Crisi internazionale d'impresa

a cura di Luciano Panzani

Dalla Russia, un contributo sul tema della responsabilità di soci e amministratori nelle situazioni di crisi

From Russia, a contribution on the liability of parent companies and directors in situations of distress

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ABSTRACT

Una breve introduzione all'articolo sulla responsabilità di soci ed amministratori in situazioni di crisi in Russia attraverso un confronto comparatistico tra l'approccio adottato dai tribunali in quell'ordinamento – come di recente confermato dalla Suprema Corte – e quello di altri ordinamenti, in particolare quello italiano, sul dibattuto tema dell'individuazione dei soggetti in posizione di controllo e delle circostanze al verificarsi delle quali debba cadere il velo societario. Un tema che meriterebbe ulte-riori riflessioni anche da parte del legislatore italiano.

PAROLE CHIAVE: Russia – Corte Suprema – soggetto controllante – responsabilità.

A brief presentation of the essay on the subsidiary liability of shareholders and directors by comparing the approach adopted by the Russian Courts – as recently confirmed by the Supreme Courts – with those of other legal systems, the Italian one in particular, to the debated topic of the identification of the circumstances the occurrence of which make it possible to pierce the corporate veil, a topic that would deserve further attention by the Italian legislators, too.

KEYWORDS: *Russia – Supreme Court – controlling person – liability*.

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In the Russian Federation, legislative developments – and the relevant case law – concerning the liability of shareholders and directors of companies in distress appears to be moving along the lines of other legal systems in Europe, but with a more aggressive approach.

If compared with the approach of the Italian legislator, a radical difference can be noted with regard to the treatment of the liability of the directors, who respond in Italy towards creditors in case of *mala gestio* (mismanagement), whereas the Russian legislator seems to ground their liability – under certain conditions – on their qualification as controlling persons.

Interestingly, the Russian system places emphasis on the delayed acknowledgment of the crisis and commencement of an insolvency/restructuring procedure. The same emphasis that characterizes the new Insolvency Code recently adopted by the Italian legislator.

Shareholders who own 50% or more of the corporate capital are also considered controlling persons and as such respond vis-à-vis unsatisfied creditors, under certain conditions.

Here, too, we note a substantial difference with respect to the Italian legal system, where articles 2497 and ff of the Civil Code provide for the liability of the parent company only if evidence is provided (but direction and coordination is presumed if there is control pursuant to the civil code) that it carries out direction and coordination activity over and to the detriment of the company concerned.

In limited liability companies, where, as opposed to stock companies, quotaholders could take the role as directors, liability is acknowledged when it is proved that the quotaholder intentionally decided or authorized the action(s) causing damages to the company concerned, the other quotaholders or the creditors. In this case, the ground for the liability does not seem so different with respect to the provisions of the Russian law.

The case law mentioned in the article reinforces the impression of an aggressive approach, in particular as regards the contents of the 2017 Supreme Court's ruling referred to therein. The Court recognized in that ruling a very extensive discretionary power – which is not limited by the literal meaning of the provisions in force – in determining the circumstances that cause the arising of the subsidiary liability of the controlling persons.

The more aggressive Russian approach, this is the perception, is able to catch those abuses of the limited liability that would remain unpunished under Italian law.

Nevertheless, in that jurisdiction, too, a wide and undetermined exceptions is provided for those actions carried out "*... in the course of ordinary business activity, undertaking reasonable risk management and not aimed at violating*

rights and interests of the creditors ...", which do not cause liability. *Id est*, in accordance with the business judgement rule.

The quantitative data reported in the article are impressive, too. In one year, the number of claims filed for subsidiary liability has drastically increased by 25,6 %, while the number of claims acknowledged by the courts has decreased from 30% to a – still remarkable – 26 %. The amount of damages recognized on the ground of subsidiary liability has doubled in one year up to 79.5 billion rubles (approximately 1,1 billion EUR) at the end of the second quarter of 2019.

In conclusion, it seems to us that in Russia there is a wider possibility to pierce the corporate veil, a possibility that is admitted – with different degrees of aggressiveness – in all European countries and in general in all common law legal systems.

It would be interesting to develop a comparative analysis that takes into consideration the elements whose presence, in distressed situations, is the ground for the liability of shareholders and directors towards unsatisfied creditors.

La responsabilità dei soggetti in posizione di controllo nella legge fallimentare russa

Liability of the controlling persons in Russian Bankruptcy Law

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ABSTRACT

Una recente modifica alla legge fallimentare russa introduce il concetto di responsabilità sussidiaria delle persone in posizione di controllo nei confronti dei creditori di una società in situazione di crisi. L'articolo evidenzia i criteri in base ai quali vengono identificate le persone in posizione di controllo, che possono essere anche amministratori, nonché i presupposti al verificarsi dei quali si configura la responsabilità sussidiaria. Le linee guida emanate dalla Suprema Corte evidenziano con chiarezza i criteri interpretativi che devono essere seguiti nell'applicazione della nuova disciplina, attribuendo un ampio margine di discrezionalità al giudice nel valutare le circostanze di fatto che giustificano l'insorgere della responsabilità sussidiaria, anche al di là dei limiti posti da un'interpretazione letterale delle norme.

PAROLE CHIAVE: Russia – Corte Suprema – soggetto controllante – responsabilità

A recent amendment to the Russian bankruptcy law introduced the principle of subsidiary liability of the controlling persons towards the creditors of a company in a situation of distress. The article explains the criteria on the basis of which to identify the controlling persons – including directors – as well as the circumstances that may ingenerate subsidiary liability. The ruling of the Supreme Court clearly outlined the criteria that must be followed in applying the new provisions of the bankruptcy law. It recognized a large discretionary power to the judges in evaluating the factual circumstances that justify the arising of the subsidiary liability, even beyond the limits imposed by a literal interpretation of the law.

KEYWORDS: *Russia– Supreme Court – controlling person – liability.*

* Avvocati in Mosca.

SUMMARY:

1. Preamble

Insolvency matters in Russia are primarily regulated through the Russian Civil Code, Federal Law "On Insolvency (Bankruptcy)" dated 26 October 2002 No. 127-FZ (hereinafter – the "**Law**") and extensive court practice.

A concept of subsidiary liability was introduced into the Russian bankruptcy legislation rather recently through the adoption of Federal Law dated 29 July 2017 No. 266-FZ "On introduction of amendments to the Federal Law on Insolvency (Bankruptcy) and the Code on Administrative Offences" (hereinafter – the "**Amendments"**).

These new amendments provide for a possibility to impose subsidiary liability on controlling persons when full discharge of the creditors' claims becomes impossible due to actions or omissions of such controlling persons.

According to the most recent statistics, the number of claims filed for subsidiary liability has drastically increased in the second quarter of 2019, going up 25.6% compared to the same period last year. At the same time the number of claims acknowledged by the courts has decreased from 30% to 26%, and the general amount of subsidiary liability has doubled up to 79.5 billion rubles (approximately 1,1 billion EUR).

2. Notion of the controlling person

The Amendments entered into force in July 2017. Provisions of Article 61.10 of the Law provide for a basic definition of a controlling person, being either an individual or an entity, as a person able to determine the economic activity of the debtor. To be determined as a controlling person for the purposes of subsidiary liability, such control has to be exercised by a controlling person over the period of three years preceding the identification of the signs of bankruptcy of the debtor.

The Law provides for a few clear assumptions when the control and thus the status of a controlling person is presumed under the disputable presumption:

• when the person is a CEO (even nominal [1]) of the debtor;

• when the person had the right to solely or jointly with other persons, control 50% or more shares or participatory interest of the share capital of the debtor;

• when the person benefitted from illegal or mala fide actions of the management (CEO or other persons having authorities to act on behalf of the company) of the debtor.

Disputable presumption of the status of a controlling person has the nature of a presumption prima facie, which has to be contested and overturned by clear evidence confirming the absence of control. Such evidence has to be provided by the presumed controlling person.

The law also provides that ability to control the debtor can be reached due to the job function of the individual (CFO, chief accountant, etc.), due to kindred relationships with the officers of the debtor, due to possibility to act on behalf of the debtor based on the power of attorney or otherwise, including by forcing the debtor's CEO or its officers by other means.

The Law stipulates that a person cannot be considered as controlling when it owns 10 % or less of the share capital of the debtor and receives usual and reasonable income derived of such possession.

3. Liability of controlling persons

A controlling person can be subject to subsidiary liability in the following cases:

- When full discharge of the creditors' claims is impossible. When such discharge is impossible due to actions and/or omissions of one controlling person, such person shall be subject to subsidiary liability. In case of concerted actions on the side of several controlling persons, such persons will bear subsidiary liability towards the debtor jointly, meaning that the creditors can claim the full or part of their claims to either controlling person or to all, at their discretion;
- When the debtor has not filed a petition in bankruptcy on its own, or in case such petition has been filed late;
- When there have been violations of the Law. Such violations occur if:
  a) a controlling person has filed a petition in bankruptcy when it had a possibility to discharge creditors' claims in full; or
  b) a controlling person failed to contest unreasonable claims of the creditors.

[1] Article 61.11, Clause 9 of the Law.

Such actions or omissions have to be taken within ten years. Expiration of the ten-year period will preclude an interested party from filing a petition on subsidiary liability.

In certain cases, the joint liability can be substituted by the proportionate or several liability. If actions of several controlling persons taken individually did not objectively lead to insolvency of the debtor, but in a particular bankruptcy case the actions in question appeared to cumulatively and finally have led to bankruptcy, in such case the several subsidiary liability of the controlling persons appears. The participation interest or amount of shareholding and the degree of damage caused shall be taken into consideration, together with the periods of actual control of the debtor by each controlling person in order to determine the extent of the liability of each controlling person.

As a separate note, according to the Russian Criminal Code, managers of the debtor and its shareholders can be subject to criminal sanctions for fictitious and intentional bankruptcy and misbehavior in the course of the bankruptcy (concealment of assets, termination or fabrication of accountant documents, unlawful satisfaction of creditors' claims). The same actions can be punished with administrative liability if they did not cause major damages, i.e. RUB 2,250,000 (approximately EUR 32,000).

4. Limitation period and injunctive measures

A claim for subsidiary liability can be filed within three years from the date the person authorized to file a claim learned or was supposed to learn about the grounds for claiming the subsidiary liability of a controlling person, but not later than:

- three years from the date the debtor has been declared bankrupt; and
- ten years from the date when the actions or omissions that are grounds for liability took place.

The limitation period stipulated by the Law has to be calculated jointly, i.e. three and ten years.

It is important to note that, besides declaring controlling persons liable, the court may, at the request of a party to the bankruptcy procedure, grant injunctive measures in respect of the assets of the controlling persons.

The bankruptcy procedure usually lasts for a few years and creditors remain waiting for their monetary claims to be satisfied. Thus, the procedure of injunctive measures is used to secure the assets of the controlling persons at an early stage for future settlement with the creditors of the debtor. Otherwise, in

many cases the initial meaning of the subsidiary liability of the controlling persons vanishes. Granting injunctive measures in respect of the assets of controlling parties ensures due balance of the interests of both creditors and debtor, and supports the execution of court decision to hold controlling persons liable.

5. Court practice toward application of the new rules

The ruling of the Supreme Court No. 53 dated 21 December 2017 was elaborated by the Supreme Court in order to contribute to the rapid development of court practice and resolve particularly unclear aspects of the Amendments (hereinafter the "**Ruling**"). Particularly, the Supreme Court has made the following conclusions:

• Exceptional nature of the subsidiary liability: it cannot be applied to every case without comprehensive analysis of the activities of the debtor which led to bankruptcy;

• Inadmissibility of subsidiary liability when the unfortunate consequences for the debtor occurred due to actions taken in the course of ordinary business activity, reasonable risk management and did not aim at violating rights and interests of the creditors;

• Necessity for a wider, informal approach to be developed by the courts when determining a controlling person: lack of grounds for subsidiary liability does not automatically eliminate such liability of a controlling person, meaning that all the circumstances of the case have to be analyzed collectively;

• In case the shareholder of the debtor holds more than 50% of the share capital, its affiliated parties/companies of the group are considered controlling as well.

The Supreme Court, thus, provides much discretion to the courts when determining the status of a controlling person. The idea is that the courts should not be bound by the grounds set forth in the Law when resolving whether a person shall be deemed controlling.

Generally, the main idea described in the Ruling consists in the obligation of the court to determine the degree of involvement of a person subject to subsidiary liability in the process of managing the debtor, examining the significance of its influence on the major business decisions regarding its activity.

Additionally, the following recent court practice may be of interest:

• *The company's insolvency manager filed a suit requesting imposition of subsidiary liability on the top management amounting to RUB 8,229,091,182 (approx. 116.5 million euros). The Supreme Court partially reversed the decisions of the inferior courts providing that the subsidiary liability of the beneficiary cannot be denied due to the lack of direct evidence of actual control (e.g. documents of the beneficiary containing specific instructions to the debtor). The Supreme Court underlined that the courts should consider a complex of coordinated indirect evidence of control.*
(Resolution of the Supreme Court No. 302-ЭС14-1472 dated 15 February 2018)

The company's insolvency manager filed a suit requesting imposition of subsidiary liability on the top management amounting to RUB 1,258,902,940.74 (approx. 18 million euros). The Supreme Court partly reversed the decisions of the inferior courts, changing the rules for calculating the timeframes legally relevant to be qualified as a controlling person. The Supreme Court introduced the concept of the abuse of the right not to be subjected to liability and ruled that the manager can be subjected to subsidiary liability even if his/her authority was discontinued beyond the legally relevant terms.
(Resolution of the Supreme Court No. 193-ПЭК18 dated 3 September 2018)

The Monolit bank's insolvency manager filed a suit requesting imposition of subsidiary liability on the top management amounting to RUB 6,444,817,186.19 (approx. 91 million euros). The courts of first and appellate instances ruled that one of the top managers (chairman of the board) could not be subjected to liability since he only nominally performed his duties.[2]*. The court of cassation did not rule on the above issue, since the appeal in cassation did not contest resolutions of the inferior courts in that part.*
(Appellate Decision of the Ninth Arbitration Appellate Court No. A-40-35432/14 dated 7 June 2018)

6. Conclusion

The fact of expanding the courts' discretion in the identification of the controlling persons makes it clear that each case is treated individually and close attention is brought to actions and omissions of the controlling parties. The idea of the Law is to allow the judge to consider as much evidence as possible

[2] This ruling directly contradicts the provisions of the law, as provided above.

and scrutinize the circumstances of actions and omissions of controlling parties not only from a purely legal or formal but also from a factual standpoint.

The court is no longer bound by the former formalistic approach and able to analyse, in particular, the degree of involvement of the controlling persons in each specific transaction or chain of transactions that could possibly bring negative consequences to the debtor and/or additional benefits/gains as a result of such actions by the controlling persons. Non-involvement in due control and management of the debtor by its shareholder may also become a reason to treat such shareholder as a liable controlling person due to omissions on its side. It is necessary to note, however, that if the actions of the controlling persons have been carried out within the ordinary course of business and taking reasonable business risk, the controlling persons will be exempt from liability.