

RESPONSIBILITIES OF FOREIGN QUOTA HOLDERS IN THE LIQUIDATION OF A SOCIEDADE LIMITADA IN BRAZIL.

Ana Beatriz Nunes Barbosa
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We hereby briefly explain the responsibilities of foreign quota holders in the liquidation of a Sociedade Limitada in Brazil.

In general, due to the principle of the continuance of the legal entity, in a company with unlimited duration, the stockholder who wishes to exit the company will sell his stock (having in mind the limits applicable to the due case by the law or contract), when he will be jointly liable with the acquirer of the quotas before the company and third parties, for the obligations he had as a partner at the time of the sale until two years after the sale (Article 1.003 of the Brazilian Civil Code). It must be noted that any sale shall obey the restriction existing in the Articles of Association and/or Quota holders Agreement.

We must note that there was a change in the law applicable to the Sociedades Limitadas in January 2002. The New Civil Code established some new rules regarding legal entities, as well as required due adaptation to these new rules until January 2003. If the due adaptation is not fully completed, and the company is not duly registered, the quota holders may be held responsible. The extent of responsibility will vary in accordance to whatever adaptation is not completed. If all amendments are duly effected, there will be no change in responsibility other than hereunder explained. We will make the comments under the assumption that all amendments were made. In other to verify due accomplishment a further analysis of the company's act would be necessary.

The Sociedade Limitada, named before the Civil Code of 2002 as Sociedade por Quotas de Responsabilidade Limitada, grants to the quota holders limited responsibility as long as there is no illegal act by such quota holders, or else:

- (i) If the company's capital stock is not completely paid in the quota holders will respond until the total value of the capital stock not paid in. Such contribution may be required from any quota holder independently if such party has already paid in his part of the capital stock. The quota holder that pays in more than his percentage in the capital stock may then demand from the other quota holder(s) the due repayment; or
- (ii) If the company's capital stock is completely paid in, the quota holders, if no exceptions apply, do not respond for debts of the company more than the value of the quotas that may be sold in order to pay the due debts.

This general rule does not apply when the quota holders authorize an illegal act. As so, if a quota holder approves a corporate decision that is against the law, he will respond for such acts unlimitedly (Article 1.080 of the Brazilian Civil Code).

Liquidation of the Company

The New Brazilian Code establishes that *Sociedades Limitada* will be subsidiarily governed by rules of the *Sociedade Simples*, except if the Articles of Association establishes the subsidiary ruling of the Business Corporation Law (Art. 6.404/76).

Civil Code

The Civil Code rules that a stockholder may leave a company with unlimited duration by notifying his partner with 60 days in advance. If the company has a limited duration, the stockholder must prove fair cause in court.

The Articles of Association may establish causes for dissolution. The law establishes that there is dissolution when there is consent of all stockholders or majority vote deliberation in a unlimited duration company. There may be a judicial dissolution when the constitution is annulled, when the corporate purpose is concluded or verified its non-enforceability.

Brazilian Business Corporation Law (Law 6.404/76)

The causes for dissolution of the company are similar to the rules of the Civil Code with some specific rules that are irrelevant at this time.

In general, a stockholder may leave the company except if there is the company has a limited duration or a contractual obligation impeding such act.

Regarding the unenforceability of the corporate purpose, Fabio Ulhoa Coelho¹ understands that the lack of market, losses with no possible recuperation, would be a possibility of dissolving the company (Business Corporation Law Art. 206, II, b, Civil Code Art. 1.034, II) or in case of grave conflicts among the stockholders that difficult the furtherance of the corporate purpose.

In the liquidation of a company, Article 1.110 of the Brazilian Civil Code and Article 218 of the Business Corporation Law establish that the stockholder will be responsible until the limit received from the company. There may be a demand for losses against the liquidator, responsible for the liquidation, when proved damages in his activities in such duty.

We will now deal more closely regarding the responsibilities in the different legal areas.

Responsibilities of the Quota holder regarding Commercial and Civil Debts

The general rule applies to the commercial debts. As so, unless there is an illegality, the quota holders responsibility will be limited to the value of the capital stock as above explained. The quota holders will be responsible also for the valuation of assets in case of payment of the subscribed capital with such assets.

Responsibilities for Consumer Debts

¹ COELHO, Fabio Ulhoa, *Curso de Direito Comercial*, Ed. Saraiva, Vol 2

The quota holder is responsible for consumer debts when acting with excess of power, illegally or in violation to the Articles of Association (Article 28 of the Brazilian Consumer Defense Code), that authorizes personal responsibility.

Responsibility for Labor Debts

The Superior Labor Court (TST) is of the understanding the piercing of the corporate veil is a mean to enable the due guaranty for employees rights.

Responsibility for Tax Debts

The quota holder is not responsible in general for tax debts of the Sociedade Limitada before the Brazilian Tax Authorities². The Brazilian Tax Code in Art. 135, III, establishes that the manager may be responsible, however. Nevertheless, an irregular dissolution of the company, having the due taxes not been paid, may lead to personal responsibility for the quota holders.

Responsibilities for Social Security Contributions

The responsibility for social security contributions are the same as for tax debts, as Articles 149 and 145 of the Brazilian Federal Constitution, consider such contributions similar to taxes.

Criminal Responsibility of the Quota holder

There may be responsibility in case of verification of illegal acts.

Environmental Responsibility

Authors interpret Article 4th of Law 9.605/98 as granting the same responsibility as in consumer cases.

Disregard of legal entity doctrine

Initially in the common law countries (England and United States of America), case law and Authors, to avoid the use of legal entities to harm its creditors, developed the disregard doctrine (Disregard of Legal Entity, Piercing the Corporate Veil or Lifting the Corporate Veil), consisting in the disregarding of the legal entity, imposing personal liability on partners who committed fraud against their creditors, with the separate existence from the company and limited liability being ignored by the Courts.

Such theory, that establishes the power of the courts to disregard of the corporate formalities and set aside the status of the legal entity, holding the stockholders unlimitedly responsible, requires the proof of complete domination of the corporate formality used to commit a fraud or wrong that causes injury.

² LOBO, Jorge, *Sociedades Limitadas Vol I*, Ed. Forense, pg. 207

Internationally, case law and Authors exemplify what would be considered as factors that could imply in cause for declaration of the piercing of the veil: disregard of the corporate formalities, thin capitalization³, when capitalization (at the time of incorporation) is very small in relation to the nature of the company's business and to the risks that the business necessary entails, alter ego⁴ (which means "second self"), when the separate personalities of the company and its partners do not exist, with the company being a mere instrumentally of them, small number of shareholders, active involvement by shareholders in management, among others.

We shall note that the legal entity existence is not terminated if the requirements for incorporation were duly observed, and will be maintained by Court⁵. However, if equity holders use the corporate form with malice, the legal separation of the company and its equity investors shall be ignored.

In Brazil, the disregard doctrine was first introduced in the sixties. Now our legislation has some provisions regarding the disregard doctrine.

Brazilian Legal Literature have established cases where the disregard theory is applicable: (i) fraud and abuse of power, where one or even more legal entities are used by its equity holders to harm creditors, employees, government authorities and/or third parties, and/or (ii) lack of economic (very similar to the alter ego theory) and legal autonomy, where the legal entities and equity holders do not have the required separation regarding its assets and will, as the requirements to pierce the corporate veil of a company.⁶

³ COMPARATO, Fábio Konder. O Poder de Controle na Sociedade Anônima. 2^a ed., Revista dos Tribunais, São Paulo, 1977, p. 333 a 335, 340 and 354. KOURY, Suzy Elizabeth Cavalcante. A Desconsideração da Personalidade Jurídica (disregard doctrine) e os Grupos de Empresas. 2^a ed, Forense, Rio de Janeiro, 2002, p. 105.

⁴ EISMEIER and DINDINGER II, Dana L. and F.J. "Rick". The Alter Ego Doctrine in Colorado. The Colorado Law Review. March, 1999, Vol. 28, No. 3. COMPARATO, p. 336 e 337. Suzy p. 103.

⁵ "De tudo o que se vem de expor, decorre que esse efeito jurídico fundamental da personalização – separação de patrimônios – e que pode ser atingido por outras técnicas de direito, como lembramos, deve ser normalmente afastado, quando falte um dos pressupostos formais, estabelecidos em lei; e, também, quando desapareça a especificidade do objeto social de exploração de uma empresa determinada, ou do objetivo social de produção e distribuição de lucro – o primeiro como meio de se atingir o segundo; - ou, ainda, quando ambos se confundem com a atividade ou o interesse individuais de determinado sócio. A sanção jurídica, em tais casos, não deve ser indistintamente, a nulidade (absoluta ou relativa) do ato, negócio, ou da relação, mas a *ineficácia*. **Não deve ser a destruição da "entidade" pessoa jurídica, mas a suspensão dos efeitos da separação patrimonial in casu.**" COMPARATO, Fábio Konder. O Poder de Controle na Sociedade Anônima. 2^a ed., Revista dos Tribunais, São Paulo, 1977, p. 271 e 272. In the same way, COELHO, Fábio Ulhoa. Curso de Direito Comercial – Volume 2. 5^a ed., Saraiva, São Paulo, 2002, p. 42 and KOURY, Suzy Elizabeth Cavalcante. A Desconsideração da Personalidade Jurídica (disregard doctrine) e os Grupos de Empresas. 2^a ed, Forense, Rio de Janeiro, 2002, p. 144.

⁶ COMPARATO, Fábio Konder. O Poder de Controle na Sociedade Anônima. 2^a ed., Revista dos Tribunais, São Paulo, 1977, p. 343 e 344. COELHO, Fábio Ulhoa. Curso de Direito Comercial – Volume 2. 5^a ed., Saraiva, São Paulo, 2002, p. 31 a 34 e 40. KOURY, Suzy Elizabeth Cavalcante. A Desconsideração da Personalidade Jurídica (disregard doctrine) e os Grupos de Empresas. 2^a ed, Forense, Rio de Janeiro, 2002, p. 94, 106, 153 e 154.

Case law confirms such understanding regarding fraud and abuse of power⁷ and lack of economic autonomy, specially in companies used by individuals to buy assets of personal use, and in economic groups where the “control is under a management, labor and economic unity, constituting one unique formal structure, and, as so shall being regarded as a single company”.

In Brazil, one of the main argument for defendants who face a disregard doctrine pleading is to require a specific law suit with the purpose of obtaining the judicial declaration that the partners are personally liable, observing the constitutional due process of law principle.

However, our *Superior Tribunal de Justiça – STJ* does not consider the necessity of a specific suit, understanding that “once the due requirements are verified, the judge may, in the enforcement action, pierce the corporate veil to deem liable the partners involved in the illegality, intending to prevent fraud against the law or third parties”.

Nevertheless, the general understanding in Brazil is that such theory must be applied with caution as in general the limited responsibility is the rule for stockholders. There is a tendency of increasing the responsibility of the stockholders when regarding labor, consumer and tax debts due to the legal dispositions mentioned above.

Regarding labor debts, the risk is increased due to the labor judge trend to grant protection to the employees.

⁷ “DESCONSIDERAÇÃO DA PESSOA JURIDICA. PRESSUPOSTOS. EMBARGOS DE DEVEDOR. E POSSIVEL DESCONSIDERAR A PESSOA JURIDICA USADA PARA FRAUDAR CREDORES.” (RESP 86502 / SP ; Recurso Especial 1996/0004759-6, Quarta Turma do STJ, Relator Min. Ruy Rosado de Aguiar, Julgado em 21/05/1996, Publicado no DJ em 26/08/1996).

“(…) III – Provada a existência de fraude, é inteiramente aplicável a Teoria da Desconsideração da Pessoa Jurídica a fim de resguardar os interesses dos credores prejudicados.” (RESP 211619 / SP; Recurso Especial 1999/0037666-8, Terceira Turma do STJ, Relator Min. Eduardo Ribeiro, Relator p/ Acórdão Min. Waldemar Zveiter, Julgado em 16/02/2001, Publicado no DJ em 23/04/2001).