The principle “piercing the corporate veil” in Italy

1. Piercing the corporate veil in the Italian legal system.

1.1. Introduction

The term “piercing the corporate veil” in English Law describes how directors or shareholders in a corporation can be held accountable for the liabilities and debts of the corporation, which previously they would have been immune from.

It is possible to affirm that this premise also exists in the Italian legal system.

The Italian reform of company law approved in Italy in 2003 has played a key role in “piercing the corporate veil”.

In this paper I shall examine the different methods of piercing the corporate veil within the Italian judicial system.

1.2 The shadow director.

The shadow directors belong to the class of “factual contractual relationships”, under the scrutiny of doctrine and the courts. The terminology “factual contractual relationships” was first used in Germany, which refers to a number of proceedings (Tatbestand) that allowed the inclusion of personal property in voluntary declaration cases.

Although not originally a central consideration the inclusion of personal property in these proceedings had a positive social impact. The doctrine of civil law considers the category of the “factual contractual relationships” as a basis of obligations.

The category of shadow director has been included in criminal law in the Italian judicial system, which now extends the liability of the directors who have run a company illegally.

The Italian High Court has defined the shadow director as the subject which “despite lacking a formal appointment from the company’s meeting, works systematically as a manager of the company, working with third parties”; to identify a shadow director, therefore, “what is important is to ascertain if the activity undertaken was or not exceeding the management’s powers.

The acknowledged attributes of a director of a business effectively extends to him all the rules provided by the law for the company’s directors, as affirmed by the doctrine: “the rules provided for the liability of the directors apply to everybody that, without any formal appointment, exercises the typical functions of the company’s director”.

1 Published in International In-house Counsel Journal Vol. 2, No. 7, Spring 2009, 1064–1069
2 The Italian legislatore with the law of Januart 17 gennaio 2003, n. 6, ha approved the reform of Italian company law (hereinafter, the “Reform”).
3 FUNAIOLI, I rapporti di fatto in materia contrattuale, in Annali dell’Università di Ferrara, 1952, I, p. 103; BETTI, Sui cosiddetti rapporti contrattuali di fatto, in Jus, 1957, p. 353-
4 BETTI, Sui cosiddetti rapporti, cit., p. 353.
5 Cass. 23 aprile 2003, n. 6478.
7 BONELLI, La responsabilità degli amministratori di società per azioni, Milano, 1992, pg. 131
1.3 The hidden shareholder.

In the Italian judicial system the figure of the entrepreneur (imprenditore), is a fundamental part of the economic market, is defined by art. 2082 of Italian civil code, defining an entrepreneur as one who undertakes professionally an economic activity, organized to produce or to exchange goods or services. The main attributes of an entrepreneur is to manage the enterprise, and that the finances are administered in a professional and an organised manner.

It is therefore the entrepreneur who undertakes this activity under his name. In practice it often happens that, for different reasons, the management of the enterprise is conducted by a different person from the official entrepreneur, this can be a ploy to reduce the risk of the enterprise. The official entrepreneur chooses a manager (or an undercapitalized company) to act on his behalf: if the company works well, there is not a problem, but when the enterprise fails and enters in to bankruptcy, the official entrepreneur is not able to satisfy the debts.

By using this method, the risk of the enterprise is transferred to the creditors, the suppliers: as the formal entrepreneur has become insolvent, they can ask for a declaration of insolvency but, after that, they shall not be able to satisfy their debts, as a debtor they do not have any assets.

In this case the theory of the hidden entrepreneur applies -

The above premise was first acknowledged in the 50’s, but since then it has not met the favour of doctrine and courts. The premise tried to protect the creditors from the bankrupt entrepreneur, in cases where the enterprise is conducted through a “dummy company” without capital.

The source of the above extension of liability was found in article 147 of the Insolvency Law: “the judgment ascertaining the winding up of a company with unlimited liable shareholders produces also the insolvency of the unlimited liable shareholders. If after the winding up declaration it is discovered the existence of unlimited liable shareholders, the courts, on request of trustee or automatically, declares their insolvency, after hearing them”.

The justification for the above article was that shareholders are considered “indirect entrepreneurs”, working through a company. Therefore, it is expressly provided the existence of which did not result at the time of the winding up declaration, but it has been discovered only in the course of the insolvency procedimenti; it is so provided the winding up of the hidden shareholders.

The reasons for which a person hides their own interest in a company are the same as hiding the worth of an entrepreneur, often to keep the patrimony of the person out of the enterprise’s risk.

Article 147, co. 2, of Insolvency Law concerns the premise of hidden shareholders of a “show” company: the existence of the company is known to third parties and what is hidden is only known by some of the shareholders.

In practice it has been extended to the premise of a hidden shareholder of a hidden company, that is the premise where a person acts, with third parties, as sole entrepreneur, despite having one or more shareholders, hidden as well to third parties.

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10 BIGIAVI, L’imprenditore cit., 89 ss.
Therefore, it is not only the existence of the shareholders that are hidden, but also the existence of the company.

The person who acts as a sole entrepreneur is, in reality, a hidden shareholder of a hidden company.

1.4. Conclusions

The analysis carried in this work allows us to come to a primary conclusion: that the Italian judicial system recognises and applies the piercing the corporate veil.

This concept, as seen, means several cases where a subject that has not used his name in the relationship with third part, is considered liable for the obligations of a company, giving the company’s creditors new asset to attach to satisfy their debts.

This extension of liability is found, in cases of obligation arisen from legal acts, in the shadow director, the sole shareholder, the hidden shareholder.

We have also seen as, with the introduction of separate patrimonies created by the last company law reform, the legislator considered the possibility of piercing the corporate veil in cases of extra contractual illegal acts imputable to a limited liability company (società di capitali).

Regarding our conclusions, it can be seen that the Italian doctrine has given some favourable indications for the application of the piercing the corporate veil for extra contractual illegal acts.

First of all, the limited liability is not a fixed effect of the limited liability, as affirmed by Italian doctrine.

Some authors underlined that there are “problems that every time and in every judicial are connected to the corporation and its separate patrimony”13. The above problems are the effect of the irresolvable contrast between the need to consider all the interests belonging to the corporate entity and the arising of “cases and situations” where this consideration “can result impossible or not opportune”.

Sympathy goes to the interest of the involuntary creditors, in respect of the unitary concept of a corporate entity, based on the total preservation of the limited liability, which is in contrast to the assumption of too high a risk.

The presumption of the principle of limited liability has a special attraction to the one for which the description of the company in respect of the norms considered the basis of a company’s organization, are the presupposition of the application of the special rules that, in the notion of legal person, “found its synthetic formulation”14.

The necessary condition of the limited liability would be not only the recognition of the separate entity but, also, the special organization of the company.

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12 An important doctrine expressly deines a corrisondence between the concepi of corporate entity and the privilege of the limited liability. GALGANO, Struttura logica e contenuto normativo del concetto di persona giuridica, cit., p. 619.
13 PELLIZZI, op. ult. cit., p. 7
14 GALGANO, Struttura logica e contenuto normativo del concetto di persona giuridica, cit., p. 624
PAVONE LA ROSA, La teoria dell’imprenditore occulto nell’opera di Walter Bigiavi, cit. p. 669, nota 84.
It would be a conditioned benefit under which shareholders enjoy the limited liability only observing the principle and the rules characterizing the organization of the company.\footnote{GALGANO, Struttura logica e contenuto normativo del concetto di persona giuridica, cit., p. 630.}

For this example, the risk of the shareholders would no longer have the function of guarantee against a third party, instead there is a strict organization of control to ensure the correct management of limited liability companies and of one imperative discipline to protect the integrity of the company’s patrimony.\footnote{GALGANO, op. loc. ult. cit.}

In the absence of this “conditions of use”, the general principle of law of the liability would apply, provided by article 2740 of Italian civil code.

In principle limited liability cannot be considered a privilege for the shareholder in court, because the voluntary creditor can rely on the company’s patrimony: this structure is based on the existence of the above mentioned company’s organization, taking into consideration the directors’ liability.\footnote{ASCARELLI, Considerazioni in tema di società e personalità giuridica, cit., p. 202, che la qualifica “strumento di progresso economico”.}

It must be noted that the above rules can not protect the position of the involuntary creditor, as compensation to his specific risk: in fact any of the rules protecting the company’s creditors results, in the same way, justifiable for the involuntary creditors, for whom the balance and the advertising can not be elements of the evaluation of the solvency of a company of which they do not want to become creditors.

The mechanisms of information and control are, for them, completely lacking in affectivity.

Similarly a dominant consideration is the function of the company’s capital, being able to be overcome by the entity of the request of insolvency creditors: it is impossible to forecast the right of involuntary creditors.

Neither the strict discipline on the liabilities of the directors and the auditors can be considered valid.

All the amount of norms is inadequate from the point of view of the involuntary creditor.

Part of the set of guidelines would seem to open to a piercing the corporate veil.

A recent set of guidelines\footnote{RAGUSA MAGGIORE, Premessa semantica ad una teoria sulle società per azioni, cit., p. 975.} affirm that the definition given by Italian code of the corporate entity “cover the liability of who use a specific scheme”.\footnote{RAGUSA MAGGIORE, op. loc. ult. cit.} The rules governing the corporate entity are considered not complete, by being a shareholder, which ultimately are the real owners of the company.\footnote{RAGUSA MAGGIORE, op. loc. ult. cit.}
The above considerations are without any doubt an indication to make a revision of the concept of legal person in respect of the limited liability of the shareholder. In this context inserts the recent reform of Italian company law, with the institute of separate patrimony and the connected provision of the hypothesis of piercing the corporate veil in case of extra contractual liability.

In the view of the above examination, I think that the Italian legal system has now given the involuntary creditors of a limited liability company the device to pierce, when needed to protect their interests, the corporate veil.