtors' interest.

As a matter of fact, under the actual Anglo-American doctrine, the legal personality does no longer confer the classically acknowledged protection to the shareholders' assets, personal liability being possible by applying more and more, in jurisprudence, the doctrine of *piercing the corporate veil* and which has as consequence the extension of the liability beyond the legal personality's shield (Cabrelli 2010).

2. Legal personality and its effects with reference to the concept of liability under the Romanian law

Under the Romanian law, the limited liability is particular to the joint stock company and the limited liability company, regulated by the Law no. 31/1990, republished, these forms being preponderant in Romania. Additionally, are limitedly liable to submission the commissioners within partnerships limited by shares, but these forms, however, have never represented, in Romania, an option for an extended development of the industrial activity.

Companies with legal personality and limited liability, under the Romanian law, represent a good form of protection of the partners/shareholders to the claims of personal creditors and, concomitantly, a means of protection of partners/shareholders' assets to the claims of corporate creditors.

De lege lata, the Romanian legislation, until now, has known forms of extension of liability only in the circumstance under which the legal personality ceases, as a consequence of the dissolution, either by means of the procedure of insolvency, or in the cases regulated by the Companies' Law no. 31/1990, republished.

Thus, it is by tradition acknowledged the possibility of attracting the personal liability of the partners or managers under the procedure of insolvency regulated by the former Law no. 85/2006 on insolvency, according to art. 138 para. 1 of the law (for the present, art. 174 para. 1 of the Insolvency Code - Law no. 85/2014), which statutes that in the case when the report issued by the official receiver identifies persons to whom it would be imputed the occurrence of the debtor's insolvency state, the syndic judge could dispose that a part of the debtor's (legal person) liability, arrived to insolvency, to be born by the members of the management and/or supervision authorities within the company, as well as by any other individual who caused the creditor's state of insolvency.

The syndic judge decides the attraction of the liability to the extent to which it is proven the existence of one of the facts restrictedly enlisted in the legal text, which he circumstantiates within the context of flagrant liability, which presumes the existence of the prejudice (caused to the creditor), of the illicit fact, of the guilt and the relationship of causality between fact and prejudice.

The Romanian law contains a legal text which suggests the enforcement of the doctrine *piercing the corporate veil*, respectively the art. 237 index 1 para. 3 and 4 of the Companies' Law no. 31/1990, republished, transposing in essence the doctrine's principles; however, the legal provision has as premise the company's dissolution.

Thus, the shareholder who abuses of the limited character of his/her liability and of the distinct legal personality of the company, by disposing of the company's assets as if they were his own or who decreases the asset of the company in his/her or a third party's benefit, in the case of dissolution, it will unlimitedly be liable for the unpaid obligations of the company.

From this point of view, the limited liability of the shareholder extends, yet the creditors must, for the beginning, find the motives and the procedural framework within which they could exercise the rights, the dissolution having limitative causes provided by the law (art. 227, 228 and 229 of the Companies' Law no. 31/1990, republished, regulating the general cases of dissolution of companies as well as special cases of dissolution of companies where the shareholders' liability is limited).

It is worth outlining, in our opinion, that the extension of liability in the Romanian law, even if it has as premise the loss of the legal personality, is founded on the concept of abuse, expressed under the form of liability in tort.

The same conceptualization of the abuse is found in the fiscal law, the Tax Procedure Code, as well as the orders adopted by the Ministry of Public Finance (the most recent being the Order no. 127/2014 for the approval of instructions for the application of the joint liability principle, regulated by Art. 27 and 28 of the) defining the notion of interdependent liability in the case of creditors declared insolvent, showing that will jointly and severally be liable to the debtor declared insolvent all natural or legal persons who, in the last three years before the declaration of insolvency, by bad-faith, acquire by any means assets from the creditors thus provoking the insolvency or from the managers, partners, shareholders or any other persons who caused the insolvency of the creditor legal person by alienating or hiding with bad-faith, by any means, of the movable and immovable goods under his/her property.

What differentiates the insolvency regulated by the former Law no. 85/2006 (for the present Law no. 85/2014) of the insolvency regulated by the Tax Procedure Code is the fact that, if within the context of the insolvency procedure the court is the one deciding the attraction of liability after the judgment of the bankruptcy procedure, which is equivalent to the loss of legal personality, in the case of insolvency regulated in fiscal matter, the means of engagement of liability is accomplished by fiscal authorities by forced execution or the main creditor, during the development of their attributions.

The effect of the application of these measures is, in our opinion, the reflection of the enforcement of the doctrine *piercing the corporate veil* within fiscal relationships, the legal personality of the debtor declared insolvent being kept.

It is true that the judicial practice in Romania abstained from providing efficacy to this doctrine with reference to the private law, because of the absence of clear regulation of the mechanisms by means of which it can be attracted the personal liability of the shareholder – in such sense, the decisions no. 245/2009 of the High Court of Cassation and Justice of Romania – Commercial Section, where it is shown that the « *provisions of the art. 42 of Law 105/1992 acknowledged a restrictive interpretation in doctrine and jurisprudence, while the acquittal by the Romanian stat of the proper obligation of the defendant did not have a correspondent legal reason under the Romanian law, by applying the principles of alter ego and piercing corporate veil, specific to the American law* » – www.sci.ro.

It is not less true that the judicial practice of the European Convention on Human Rights, although started as well from the hypothesis of the company's dissolution, has made a step forward, conferring self liability to the Romanian State, as shareholder of certain companies to a creditor (Victor Moldoveanu against the Romanian State, ECHR decision on 29.07.2008 and Aurelia Popa against the Romanian State, ECHR decision on 26.01.2010).

3. The extension of the shareholders' liability in the Romanian law – *de lege lata* and *de lege ferenda*

In our opinion, under the Romanian law, as well, the approach of the limited liability may be circumscribed to the doctrine of *piercing the corporate veil*, to the extent to which the legal personality is diluted by means of abuse, even in the cases in which the legal personality is not affected.

A possible, yet new, application of the doctrine *piercing the corporate veil* under the Romanian law is represented by the case regulated by the Law no. 31/1990, republished, as a consequence of the amendment brought by GEO no. 54/2010 on certain measures for preventing tax evasion, by means of which had been amended the regulations regarding the cession of shares to third parties.

Thus, according to art. 202 para. 2 index 3, corporate creditors and any other prejudiced persons by means of the shareholders' decision on the transfer of shares may formulate an opposition form by means of which the court is solicited to oblige, if applicable, the company of the shareholders to the reparation of the caused prejudice, as well as, if applicable, the attraction of the civil liability of the shareholder who intends to transfer his/her shares.

Moreover, by means of the opposition to the cession of shares, the court has the possibility to dispose the extension of the liability, regularly limited, of the shareholder who transfers his/her shares, thus creating a certain prejudice to a creditor. The effects of the admission of the opposition do not bear down on the legal personality, do not affect the shareholders' decision on the cession, but strictly envisage the reparation of the prejudice caused to the creditor. The purpose of the procedure regards, in final analysis, the transferor shareholder, to the extent to which the prejudice was created by him/her, by proving the existence of the elements of the action of civil liability.

The legislative solution is yet critical, first of all because are not established, concretely, the effects of the admission of such opposition over the shareholders' decision, irrespective of the fact that the court admits the extension of the transferor shareholder's liability. Furthermore, it is noticed the fact that this procedural means is exclusively acknowledged in the case of the limited liability company.

Thus, even in dissipated legislative forms, by taking into careful consideration the concrete circumstances of abuse of process, even in the absence of a legal and unified regulation in the Romanian law of the specific principles of the doctrine of *piercing the corporate veil*, it can be argued, in certain cases, over the extension of the shareholder's liability, to the extent to which he/she abuses of these limits.

That is also because the European doctrine has explained that the European directives in the matter of trading companies do not provide the obligation of the Member State to essentially regulate the definition of joint stock companies and the hybrid form of the limited liability company, the limited liability to the company's assets. It has also been shown that the Member States have the possibility to maintain, legally or jurisprudentially, certain provisions which would allow, in determined cases, the direct liability of the shareholders for the company's debts, according to the principle of lifting the corporate veil. (Werlauff 2003).

Yet, in our opinion, although under the recent doctrine it has been attempted to approach the possibility of receiving, at least jurisprudentially, the doctrine of *piercing the corporate veil* (Horvathova and Stănescu 2012, Piperea 2012), we appreciate that the extension of the shareholders' liability under the Romanian law needs a self-standing regulation, without this being particularly related to the disappearance of the legal personality, the final purpose being that of ensuring the creditors' protection, be them private or public institutions.

De lege ferenda, by undertaking the classic spirit of the American jurisprudence according to which, "where the corporate form is used by individuals for the purpose of evading the law, or for perpetration of fraud, the court will not permit the legal entity to be interposed so as to defeat justice" (Supreme Court of Minnesota, *Erickson v. Revere Elevator Co.*, 110 Minn 443, 444, 126 N.W. 130 (1910), in Canfield 1917), by applying the theory of abuse of process, in compliance with the art. 15 of the Romanian New Civil Code, our proposals in company matter refer to the legislative regulation of the right (the active procedural quality) of the debtors (public or private) of claiming, in court, the

acknowledgement of the shareholders' abuse in the development of the company's life, to the prejudice of the debtors.

In this manner, would be considered legitimate the procedures by means of which the court decides over the extension of the shareholders' limited liability, while keeping the company's legal personality, under the circumstance of acknowledging the abusive exercise of the rights deriving from the quality of shareholder. Thus, it would be permitted, on one side, the satisfaction of the debtors' rights, alternatively, either from the company's assets constituted by continual activity, with the possibility to exercise the action in regress against the shareholders who abused of the legal personality, or the proper patrimony of the guilty shareholders, while eliminating the barrier generated by the uneasy procedural framework, presently, in which is brought into discussion the subsistence of the legal personality.

Conclusions

Making the connection between legal personality and limited liability under the Romanian and the Anglo-American laws, the conceptual delimitations regarding this matter dilute. The legal personality, under the Anglo-American law, does no longer confer the shareholders the protection acknowledged under the Romanian law, so that the option for these forms of development of the industrial activity provided with legal personality does not take into consideration, with priority, this characteristic of the liability's delimitation.

On the contrary, under the Romanian law, the investors take into account of the shield created by the legal personality, which, generally, also confer the advantage of the liability's limitation. Although the doctrine submitted to the discussion the possibility of receiving, by the Romanian jurisprudence, the doctrine *piercing the corporate veil*, founded on the theory of the abuse of right, precisely the way this is regulated presently, this does not acknowledge the possibility of extending the shareholders' liability, obviously in the proven cases of abuse, motivated by the inexistence of a normative framework.

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