Company & Commercial - Ecuador

Courts Indicate Conditions for Piercing the Corporate Veil

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Author

Cesar Coronel Ortega

Ecuadorian law includes no specific provisions on the circumstances in which the corporate veil can be lifted - that is, where the shareholders, directors or managers of a company can be held personally liable for the actions of the company.

However, in recent years some court decisions have indicated that a doctrine is developing. The Supreme Court has already applied the principle of piercing the corporate veil in one case and there have been a few others where the principle has been invoked, although not strictly applied. The cases are significant because they clarify that the corporate veil can be lifted where a juridical person is used abusively and they specify where such abuse exists. They are also significant because, in Ecuador, once the Supreme Court applies (rather than invokes) a principle in three decisions, it becomes mandatory for all lower courts.

Diners Club del Ecuador v Mariscos de Chupadores Chupamar

The only case in which the principle was clearly applied is *Diners Club del Ecuador SA Sociedad Financiera v Mariscos de Chupadores Chupamar SA*e (Verbal Judgment Summary 242 (1999), Supreme Court Resolution 120 (2001)), where the defendant claimed that he was not the legal representative of the company called to trial for failing to pay a debt and therefore asked the court to declare the trial invalid.

The court noted that, although the defendant was not the legal representative of the company, he held over 99% of its shares. The court then ruled that the company was being used for the private purposes of the defendant. These purposes were "different to those that motivated the company's creation" and were designed "to avoid compliance with its obligations", signalling a clear "abuse of legal personality".

The court also declared:

"*It is a universal principle of law to pierce through the juridical personality of a company if this prevents abuse of that personality with the purpose of breaking the law or of manipulating the law to the detriment of a third party.*"

As a result, the defendant was ordered to fulfil the obligations of the company.

Shagui v Serrano

Although *Diners Club* is the only strict instance in which the court has lifted the corporate veil, the case of *Angel Puma Shagui v Mario Terreros Serrano and Importadora Terreros Serrano Cia Ltda* (Ordinary Judgment 67 (2002)) refines and expands the court's view on this principle.

In its decision the court stated:

"*Every judge has the obligation, when he sees that a legal person has been manipulated, to lift the corporate veil of that juridical person and to enter into the realm covered by that veil, so as to determine the real juridical situation and the person who is obligated.*"

The court adopted a view long held by most academics that abuse of the juridical person should not be permitted. Specifically, the court cited R Serick and Guillermo Cabanellas (*Derecho Societario*, Buenos Aires, Heliasta, 1994, p 73) in determining: "There is abuse where, with the help of the juridical person, a person is trying to break a law, subvert contractual obligations or fraudulently cause prejudice to a third party."

Buenaño v Gonzales* and *Buraye v Dumani

Two additional cases that mention in passing the principle of piercing the corporate veil shed light on how the Supreme Court views the application of this principle. In *Rubén Morán Buenaño v Antonio Onofre Gonzales*(Ordinary Judgment 1152, 1995) the court specifically noted that the right to pierce the corporate veil where there is abuse applies to non-profit entities as well as to corporations. In both this case and *José Manuel Massuh Buraye v Roberto Massuh Dumani* (Ordinary Judgment 36, 2003) the court urged that the principle be applied with care. It also clarified that legal representatives cannot be held personally liable for actions they take in the name of the juridical person where these actions do not abuse that person.

Comment

One can draw the following conclusions about the way in which the principle of piercing the corporate veil is applied in Ecuador today:

- A judge cannot indiscriminately pierce through the corporate veil and hold a person liable for the actions of a juridical person that are inherent to its purpose. In other words, the solidarity of a manager or shareholder with his company may not be assumed but must have been entered into expressly.
- When a judge suspects that there is abuse of a juridical personality, it is permissible to pierce through this personality to discover whose interests lie behind it;
- For a juridical personality to be abused, the company must have been used by its administrator, owner or shareholders to:
  - break a law;
  - avoid complying with contractual obligations; or
  - fraudulently cause prejudice to a third party.
- The principle applies to both profit-making corporations and non-profit entities.

For further information on this topic please contact César Coronel Ortega at Coronel & Pérez by telephone (+593 4 2519 900) or by fax (+593 4 2320 657) or by email (cco@coronelyperez.com*).*