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LIABILITY FOR THE DEBTS OF A DISSOLVED COMPANY. IS THE ITALIAN LEGAL SYSTEM LOSING CONTEST WITH OTHER EUROPEAN SYSTEMS?

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Liability for debts of a dissolved company according to Italian Company Law.

Italian legal framework provides two credit protection strategies which can be employed to enforce the liability for debts (both contingent liabilities and unpaid debit residuals) of a dissolved company: the first based on Company Law , the other on Bankruptcy Law.

According to Company Law, by virtue of art. 2495, Civil code, capital companies which have been removed from the Register after a liquidation process([1]), are to be considered extinct. Moreover, according to the Court of Cassation, U.S., February 22nd, 2010, no. 4060-4061-4062([2]) the same conclusion can be drawn for partnerships because of systematic coherence. Therefore, following the cancellation from the Company Registry, the companies no longer exist neither as legal entities nor as subjects of law. Shareholder and liquidator will respond in different ways to any surviving or overdue social debt, according to artt. 2312 and 2495 c.c.

In particular, with regards to the shareholder's liability, the Court of Cassation. U.S., March 12th, 2013, no. 6070-6071-6072 ([3]) stresses a sort of law of succession problem, on the assumption that with the disappearance of the corporate superstructure, the personal substratum will be restored. In other words, the shareholders will take on the same debt already belonging to the company, under the same terms and conditions, according to the same limitation period and without prejudice to the same guarantees ([4]). The previous interpretation, widespread in doctrine and jurisprudence before 2003 Corporate Law reform, according to which the extinction of the subject occurred when all the legal relations referable to it were extinguished, has been overcome.

In the case of already unlimited liable members, the persistent responsibility for social debts comes *de plano* from principles. However, also in the case of limited liable members, art. 2495 c.c., keeping the personal exposure limited to the "sums collected" at the time of liquidation, represents the obvious result of at least two mandatory principles of capitalist corporate law: limiting the risk of the shareholder to the maximum extent of the contribution and the necessary subordination of the equity claims of the shareholders to those of the social creditors, so as to make it impossible that a shareholder retains definitely the liquidation quota when there are unpaid creditors.

In the same way, obvious is the reaffirmation of the liquidators' responsibility, which is correctly considered as having a compensatory nature (and not patrimonial for debts) in the execution of acts badly managed within the liquidation admi-

1 Different is the case of the cancellation which is functional to international transfer: see Cass., S.U., 11th March 2013, n. 5945, in Dir. Fall., 2014, II, p. 2095. In this case there is a change in the statute of the C.O.M.I. and a business reorganization, with business continuity, but the company is not properly dissolved.

2 In Giur. it., 2010, p. 1610, with annotation of R. WEIGMANN, La difficile estinzione delle società.

3 In Giur. it., 2013, p. 858, with comment by G. COTTINO, La difficile estinzione delle società: ancora un intervento (chiarificatore?) delle Sezioni Unite; in Foro it., 2013, I, p. 2204, with comment by A. NIGRO, Cancellazione ed estinzione delle società: una parola definitiva delle Sezioni Unite; in Foro it., 2014, I, p. 228.

4 It follows, among other things, that the enforceable title taken against the extinguished company may be brought against the shareholders, although they are not textually mentioned, by virtue of an extensive application of art. 477 c.p.c. In this sense see Cass., 8th August 2013, n. 18923, in Mass. Foro it., 2013.

nistration. However, this side of liability is not peculiar to the company's eventual extinction, since it also exists in the opposite assumption that the company itself is not extinguished as a result of its cancellation, and in any case it is configurable even *durante societate* (namely, before cancellation).

Being this the framework established by Company Law to set out the responsibilities for the debts of the extinct company, it should be noted that following the unilateral cancellation option of the company, the social creditor's protections suffer a serious deterioration. This is visible from many points of view: first of all, because of the risk that no liability can be exercised in a supplementary way neither to liquidators, of whom there is no evidence of default, or to shareholders of joint stock companies, who have not received winding up accounts ([5]). Secondly, because of the possible difficulties in tracing and personally enforcing members and liquidators.

Moreover, art 2495 c.c., which grants the possibility of notifying the application in the year following the cancellation at the company's address, is not beneficial since this notification is unlikely to succeed. Furthermore, due to the confusion created in the shareholders' assets between the liquidation quota and personal assets, a competition between personal creditors of the shareholder and already social creditors occurs, in a lack of any legal destination restriction on the liquidation quota received.

Lastly, it should be mentioned the difficulty in fully applying joint and several liability rule: although the shareholders are held jointly responsible for already social debts, according to art. 2495, c.c. (in accordance with the general principles: art. 1294, c.c.), in no case can the proceeding creditor enforce it for a greater amount than the liquidation quota; if such a greater claim is put forward, this could be blocked by the objection of the shareholder regarding the limitation of his responsibility. Instead if the decision of the measure of responsibility limited to the amount of liquidation received by the individual is entrusted in the set-back action between co-obligors, there would be the risk of undermining the principle of public economic order on the limited liability of the shareholder.

Liability for debts of a dissolved company according to Italian Bankruptcy Law

Liability enforcement provision granted by Bankruptcy Law might overcome critical issues with the credit protection system offered by Company Law. In fact, in the name of equitable requirements aimed at curbing the moral hazard of the debtor who urges cancellation, and, at the same time, for reasons of legal certainty, it is established that the extinct society is still exposed to the risk of a bankruptcy order in the year following the date it was removed from the register of companies ([6]).

There is a clear overturning of the underlying logic within Company Law. In fact, in Company Law framework, the assumption of the extinction of the company leads articles 2312 and 2495 c.c. and the teaching of Cass. U.S. 6070-6071-6072 /2013 aims to redefine the consequential responsibilities of shareholders and liquidators. In Bankruptcy Law, instead, the *fictio iuris* of the survival of the company is raised in the year following its cancellation, so that the company itself

5 In that case, they would be "debtors with no responsibility ": Cass., 12th March 2013, nn. 6070-6071-6072, cit.

6 See artt. 10 – 11 e 147 l. fall; artt. 4 - 23, d. lgs. 270/99.

fails - in person of the liquidators – and is personally involved in the bankruptcy proceeding and personally assumes surviving debts. Clearly, in order to restore the corporate assets needed for the debt burden, recovery instruments are necessary, such as: *i)* actions for liability against directors, liquidators and shareholders who are responsible for *mala gestio*, according to art. 146 l. fall ; *ii)* revocation actions exercisable pursuant and according to the conditions of art. 67, 2nd paragraph l. fall. for the declaration of ineffectiveness of the payments made in favour of other social creditors, as being prejudicial to the par condicio; *iii)* the return of any amounts erroneously distributed to the shareholders by way of liquidation quota.

According to the interpretation accepted by the most recent jurisprudence ([7]) the application for bankruptcy pursuant to art. 10 l. fall. can only come from creditors and not from the same debtor. This is both because of a principle of non-contradiction (having the debtor chosen to de-register) and because the company is already extinct and no longer fully recognized as an independent legal entity.

It must be said that, on the one hand, that in this case a bankruptcy order is relatively easy to obtain, since the state of insolvency, instead of having to be ascertained through the usual financial assessment, dynamic and prognostic, is measured in strictly patrimonial and static terms, resulting in the fact that the survival of a debt necessarily entails patrimonial inability.

On the other hand, the bankruptcy strategy pursuant to art. 10 l. fall. might face difficulties:

- over time, the prolongation of the liquidation process could have broken the dimensional parameters that set the quantitative threshold for fallibility, according to art. 1, 2nd paragraph, l. fall, so that the company is no longer considered fallible by having been below the threshold in the last three liquidation periods;

- the provision of the last paragraph art. 15 l. fall., which states that no bankruptcy order is allowed if the overdue debts are less that 30,000 Euros. Therefore, bankruptcy of a de-registered company could be a viable solution only if the surviving credit is higher;

- according to common interpretation of art. 10 l. fall. ([8]), the annual term is fixed for the purposes of the bankruptcy order: therefore the creditor must take action early and in time to obtain, in the year, the declaration of bankruptcy.

Finally, it must be considered that Company and Bankruptcy Law framework should not include the whole list of case law concerning revocation of the cancellation of the company ([9]), pursuant to art. 2191 c.c., which allows the cancellation of erroneous entries in the company register.

Given it is clear that the legal system has to provide for a remedy to erroneous inscriptions, then the relevant irregularities should only have a formal nature, since the examinations carried out on the documents to be registered is formal too. Although there is no valuation of the correctness of the liquidation process as well as the accuracy of the liquidation balance sheet preceding the cancellation request, the same can not be said of the incorrectness affecting the liquidation process

7 Cass., 4th July 2013, n. 16751, in www.ilcaso.it

8 Cass., 12th April 2013, n. 8932, in Giur. it., 2013, p. 2537.

9 After Cass., U.S., 9th April 2010, n. 8426, cfr. ex multis Trib. Cuneo, 16th July 2012, in Società, 2013, p. 400; Trib. Vicenza, 24th June 2013, www.ilcaso.it; Trib. Bologna, 6th June 2013, www.ilcaso.it; Trib. Padova, 2nd March 2011. Contra v. Trib. Milano, 30th October 2012, in Società, 2013, p. 503

when removing cancellations which have been carried out and re-establish companies already extinct, for the interest of surviving creditors.

Moreover, it should be noted that the survival of debts is textually defined compatible with the extinction of the debtor / company, according to art. 2495, c.c., now also applied to partnerships; and, secondly, that on this premise the Supreme Court ,U.S.,in 2013, appointed the terms and the borders of the consequent responsibilities of the only surviving subjects - shareholders and liquidators-.

Finally, it can not be overlooked that Bankruptcy Law applies a peculiar form of overcoming the cancellation of the company: this is the above mentioned case of the fallibility of the company which has been removed from the registry for less than a year. Therefore it seems correct to argue *a contrario* that over the year art. 10 l. fall. mentions, restoring the company may result *contra legem*, and risks to push the term of fallibility beyond the annual limit.

In the current legislative and jurisprudential framework, therefore, the cancellation of a company, both of people and capital, is looming as an irreversible event, capable of permanently modifying reality, while the protection of creditors and damaged parties is drawing back from a real to a merely compulsory level.

Prospects for the implementation of Italian law: comparative notes

While Italian Law reacts *in extremis*, responding to the infringement of the rights of any deregistered company creditor, a quick look at the main European laws shows more efficient solutions, which in turn represent possible objectives for the implementation of Italian law within a logic of competition between legal systems. Following this approach and in a nutshell, at least two aspects stand out.

Firstly, with regards to preventive remedies which allow the creditor to intervene in the liquidation and extinction phase of the company, so that the third party is encouraged to bear the costs of monitoring the debtor, promptly exploiting the mechanism of corporate documents disclosure, *durante societate* ([10]). For example, according to the British Companies Act, the application for a limited company's Strike off requires the application of one of the parties, accompanied by prior information to all the other parties ([11]). In the absence of notification, any entity or person interested in the affairs of the company who has been damaged by lack of notification, may in the future object to the request for cancellation. It is then necessary to notify the request of cancellation to the appropriate HMRC offices and to the DWP ([12]) in case of any liabilities. Employees, managers or trustees of pension funds for employees and any other directors of the company

10 See D. GALLETTI, La ripartizione del rischio di insolvenza, Bologna, 2006, p. 128.

11 https://www.gov.uk/government/publications/strike-off-a-company-from-the-register-ds01): "Notify all parties. Please ensure that you send copies of this application to all notifiable parties e.g. creditors, employees, shareholders, pension managers or trustees and other directors of the company within 7 days from the day on which the application is made. Please also send copies to anyone who later becomes a notifiable party within 7 days of this taking place. This applies from the day of application and before the day on which the application is finally dealt with or withdrawn. Please check the guidance notes which contain a full list of those who must be notified. Failure to notify interested parties is an offence. It is advisable to obtain and retain some proof of delivery or posting of copies to notifiable parties".

12 HRMC, Her Majesty-s Revenue and Customs, DWP, Department of Work and Pensions.

who have not signed the form to request the strike off will also be notified. The Companies House that receives the request for Strike off is in charge of examining it, registering it and inserting it in the public registers so as to allow the subjects that may have interest in the matter, to oppose it.

In the same way, in German Corporate Law, liquidators must notify creditors in the event of company's liquidation (*Glaubigeraufruf*) through a notice published three times in the *Gesellschaftsblatter*. This is to ensure that the creditors of the company are aware of the liquidation process and to avoid in the meantime an early division of the corporate assets ([13]). From the last of the three publications, there is a period of one year (*Sperrjahr*) during which the creditors must report their credit to the company and before it expires, the liquidators cannot proceed with the allocations of assets ([14]). Creditors who do not show up and are unknown by the company, have definitely no possibility of enforcing their credit ([15]).

Secondly, by continuing to assess how other modern systems face the problem we are dealing with, it should be noted that the end of liquidation and de-registering are not usually considered as irreversible events which produce definitive effects. Taking into account, for example, the Spanish Corporate Law, which is substantially similar to that of the Italian art. 2495 c.c. ([16]), we note that it actually shows greater completeness: it gives a major consideration to the *Activo Sobravenido*, which must be managed and liquidated in an additional phase of the liquidation process. Moreover, a perpetuation of the liquidator's legitimacy for the fulfilment of residual formalities is mentioned ([17]). Furthermore, according to the *Ley Concursual*, having proceeded to a fraudulent or too hasty liquidation results in a state of insolvency indication ([18]).

Also German legal framework allows for the fulfilment of further management obligations during liquidation in the period following the company has been removed from the registry, by calling the liquidators or by nominating an *ad hoc proxy* ([19]). In addition, it's possible to reopen the liquidation following the cancellation of the company (*Nachtragsliquidation*) if assets yet to be distributed are discovered by a shareholder or a creditor after the deletion of the registration; and the same can happen when further liquidation measures are still necessary

13 §267 AktG; § 65 Abs. 2 GmbHG; §272 AktG.

14 § 73, Abs. 1 GmbHG e 272, Abs. 1 AktG. Furthermore, in the event that a known creditor does not appear, the amount owed must be deposited in favor of the same creditor and if the performance of an obligation is not currently possible or it is a disputed obligation, the division of the assets can only occur if a specific guarantee has been given to the creditor (§ 73, Abs. 2 GmbHG e 272, Abs. 2-3 AktG).

15 Given there is no equivalent of action according to Italian art. 2495 c.c.: see A. ZORZI, L'estinzione delle società di capitali, Milano, 2014, p. 150.

16 Real Decreto Legislativo 1/2010, de 2 de Julio, texto refundido de la Ley de Sociedades de capital, Art. 397- 399.

17 Real Decreto Legislativo 1/2010, "Artículo 398; Artículo 400.

18 Artículo 2, Ley concursual 22/2003, and subsequent amendments.

19 Aktiengesetz § 273 Schluß der Abwicklung.

([20]). It can be argued that, in all the cases just mentioned, the company still exists despite its deletion.

Under French Law when a company is dissolved, it retains its legal personality until the publication of the liquidation closure for civil companies ([21]) and until the end of the liquidation process for commercial companies ([22]). But the publication of a *radiation prématuré* cannot lead to the extinction of the company, or better, to the loss of its moral personality, until there are still rights and obligations to be liquidated; the *Cour de Cassation* considers that the moral personality of a company under French law exists until the social rights and obligations have been liquidated or when a third party claims a credit against the company which originates from the social activity ([23]). Therefore, if the creditor feels damaged and wants to reopen the liquidation process, it is up to him to seek a judicial appointment of an *ad hoc proxy* who represents the company ihjn any judicial proceeding. This interpretation is very similar to that of the Italian jurisprudence before the 2003 Corporate Law reform.

Finally, regarding to Common Law system, British jurisprudence shows the practice of restoring companies already removed from the registry, within a maximum period of two years, upon the request of the counter-parties. In the English legal system there are various liquidation procedures where action and control of creditors have a greater scope. The Anglo-Saxon legal framework shows two main forms of de-registering: Compulsory Winding up and Voluntary Winding up, which then split up in Creditors' Winding up and Members' Winding up. English law provides for special procedures for the restoration of previously canceled companies (Administrative Restoration and Restoration by the Court) which, once restored, keep alive the relationships pending at the time of cancellation. In addition, creditors have the power to claim against the former directors, for wrongful trading and fraudulent trading, when it's proved that they were aware of the company state of insolvency, but led to an early delete from the registry.

20 § 273, Abs. 4, AktG. For the appointment of the Nachtragsliquidatoren the only competent court will be the company registry court, according to § 273, Abs. 4, AktG.

21 Art.1844-8, 3rd paragraph, code civ.

22 See art. L 237-2, 2nd paragraph, Code de Commerce.

23 Cass. Com., 26th January 1993, n.91-11285, Bull. civ. 1193, IV, n.33; Cass. 3 civ., 31st May 2000, n.98-19435, Bull.2000, III, n.120, p.80.