



Francisco de Assis Marques v Center Trading Indústria e Comércio Ltda – a case note regarding limited liability in Brazilian Law

by Bruno Caraciolo Ferreira Albuquerque

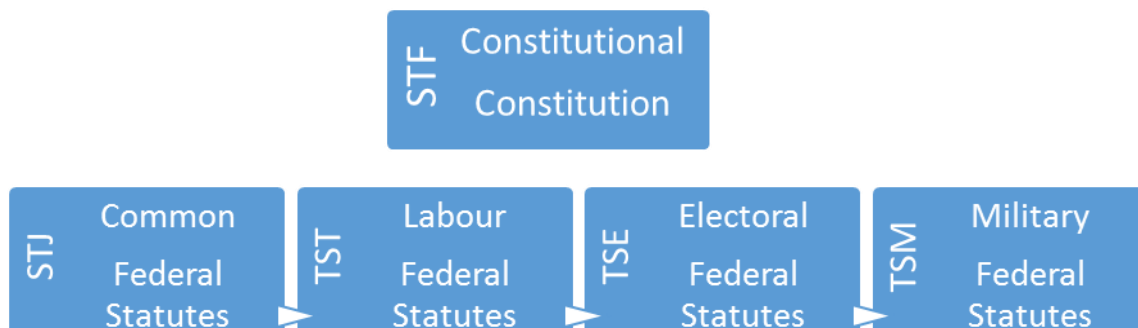
Abstract

This case note provides an objective notion regarding limited liability in Brazilian law. Francisco de Assis Marques v Center Trading Indústria e Comércio Ltda is a recent case from February, 2013, decided by the Brazilian Supreme Federal Court. The case note is divided into five parts. The first part provides a notion about the Brazilian courts' system and its decisions on limited liability. The second part presents the Brazilian Superior Labour Court's position on this subject. The third part discusses the interpretation given on this issue by the Brazilian Superior Court of Justice regarding limited liability. In the fourth part the proper case study is developed, clarifying the facts involved, the Court's decision and its effects. Finally, in the fifth part I present my conclusions linking this subject to the initiative of a new Brazilian Commercial Code, affirming that this important event may have a great efficacy not just by the means of well-drafted general rules but also as a great opportunity to the Brazilian legal community to unify its position about the matter, and to provide more legal certainty for investments in the country.

1. The Brazilian Supreme Courts and the Superior Courts Jurisdiction and Limited Liability Interpretation

The parties involved in a lawsuit in Brazil may face several court levels until a final decision. The top of Brazil's court system is the Federal Supreme Court (STF), a constitutional tribunal.

The final interpretation on federal statutes shall be decided by one of the four superior courts; (i) the Superior Court of Justice (STJ); (ii) the Superior Labour Court (TST); (iii) the Superior Electoral Court (TSE); and (iv) the Superior Military Court (TSM) as shown in the chart below:



As the conflicts involving the subject matter – limited liability – do not include electoral or military matters, the jurisdictions of TSM and TSE will not be analysed hereafter.

The cases in which the subject matter is discussed for obvious reasons always deal with creditors rights, and creditors, for the purpose of Brazilian court system, might be treated as employees or not.

The TST is the court in charge of the interpretation of labour statutes on employees v employers conflicts. Thus, the final decision on the interpretation of federal statutes about limited liability in a labour credit lawsuit shall be issued by the TST.

The STJ is in charge of all other final decisions involving the interpretation of federal statutes and limited liability issues, deciding the destiny of ordinary creditors but for the employees. However, collective insolvency or bankruptcy proceedings, which may include labour credits enforcement, shall be decided by STJ.

As the court system is established by the Brazilian Constitution, all kind of conflicts of jurisdiction between superior courts shall be decided by the STF.

Additionally, STF, STJ and TST shall not discuss the facts involved in the lawsuits submitted in appeal to their judgement. The jurisdictions of those courts are restricted to legal matters, the interpretation of the constitution by STF, and federal statutes by the others.

This is a simplified explanation of the Brazilian court system, in order to allow non-Brazilian readers to better understand this case note. All the aforesaid courts have jurisdiction over other matters, but they are not expressly related to limited liability, therefore it will not be dealt hereafter.

2. TST's position on Limited Liability

Unpaid employee's credits against limited liability structures in Brazil have a predicable end, the disregard of the investor's protection. Shareholders will have their assets seized to solve the company's debt, as the TST understands that limited liability shall not be applied in case of conflict with labour rights enforcement.

Even without specific provisions in this matter, the TST interpretation is that limited liability shall not apply on labour rights enforcement conflicts, irrespective of the shareholder being involved in malpractices or not.

3. Limited Liability interpreted by STJ

Based on Article 50 of the Brazilian 2002 Civil Code, the STJ understands that limited liability shall only be disregarded to solve ordinary credits in case of abuse of the legal entity, due to assets confusion or misuse of the company by its members. Exceptionally, the STJ understands that in case of consumer rights or environmental protection, special statutes are applied.

Therefore, according to the STJ's majority interpretation of the limited liability provisions, they should not disregard the corporate veil simply based on the fact that a determined credit has not been solved by the company, except for environmental or consumer credits.

For consumers and environmental protection law purposes, the STJ understands that the special federal statutes expressly provides for provisions under which limited liability shall be disregarded only based on the company incapacity to pay the debt, irrespective of the shareholder being involved in malpractices or not.

4. Francisco de Assis Marques v Center Trading Indústria e Comércio Ltda

As discussed above, the TST understands that even without express provision allowing for the disregard of the investor's protection, it is their responsibility to solve all employees' credits, regardless of the fact that such investors were involved in corporate malpractices.

On the opposite side, the STJ understands that just applying special provisions (as specified by environmental protection and consumer law federal statutes) the investors are liable for the company's debt based only on the company's incapacity to pay. To the STJ all other cases will depend on evidences that the investors were involved in the abuse of the legal entity.

As limited liability conflicts do not involve constitutional express provisions, the STF usually declines to hear the cases. Under STF interpretation, limited liability is regulated in federal statutes and the related conflicts shall end in TST or STJ.

However in Francisco de Assis Marques ('Francisco') v Center Trading Indústria e Comércio Ltda. ('Center Trading')¹ the company was in a judicial reorganisation, a collective insolvency proceeding, which should be heard by a single judge and shall have the final appeal submitted to the STJ.

The Brazilian judicial reorganisations and bankruptcy federal statute provides that all credits enforcement shall be discussed jointly within a lower civil court judge, who will proceed with the payments in the order established by the same statute.

On the other hand, the discussions regarding the credits amount or the existence of the credit shall be held within the court that has jurisdiction over that matter. Thus the labour courts and the TST will be entitled to decide the employees' demands but the correspondent credit enforcements will be held by the lower civil courts and the STJ when the debtor is in a judicial reorganisation.

In the case object of this paper, Francisco was the plaintiff as a Center Trading employee claiming for his rights within the labour courts. As he remain unpaid after the final decision of the labour courts, Center Trading's shareholders assets were seized by the labour single judge in order to solve Francisco's credit.

Center Trading argument was not based on the absence of special provision to disregard limited liability in labour statutes, which is not accepted by TST, but on the jurisdiction of the judicial reorganization judge over all credits enforcement. The labour courts accepted this argument and made Center Trading shareholder's assets available, what was confirmed by STF.

It is important to state that in previous cases regarding the enforcement of employee credits in judicial reorganizations decided by STF investor's liability was not the issue. Previous related cases deals solely with the correct procedure to labour credit enforcement against the company in judicial reorganization. Before Francisco's case there was no STF's decisions regarding shareholder's liability in insolvency proceeding and the labour courts jurisdiction.

The previous cases decided by the STF on judicial reorganizations referred only to conflicts of jurisdiction between the STJ and the TST. Consequently, after Francisco's case, the TST must not decide limited liability matters regarding employee credits enforcement if the company is in a judicial reorganization.

If the STJ follows its general position it must understand that without specific provisions employee credits should not be solved by shareholders as far as they are not involved in malpractices. Thus, pragmatically Francisco's case means that shareholders are liable for the company's debts with

¹ STF. AI 794836 ED, Relator(a): Min. CELSO DE MELLO, Segunda Turma, julgado em 19/02/2013, ACÓRDÃO ELETRÔNICO DJe-050 DIVULG 14-03-2013 PUBLIC 15-03-2013.

employees, with exception to the situation in which the company is in a judicial reorganization or in bankruptcy.

It is a complete non-sense, but if deciding on the same federal statute and the same case, the STJ and the TST may decide in opposite directions regarding the exactly same issue, the employee credit enforcement against shareholders that were never involved in malpractices. Shareholders will be both liable and not liable for employee credits depending if the same case is decided by TST or STJ.

5. Conclusion

It may seem to a non-Brazilian reader that the unique – and simple - way to unify the interpretation about limited liability in Brazil is to change the courts system. For example, if the STF jurisdiction includes not just conflicts of jurisdiction between the STJ and the TST but also the conflicts of interpretation regarding the same federal statutes provisions, the problem could be solved.

However, to modify the jurisdiction of these courts means to amend the Brazilian Constitution, which requires a storming, long and bureaucratic procedure. More than an endless procedure, it means to include a big number of new cases under STF's jurisdiction, which is already incapable to decide all its immense number of cases². The sad conclusion is that there isn't a simple way to solve the issue.

Nevertheless, It is important to state that a decade ago even the common courts were not sure about when to disregard the limited liability in order to solve the company's debt, but nowadays the STJ has a strong position to apply the doctrine of disregard of the legal entity just if there is a special permission on a federal statute or if the investor is involved in malpractices.

This development on common courts interpretation was not related to any change in the courts' system or even on a radical change of federal statutes. The STJ and lower common courts' interpretation about limited liability has evolved on the application of this doctrine around, particularly after the Civil Code of 2002 was enacted.

However, it is a common sense in the Brazilian legal community that the Civil Code of 2002 did not bring any new rule on lifting the corporate veil. Article 50 of that Code only states what was already available to the courts as a general remedy against abuse of rights or fraud of the law. Nonetheless, the studies about this provision bring the maturity necessary to the STJ and common lower courts to unify their interpretation, what is still in progress.

In this sense, I understand that a new Commercial Code, with principles regarding corporate structures and business, as it is under discussion in the Brazilian National Congress, might have a huge efficacy not just by the means of well-drafted general rules, but also as a great opportunity to the Brazilian legal community to promote more studies on this subject and to unify its position around the matter.

Bruno Caraciolo Ferreira Albuquerque
(Graduated in Law at Universidade Católica de Pernambuco (UNICAP), MSc in Commercial law at Pontifícia Universidade Católica de São Paulo (PUC/SP), Corporate and Commercial Lawyer in Brazil, Partner at ADCM Law)

² From January to October of 2014, 59,818 new cases were submitted to the STF. Brazil, Supreme Federal Court: www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica accessed 16 October 2014.