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Piercing the corporate veil in brazilian, canadian, and spanish civil law

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Abstract: This research focuses on the Brazilian regulation of veil piercing, making a functional comparison with the regulation of the subject in the Canadian (Québec) and Spanish civil law systems. After briefly introducing the Brazilian problem, we present the reasons for the intended comparison and the procedure adopted. The following axes of the procedure for veil piercing were compared: (i) degree of legislative regulation, (ii) exceptionality of its application, (iii) the need for specific intent, (iv) the subsidiarity of the patrimonial liability of the partners, (v) the criterion and degree of liability of the partners subject to the piercing of the corporate veil, and (vi) the repercussions on group relations. Partial considerations were performed sequentially to the exposure of the base scenario of each regulatory axis, aiming to facilitate the analysis of the results by other researchers.

Keywords: Piercing the corporate veil. Comparative Law. Brazil, Canada and Spain.

1. Understanding the Brazilian problem

Patrimonial autonomy is one of the foundations of Private Law, communicating that legal entities, as independent imputation centers, can securitize a mass of their assets[1] [2] [3] [4] [5] [6] [7]. In the corporate sphere, its primary effect is the limitation of liability

[1] VANDEKERCKHOVE, K. *Piercing the Corporate Veil*, Kluwer Law International, New York, 2007, p. 3-4.
[2] WARDE JÚNIOR, W. J. *Responsabilidade dos sócios*: a crise da limitação e a teoria da desconsideração da personalidade jurídica, Del Rey, Belo Horizonte, 2007, p. 97.
[3] TAVARES GUERREIRO, J. A. *Regime jurídico do capital autorizado*, Saraiva, São Paulo, 1984, p. 6-7.
[4] GONÇALVES, O. "Os princípios gerais do Direito Comercial autonomia patrimonial da pessoa jurídica, limitação e subsidiariedade da responsabilidade dos sócios pelas obrigações sociais", *Revista de direito bancário e do mercado de capitais*, São Paulo, v. 58, p. 183-202, 2012, p. 185-188.
[5] CARVALHO DE MENDONÇA, J. X. *Tratado de Direito Comercial brasileiro*, v. 2, t. 2, Campinas, Bookseller, 2001, p. 123.
[6] FERREIRA, W. *Tratado de Direito Comercial*, v. 3, Saraiva, São Paulo, 1961, p. 107 [*Owner's equity is, therefore, of the corporation. Only and exclusively of the corporation. Entirely distinct from its partners, the corporation is invested with self-determining power, as the owner of its rights and slave to its obligations*].
[7] FERRER CORREIA, A. "A autonomia patrimonial como pressuposto da personalidade jurídica", en (Ferrer Correia, A. org.), *Estudos vários de Direito*, Universidade de Coimbra, Coimbra,

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in favor of *(i)* the legal entity – of which patrimony cannot be affected by obligations or debts of others – and *(ii)* its partners - who, according to the contracted modality, shall be liable only for the payment of the owner's capital.

In Brazil, the already repealed Civil Code of 1916 expressed the recognition of patrimonial autonomy in its article 20, by which "legal entities have a distinct existence from that of their members." This device did not maintain correspondence with the current Civil Code of 2002. Until 2019, its presence was verified from inferences such as the description of the circumstances authorizing the veil piercing and its effects on the liability regime of partners and managers.

Although the rigorous interpretation of the rules put in place led to the materialization of patrimonial autonomy, this was not the path followed by a significant part of Brazilian jurisprudence, resulting in complete unpredictability regarding the situations in which a case of abuse could or not be characterized that justified the casuistic abstraction of veil piercing.

Provisional Measure (PM) 881/2019 was published in an attempt to combat veil piercing outside the authorizing hypotheses of article 50/CC of the time. It was partially converted into Federal Law 13,874/2019 – the Declaration of Economic Freedom Rights (DEFR) -, backed by three pillars: *(i)* the expressed positivity of the content of *patrimonial autonomy*; *(ii)* the definition of the concepts of *deviation from purpose* and of *patrimonial confusion* for purposes of piercing the corporate veil (PCV), and *(iii)* the regulation of the liability of legal entities concerning the group.

Although the new law was supposed to establish consensus and the consequent pacification of conflicts involving veil piercing, it does not seem to have fulfilled the purpose for which it was created. A recent study on the topic[8] identified severe problems in its incorporation, such as uncertainty about the need for *malicious intent* for the characterization of the so-called "deviation of purpose"; the legislative prejudgment regarding the illegality of acts of commingling of assets, especially in economic group relations; and the option for a merely exemplary list of hypotheses authorizing the veil piercing based on the allegation of "commingling of assets."

With the apparent failure of the recent attempt at an internal solution for the problem of legal regulation of veil piercing in Brazil, we decided to verify how other countries have regulated and applied their veil piercing systems.

2. Why compare and the intended comparison

The grounds for the use of Comparative Law are classified in many ways. ALLARD AND EYNDE[9] divide them into pragmatic, rationalist, and political; Almeida[10], into cultural and practice. Although these structures have didactic importance in the systematization of knowledge, we prefer not to make specific affiliations, dedicating this moment to present functional reasons for a comparative investigation. In summary, it is common to argue that Comparative Law serves:

1982, p. 548 [*The concept of patrimonial autonomy assumes several meanings. In the most current, it expresses a specific behavior of a certain mass of assets regarding the responsibility for the debts assumed in their administration or exploitation. Then, such autonomy is still susceptible of different gradations. In its most perfect form, it reflects a twofold phenomenon: on the one hand, the insensitivity of the assets in question to debts other than those related to the special purpose to which they are assigned; on the other hand, the insensitivity to those obligations of any other patrimony*].

[8] LAUAR LEITE, M. "Autonomia patrimonial após a Lei de Liberdade Econômica", *Revista Semestral de Direito Empresarial*, Rio de Janeiro, n. 27, p. 23-41, jul./dez. 2020.

[9] ALLARD, J.; VAN DEN EYNDE, L. "Le dialogue des jurisprudences comme source du droit: arguments entre idéalisation et scepticisme", en (Hachez, I. *et al* org.), *Les sources du Droit revisitées*, v. 3, Anthemis, Limal, 2013, pp. 299-300.

[10] FERREIRA DE ALMEIDA, C. *Direito Comparado: ensino e método*, Cosmos, Lisboa, 2000, p. 68.

> *(i)* To integrate incomplete legal standards[11];
> *(ii)* For reflecting on legal systems in comparison, given that persuasive authority encourages the qualification of arguments and the increased repertoire of legal solutions[12] [13] [14] [15] [16]; and,
> *(iii)* For the creation of globally harmonic solutions, the problems for which jurisdictions require answers are often similar[17] [18] [19] [20].

As Bogdan points out[21], if the foreign experience is shared, stimulated, and often seen as evident in the health and technological sciences, the legal-comparative tool should not be a source of distrust or prejudice but scientific development in the legal field.

For this multilateral[22], micro-comparison work[23], we chose to investigate their equivalent institutes in Francophone Canada[24] and Spain as objects-*comparantum*. These are jurisdictions with *(i)* tradition in the discussion of the topic - development of the state of national art and *(ii) civil law* legal systems - constitutional hierarchy, the predominance of written law and common structuring values - liberal democracies with market economies that have freedom of economic initiative as their crucial foundation[25]. Therefore, the research aims to assess the similarities and differences in

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[11] LAUAR LEITE, M. "O Direito Comparado na integração das lacunas de regulação", *Rev. Fac. Direito UFMG*, Belo Horizonte, n. 78, p. 159-179, jan./jun. 2021, p. 174; BOGDAN, M. *Comparative Law*, Kluwer, Cambridge, 1994, p. 32.

[12] HÄBERLE, P.; KOTZUR, M. *De la soberania al derecho constitucional común: palabras clave para un diálogo europeo-latinoamericano*, Universidad Nacional Autónoma de México, Cidade do México, 2003, p. 14.;

[13] ROTHENBURG, W. C. "Diálogo internacional entre juízes: a influência do direito estrangeiro e do direito internacional na solução de casos de direitos fundamentais", en (Edelvacy Marinho, M. et al. org.), *Diálogos entre juízes*, UniCEUB, Brasília, 2014, p. 45.

[14] RUFINO DO VALE, A. "O argumento comparativo na jurisdição constitucional", *Consultor Jurídico*, São Paulo, mai-2014, avalaible in: http://www.conjur.com.br/2014-mai-03/observatorio-constitucional-argumento-comparativo-jurisdicao-constitucional. Accessed in 23-5-2022.

[15] BOGDAN, M. *Comparative Law*, Kluwer, Cambridge, 1994, p. 27.

[16] ALLARD y EYNDE, *Le dialogue des jurisprudences comme source du droit: arguments entre idéalisation et scepticisme, Ob. Cit.*, p. 300.

[17] DANTAS DE MEDEIROS, O. "Direito constitucional comparado: breves aspectos epistemológicos", *Revista de Informação Legislativa*, Brasília, a. 47, n. 188, p. 313-332, out./dez. 2010, p. 320.

[18] OVÍDIO, F. "Aspectos do Direito Comparado", *Revista da Faculdade de Direito*, Universidade de São Paulo, v. 79, p. 161-180, jan. 1984, p. 166.

[19] NICOLAU DOS SANTOS, J. "Direito Comparado e Geografia Jurídica", *Estudos Jurídicos em honra de Soriano de Souza*, v. 2, Recife, p. 348-371, 1962, p. 349.

[20] BOGDAN, *Comparative Law, Ob. Cit.*, p. 19.

[21] *Comparative* Law, *Ob. Cit.*, p. 29.

[22] BOGDAN, *Comparative Law, Ob. Cit.*, p. 57.

[23] Comparison of specific legal rules – FERREIRA DE ALMEIDA, *Direito Comparado: ensino e método, Ob. Cit.*, p. 64.

[24] Therefore, all references to Canadian regulation on the subject will be based on the legislation of the province of *Québec*.

[25] Explicative note: the Brazilian Constitution enshrines freedom of initiative as the foundation of its economic order. [*The economic order, founded on the valuation of human labor and free initiative, aims to ensure everyone a dignified existence, according to the dictates of social justice, observing the following principles* - art. 170, *head provision*], as the Spanish Constitution does [*Free enterprise is recognized within the framework of a market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning* – Section 38] and, indirectly, in the Canadian Constitution, in addressing the freedoms of association and of earning income [*Everyone has the following fundamental freedoms: (…) (d) freedom of association* – 2; *Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (…) (b) to pursue the gaining of a livelihood in any province* – 6].

the treatment of the foundations of the theme in these jurisdictions to provoke a reflection on Brazilian choices and, indirectly, gather elements that can contribute to the reciprocal improvement of legal protection systems to patrimonial autonomy.

The treatment of information collected in the doctrine and jurisprudence of each State will follow a functional logic[26] [27], that is, a search for comparative solutions to the treatment of similar issues. Pragmatically, the Brazilian response will be presented and commented on [*comparatum*] for every regulatory problem [*tertium comparationis*], followed by the identifiable Spanish and Canadian solutions [*comparandum*] and criticism about its possible repercussions and developments.

3 Comparative regulations of the piercing of the corporate veil

3.1 Brazil: direct legislative regulation

The general rule of veil piercing in Brazil is in art. 50 of the Civil Code, which establishes in its *head provision*: "In case of abuse of juridical personality, characterized by the purpose deviation, or by the commingling of assets, the judge may, at the request of the party, or of the Public Prosecutor's Office when it is up to him to intervene in the process, disregard it for certain and precise obligations has their effects extended to the personal assets of managers or partners directly or indirectly benefited by the abuse."

The article establishes a variety of important material information. Veil piercing is authorized when corporate personality abuses through the *deviation from purpose* or *commingling of assets*. In such cases, the veil of corporate personality could be pierced, obliging partners and managers to answer for commitments made, in principle, on behalf of the legal entity. Brazilian legislation *directly* regulates the subject.

3.2 Canada: indirect legislative regulation

In Canada, the general rule of veil piercing comes from art. 317 of the Civil Code of Quebec. [*The juridical personality of a legal person may not be invoked against a person in good faith to dissemble fraud, abuse of right, or contravention of a rule of public order*]. It can be said that this legislative regulation is *indirect* because it does not refer to the veil-piercing procedure but to the hypotheses in which the legal personality of a collective entity is not legally protected, not offering details about the normative content of each of them.

3.3 Spain: regulatory gap

Spanish law has no specific rule on hypotheses in which corporate personality could be pierced [Brazilian model] or even when its protection would be guaranteed [Canadian model]. The Spanish Civil Code limits itself to recognizing the existence of the corporate personality of legal entities[28].

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[26] GLENDON, M. A.; GORDON, M. W.; OSAKWE, C. *Comparative legal tradition*s: text, materials and cases, 2. ed, West, St. Paul, 1994, p. 13-16.

[27] SAMUEL, G. *An introduction to Comparative Law Theory and Method*, Hart, Oxford, 2014, p. 66-68.

[28] Art. 35.
Legal entities are:
1.º Corporations, associations and foundations of public interest recognized by law.
Their personality begins from the very moment in which, in accordance with the law, they would have been validly constituted.
2.º Associations of particular interest, whether civil, commercial or industrial, to which the law grants their own personality, independent of that of each of the associates.
(…)
Art. 38

The complete legislative gap on the subject did not prevent the Spanish Supreme Court from admitting, in 1984[29], the possibility of piercing the corporate veil as a result of injury to pre-established rules on equity[30], good faith[31] and, especially, fraud to the law and abuse of right, according to arts. 6.4 [*The acts performed under the protection of the text of a rule that pursue a result prohibited by the legal system, or contrary to it, will be considered practiced in fraud of the law and will not prevent the proper application of the rule that has been tried to avoid*] and 7.2 of the Spanish Civil Code [*The Law does not protect the abuse of the right or the antisocial exercise of the same. Any act or omission that, due to the intention of its author, its object or the circumstances in which it is carried out, manifestly exceeds the normal limits of the exercise of a right, with damage to third parties, will give rise to the corresponding compensation and the adoption of the judicial or administrative measures that prevent the persistence of the abuse*].

3.4 Partial considerations

More than direct, Brazilian legislation addresses the issue of veil piercing in detail. In addition to mentioning the situations that would characterize an abuse apt to the piercing of the corporate veil [deviation of purpose and commingling of assets], the Brazilian legislator defined what would be deviation of purpose as[32] [*the use of the legal entity for the purpose of harming creditors and for the commission of unlawful acts of any nature*] and commingling of assets as[33] [*the absence of de facto separation between assets characterized by the repetitive fulfillment by the corporation of obligations of the partner or the administrator or vice versa; transfer of assets or liabilities without effective consideration, except those of proportionally insignificant value; and other acts of non-compliance with equity autonomy*].

Canadian law also describes hypotheses of veil piercing, although it does not qualify them. The construction of the normative content of at least two situations [*fraud* and *abuse of right*] was delegated to state jurisdiction. On the other hand, this indirect and superficial approach is more consistent than that (not) found in Spanish law, which suffers from a regulatory gap.

The existence of distinct legislative approaches to the issue is indifferent. Karen VANDEKERCKHOVE states in her classic comparative study of the subject of corporate group law in Europe, "*under a functional approach the central question of the substantive law part of our study is not 'does legal system X have rules on piercing of the corporate veil?', but rather 'does legal system X grant creditors the possibility to engage liability of parent corporations for the debts of their subsidiaries?"*[34]. Legal problems exist regardless of – and sometimes despite - legislative choices. In the Spanish case, the regulatory gap did not prevent the development of a judicial

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Legal entities may acquire and own assets of all kinds, as well as incur obligations and exercise civil or criminal actions, in accordance with the laws and rules of their constitution.
(…).

[29] *Uto Ibérica, S. A.* x *Empresa Municipal de Aguas y Alcantarillado, S. A.*, Verdict n. 330/1984.

[30] Spanish Civil Code
Art. 3
1. The regulations will be interpreted according to the proper meaning of their words, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, fundamentally attending to the spirit and purpose of those.
2. Equity will have to be weighed in the application of the norms, although the resolutions of the Courts may only rest exclusively on it when the law expressly allows it.

[31] Art. 7
1. Rights must be exercised in accordance with the requirements of good faith.

[32] Brazilian Civil Code (BCC), art. 50, § 1º.

[33] BCC, art. 50, § 2º.

[34] VANDEKERCKHOVE, *Piercing the Corporate Veil, Ob. Cit.*, p. 97. Explaining in a general way, *see* SAMUEL, *An introduction to Comparative Law Theory and Method, Ob. Cit.*, p. 65.

reaction technique to abuses committed by legal entities[35], although on grounds criticized for inaccuracy[36]. Consequently, even the fact that one of the analyzed systems does not have a direct or indirect equivalent in its law (statutory) does not make it unfit for comparison with others[37].

4 Thematic functional comparisons

4.1 Exceptionality

The purpose of this topic is to compare whether the piercing of the corporate veil is a standard or exceptional measure in the analyzed systems. The measurement of this exceptionality begins from the premise that one can only technically speak of veil piercing when the law:

(i) has instituted a limited liability for the partners; and,
(ii) does not refer to the direct or subsidiary liability of managers,

Many countries contemplate corporate models where there is no limited liability. In Brazil, professional corporations of an artistic, scientific, or literary nature (called "simple societies") treat their partners, as a rule, as subsidiaries liable for obligations of the legal entity[38]; the same occurs, to a greater or lesser extent, in "ordinary partnership"[39]; "limited partnership," and "limited partnership per shares" corporations[40]. The "General Partnerships" and the "Collective Companies" are examples in Canada and Spain[41], respectively. If there is no prior limitation of liability, the veil piercing is unnecessary and technically inapplicable.

Regarding the liable person, it must be established that the partners are the holders of the fractions of the owner's capital. They have separated part of their assets in favor of the corporation, giving this financial autonomy necessary to pursue its purposes. Special patrimonial effectiveness is established with the limited liability corporation [42] - what we call the veil–for which the sole liability of the partners concerns their correct contribution to the formation of capital[43]. From then, it is necessary to pierce the corporation's veil to achieve the partners' personal assets.

This procedure does not relate to the direct or subsidiary liability assigned to managers by law[44] [45] [46]. Managers may or may not be partners, but this relationship is not involved in creating equity effectiveness that results in partitioning personal and business assets into limited liability corporations. When the law holds managers liable, it is not carrying out or authorizing an early veil piercing simply because the

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[35] *See* BUEYNO DÍEZ JALÓN, M.; PALOMO BALDA, E. *Responsabilidad de los administradores: levantamiento del velo*, Francis Lefebvre, Madrid, 1998, p. 131.
[36] For all, *see* HURTADO COBLES, J. *La doctrina del levantamiento del velo societario en España e Hispanoamérica*, Atelier, Barcelona, 2008, p. 41.
[37] MOUSOURAKIS, G. *Comparative Law and legal traditions: historical and contemporary perspectives*, Springer, Cham, 2019, p. 116.
[38] BCC, art. 1.024.
[39] BCC, art. 1.039.
[40] BCC, art. 1.090.
[41] Spanish Commercial Code, art. 127.
[42] XAVIER LEONARDO, R; RODRIGUES JR., O. L. "A desconsideração da pessoa jurídica – alteração do art. 50 do Código Civil*",* en (Peixoto Neto, F.; Rodrigues Jr., O. L.; Xavier Leonardo, R. org.), *Comentários à lei da liberdade econômica*, Revista dos Tribunais, São Paulo, 2019, p. 279.
[43] BCC, art. 1.052; QCC, art. 2.240; SCC, art. 1.681.
[44] BCC, art. Art. 1.016 [*The administrators are jointly and severally liable to the company and third parties harmed by fault in the performance of their functions*].
[45] In Canadian doctrine, MARTEL, P. *La Société par actions au Québec: les aspects juridiques*. Montréal: Wilson & Lafleur Ltée, 2022, p. 1-88.1; 1-89.
[46] *See*, still, VANDEKERCKHOVE, *Piercing the Corporate Veil, Ob. Cit.*, pp. 12-13.

achievement of administrator assets – even if, by chance, they are also partners – concerns a legal relationship in which obligation is not of capital but service.

4.1.1 Brazil

The Brazilian general rule[47] establishes that only deviation of purpose and commingling of assets can authorize the piercing of the corporate veil. However, its application is restricted to relations between private persons governed by the Civil Code, so relations governed by consumer, labor, competition, and environmental law ignore the need for abusive conduct. A simple breach of contract is reason enough to call partners of limited liability corporations to answer for social obligations. Doctrinal warnings about the dangers of indiscriminate management *piercing the corporate veil* for legal certainty in realizing productive investments[48] [49] [50] [51] are frequent, including in foreign doctrine[52].

Even inter-company relations are likely to be evaluated not under the general rule of the Civil Code but by the Consumer Protection Code. This is because even legal entities can be framed as consumers, provided they are the final recipients of products or services[53].

4.1.2 Canada

The hypotheses of *fraud, abuse of right or contravention of a rule of public order* constants of the QCC are seen by Quebec doctrine and jurisprudence as exceptional[54] [55], even to a more restrictive degree than the sources of the *common law* before its elaboration[56]. In general, the general rule of art. 317 of the QCC, combined with the expression of patrimonial autonomy of its art. 309[57], has been subsidizing a culture of deference to limited liability.

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[47] Chapter 3.1.

[48] SZTAJN, R. "Sobre a desconsideração da personalidade jurídica", *Revista dos Tribunais*, São Paulo, v. 88, n. 762, abr. 1999, p. 81-97.

[49] BLOK, M. "Desconsideração da personalidade jurídica: uma visão contemporânea", *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, v. 59, jan./mar. 2013, p. 91-167.

[50] ; MARTINS FERREIRA, L. E. "Desconsideração da personalidade jurídica: uso e abuso", *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, v. 41, jul. 2008, p. 127-132.

[51] LAUAR LEITE, M. "Limitação da responsabilidade patrimonial como fator de proteção ao investimento: razões e propostas para uma missão de resgate", *Revista Semestral de Direito Empresarial*, Rio de Janeiro, n. 18, jan-jul. 2016, p. 135-183.

[52] KRAAKMEN, R; ARMOUR, J.; DAVIS, P., *et al*. *The anatomy of Corporate Law: a comparative and functional approach*, 3. ed, Oxford University Press, London, 2017, p. 116 [*Yet effective protection to non-adjusting creditors is rare in our core jurisdictions, although Brazil perhaps goes furthest in this regard: unlimited shareholder liability through veil piercing is the norm whenever corporate assets are insufficient to compensate the damages caused to workers, consumers, and the environment*]

[53] As stated in art. 2: "The consumer is every natural person or *legal entity* who acquires or uses the product or service as the final recipient".

[54] Cour Suprême du Canada, *Barer C. Knight Brothers LLC*, de 22-02-2019; Cour Supérieure, n. 500-17-088106-151, de 08-01-2018; Cour Supérieure, n. 505-17-008414-155, de 29-04-2022; Cour d'Appel, n. 500-09-012368-023, de 11-03-2004.

[55] In doctrine, *see* RENAUD, B. *Code Civil du Québec Annoté*. t. 1. 23. ed. Montréal: Wilson & Lafleur Ltée, 2020, p. 409 ; LACASSE, N. *Droit de l'entreprise*. 9. ed. Montreal: Narval, 2015, p. 127.

[56] ROUSSEAU, S; SMAÏLI, N. "La levée du voile corporatif em vertu do Code Civil du Québec: des perspectivs théoriques et empiriques à la lumière de dix années de jurisprudence", *Les Cahiers de Droit*, v. 47, n. 4, , p. 815-861, dec. 2006, p. 859.

[57] "*Legal persons are distinct from their members. Their acts bind none but themselves, except as provided by law*".

4.1.3 Spain

Although the legislative parameters applicable to the subject are generic and abstractly even more amenable to extension, Spanish doctrine and jurisprudence have been built in the sense of having veil piercing as a measure to be considered in an *extreme* and *exceptional* form[58], that is, when there are no other remedies in material and procedural law, given the importance of maintaining the effects of legal personality for legal certainty and economic expansion[59].

The restrictive character considers excessive use for resolving conflicts would attack the rule of law[60]. Strictly speaking, the effect of the legislative gap on the Spanish judiciary is contrary to what one might expect. Instead of openness, the Spanish judges appear to be taking great care to lift the veil. As the Spanish Supreme Court recently indicated, "*this doctrine must be applied restrictively and only impute responsibilities to the Administration that owns the insolvent company if it is proven that it was instrumentalized with a fraudulent purpose*"[61].

4.1.4 Partial considerations

Brazil does not have a culture for protecting patrimonial autonomy. Although the general rule - art. 50/Brazilian Civil Code (BCC) - makes it seem that judges can only pierce the corporate veil in abusive situations. Approximately 45% of cases of granting requests of this type ignored the assumptions of the institute, replacing the debate of its specific legal requirements with social grounds, such as the need to protect the vulnerable party in the specific case[62].

If the judge is inclined to satisfy the creditor in any way, the limitation of property liability becomes easily transposable, especially when there is no good understanding of the importance of legal protection for those who risk their capital in the offer of products or services. The legal research mentioned above makes it seem that the limitation of liability is seen as an undue privilege that should be eliminated in the face of injustices in the protection of credit.

DEFR's attempt to change the way Brazilian judges see the limitation of patrimonial liability goes through the inclusion of art. 49-A in the BCC, whose second part expresses that "*a autonomia patrimonial das pessoas jurídicas é um instrumento lícito de alocação e segregação de riscos, estabelecido pela lei com a finalidade de estimular empreendimentos, para a geração de empregos, tributo, renda e inovação em benefício de todos*".

Explaining the obvious by way of law shows the difficult path ahead of Brazilian law. Even if there were no doubts regarding the normative contents of art. 50 of the BCC – reformed by DEFR –, the existence of similar regulations on the piercing of the corporate veil – such as the one that considers legal entities consumers and, under Brazilian law, holders of the right to request the lifting of the veil for simple default, makes the path more difficult. An example of this was a 2022 case in which a company (electronic equipment supplier) had its legal personality raised for not delivering a printer to another company (a restaurant)[63].

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[58] BOLDÓ RODA, C. *Levantamiento del velo y persona jurídica en el Derecho Privado Español*, 4. ed, Aranzadi, Navarra, 2006, p. 264; DE ÁNGEL YAGÜEZ, R. *La doctrina del levantamiento del velo de la persona jurídica en la jurisprudencia*, 5. Ed, Aranzadi, Navarra, 2006, p. 109-112;

[59] *See* Spanish Supreme Court, *GRAFICAS CORNEJO, S.A.* x *PAPELERA SAN JOSE, S.A.*, Verdict 883/1996.

[60] ROSARIO LÓPES GARCÍA, L. *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria*, Universidad Complutense de Madrid, Madrid, 2017, p. 111.

[61] *Ayuntamiento de Los Barrios* x *Caixabank S.A*, Verdict 667/2017, free translation.

[62] PARENTONI, L. *Reconsideração da personalidade jurídica: estudo dogmático sobre a aplicação abusiva da disregard doctrine com análise empírica da jurisprudência brasileira*, Universidade de São Paulo, São Paulo, 2013, p. 101.

[63] Case tried in 2022 before the Court of Justice of the State of São Paulo – Appellation nº 1004335-85.2020.8.26.0344.

Even if competition between domestic standards were overcome and all inter-company relations were to be governed solely by the new rule of art. 50/BCC – which is not the case –the institute's exceptionality could still be questioned before discussing the need for malicious intent for its configuration, which shall be done next.

4.2 Specific intent

The purpose of this topic is to compare whether the piercing of the corporate veil requires specific intent [subjective element] or, on the contrary, whether it is objectively assessable.

4.2.1 Brazil

In Brazil, specific intent for veil piercing may or may not be required, depending on the type of abuse committed. The answer may be positive if the charge is that the legal entity is being used *with the purpose* of injuring creditors or *for* the commission of unlawful acts [deviation of purpose]. On the other hand, if the abuse is due to the commingling of assets, the proof of specific intent is not specified by the law, given the alleged objectivity of this measurement.

4.2.2 Canada

Canadian jurists constantly remind the need for fraudulent intent to lift the veil. The basic scenario for both is that the legal entity would be under manipulation in the expression of art. 317 of the QCC, to "*masquer*" [to *mask*] one of the actions liable for piercing the corporate veil. The act of masking is, by definition, voluntary[64]. Thus, the fraudulent intent must be underlying[65], even in the case of commingling of assets[66], regardless of whether a partner is an administrator, controller, or has the power of determining influence over the business management.

4.2.3 Spain

Since 2013, the jurisprudence of the Spanish Supreme Court has required proof of intent to grant requests to lift the veil[67]. Although the proof of intent is inalienable when the accusation is that of the legal person's machination to commit fraud, the definition of *abuse of right* of art. 7.2 of the SCC[68] expressly covers situations that are not necessarily intentional when regarding actions or omissions that "by the intent of the author, by their object, or by the circumstances in which they are carried out" manifestly exceed the normal limits of the exercise of a right with prejudice to third parties.

The hypotheses seem to be alternative. There would be intentional abuses (subjective); or others measurable by practice or circumstances (objective). Despite this, most Spanish doctrine seems to understand there is no relationship of

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[64] MARTEL, *La Société par actions au Québec: les aspects juridiques, Ob. Cit.*, p. 1-85 [*The word "hide" has indeed a connotation of secrecy, dissimulation, scheming or manipulation*] Free translation. In jurisprudence, *see* Cour Supériere, Case n. 500-17-079969-138, de 26-09-2018; Cour Supériere, Case n. 500-05-005844-947, de 21-3-2002;

[65] ROUSSEAU y SMAÏLI, *La levée du voile corporatif em vertu do Code Civil du Québec: des perspectivs théoriques et empiriques à la lumière de dix années de jurisprudence, Ob. Cit.*, p. 831

[66] MARTEL, *La Société par actions au Québec: les aspects juridiques, Ob. Cit.*, p. 1-82/1-83 [*Whatever application one gives to the concept of abuse of rights, section 317 will not allow the corporate veil to be set aside, in the absence of bad faith, for reasons of confusion (unless it is caused or is not dissipated deliberately, to the point of constituting a fraud)*]. Free translation. In jurisprudence, *see* Cour du Québec, Case n. 405-32-700343-183, of 13-12-2019.

[67] GARCÌA, *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria, Ob. Cit.*, p. 84;

[68] *Ob. Cit.*

alternation but of combination in what has been conventionally called the *eclectic* current[69] [70] [71].

Although it does not expressly address the malicious element, the Spanish doctrine is fertile in discussions on the possibility of lifting the veil in cases of undercapitalization. Part of it argues that non-contractual damages - and possibly even contractual damages in non-parity relationships[72] - could give rise to the liability of partners when the company was incorporated without adequate capital to guarantee creditors[73]. It cannot be said that this is a majority conception, with clear doctrinal[74] and jurisprudence[75] negatives on the inadequacy of undercapitalization as a criterion for piercing the corporate veil.

4.2.4 Partial Considerations

Measuring fraudulent intent is probably the essential criterion for regulating veil piercing. To understand this, we will begin from one of the hypotheses brought by the BCC as characterizing "abuse" in the "deviation of purpose" modality: the use of the legal entity for the practice of "illicit acts." Imagine that, due to a calendar error, the XYZ company has not provided the contracted input to enable a specific industrial scale order, causing enormous reputational damage to its contractor in its market of operation. Having judicialized the issue, in addition to the contractual fine, an indemnity was stipulated for off-balance-sheet damages unpayable by the regular forces of its economic activity.

In the absence of intent, can the private patrimony of the managing partner be held liable? Having analyzed the question under Canadian or Spanish law, the answer would be evidently negative[76]. The issue is substantially more controversial from the Brazilian perspective. Two reasons can be pointed out for this: the first, the influence of parallel legislative microsystems – consumer, labor, environmental, and competitive – that for years have waived the assessment of intent; the second, the legislative history of art. 50/BCC.

The volitional element was expressed in the original proposition of DEFR, reputing deviation of purpose as "the *intentional* use of the legal entity to injure creditors and for the commission of unlawful acts of any nature." However, the final text defined it as "the use of the legal entity for the purpose of harming creditors and for the commission of unlawful acts of any nature," absent the term "intentional."

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[69] JALÓN y BALDA, *Responsabilidad de los administradores: levantamiento del velo, Ob. Cit.*, p. 137;

[70] BOLDÓ RODA, *Levantamiento del velo y persona jurídica en el Derecho Privado Español, Ob. Cit.*, p. 235.

[71] GARCÌA, *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria, Ob. Cit.*, p. 84; in jurisprudence, *see* Audiência Provincial, Sevilla, Appel n. 5268, judged in 29-09-2010; Tribunal Supremo, Appel n. 599, judged in 18-06-2008.

[72] BOLDÓ RODA, *Levantamiento del velo y persona jurídica en el Derecho Privado Español, Ob. Cit.*, p. 380-381.

[73] ESPINOSA, *Ob. Cit.*, p. 21.

[74] HURTADO COBLES, J. *El levantamiento del velo y los grupos de empresas*, Bosh, Barcelona, 2005, p. 111.

[75] Provincial Court of Barcelona, judgment n. 69, of 19-3-2015 [*It is true, on the other hand, that there is no lack of doctrinal opinions in favor of the application of this technique in cases of material undercapitalization, which can be sustained by interpreting the rule on limitation of liability in a finalist sense. However, neither can it be considered to be a unanimous or majority doctrine and our jurisprudence has not yet accepted this assumption among those that justify the application of this doctrine*]. Free translation.

[76] Nor would the European discussion on undercapitalization be applicable, for one could not speak of a capitalization manifestly inadequate to the operation, as Vandekerckhove conceptualizes, *Piercing the Corporate Veil, Ob. Cit.*, P. 106 [*In general, the 'simple' inadequacy of a corporation' s capital is not sanctioned; in the legal systems of the countries examined here, in order for a shareholder to be held liable, a 'manifest' , 'gross' or 'qualified' undercapitalization is required*].

Mysteriously, this removal occurred even with the rejection of all the legislative amendments presented in the National Congress that had it as their object[77].

For civilists, this disappearance exposed the need for proof of intent to characterize abusive conduct[78]. This is not the case for commercial law[79] [80]. Due to the rejection of the parliamentary amendments, I understand that the removal was a mere legislative technique, mainly due to the expressions that remained in art. 50/Paragraph 1/BCC: use of the legal entity *(i)* "for the purpose of" [harming creditors] and *(ii)* "for" the commission of unlawful acts of any nature. It seems clear that *intentional handling for illegal purpose* - [use for the purpose; use for][81], as required by Comparative Law.

In Canada, the requirement of intent for lifting the veil by "*abuse of right*" raises a specific doctrinal discussion. Art. 7 of the QCC states that "no right may be exercised with the intent of injuring another or excessively and unreasonably, and therefore contrary to the requirements of good faith."

In addition to the intentional element of the first hypothesis [*intent of injuring*], the other practices inserted in the concept of *abuse of right* could be handled under a merely culpable bias – by the negligence, malpractice, or recklessness of the managing partner, for example. Still, legal research conducted by Rousseau and Smaïli[82] revealed statistical insignificance of the hypotheses of granting the veil piercing for abuse of the law, probably due to the criticized form of its incorporation into the Civil Code[83].

The last hypothesis of art. 317/QCC, the lifting for " contravention of a rule of public order," if read in isolation, could legitimize the form of lifting the veil for non-malicious practices that infringe legal standards of an imperative nature. Despite this, it should be noted that all legal hypotheses that authorize the piercing of the corporate veil in Canada presuppose the intentional element to the extent of the need for management to mask its authorizing illegal acts. It was in this sense that, in the event of a reverse piercing, it was recently authorized to constrict corporate assets due to the debt of a person who, being the only partner, administrator, and alter ego of a company, ceased to fulfill successive maintenance obligations to the extent that they liquidated their assets and transferred them to the ownership of the legal entity[84].

4.3 Subsidiarity

This topic aims to compare whether the piercing of the corporate veil can be decreed even while the debtor company has sufficient equity to settle its claims.

4.3.1 Brazil

Even in companies without limited liability, a partner who has correctly contributed their part in the payment of the owner's capital only has their private equity affected subsidiarily, that is, in the case of social assets insufficient to satisfy the creditors of the company. Art. 50 of the BCC says nothing about this relationship of subsidiarity in case of piercing the corporate veil. Speaking of corporations with limited liability, by symmetry, it would be expected that the partners' personal assets

[77] This "strange" itinerary was denounced in a previous publication – LAUAR LEITE, *Autonomia patrimonial após a Lei de Liberdade Econômica*, *Ob. Cit.*, p. 29-31.
[78] TARTUCE, F. *Direito Civil - Lei de Introdução e Parte Geral*, 17. ed, Gen, Rio de Janeiro, 2021, p. 318;
[79] MAMEDE, G. *Direito Empresarial Brasileiro: Direito Societário*, Atlas, São Paulo, 2022, p. 187.
[80] SAAD DINIZ, G. *Curso de Direito Comercial*, Gen, São Paulo, 2022, p. 121.
[81] As already defended – LAUAR LEITE, *Autonomia patrimonial após a Lei de Liberdade Econômica*, *Ob. Cit.*, p. 30-31.
[82] ROUSSEAU y SMAÏLI, *Ob. Cit.*, p. 854.
[83] MARTEL, *Ob. Cit.*, p. 1-78.1.
[84] Cour Supérieure, Case n. 500-11-056019-199, from 18-3-2019.

would only be reached in a subsidiary manner. In this sense, since 2015, the Code of Civil Procedure has established that "*the defendant partner, when liable for paying the debt of the company, has the right to demand that the assets of the company be foreclosed on first*"[85].

4.3.2 Canada

The Canadian solution indicates joint and several liability in case of lifting the veil[86]. In general terms, it is considered that, once the corporate legal personality has been overcome, the participating partners would be called to joint and several liability under art. 1525[87] or 1,526[88] of the QBCC, according to the contractuality or extra-contractuality of the damage[89] [90].

4.3.3 Spain

In Spain, lifting the veil implies the legal entity's unenforceability for patrimonial constriction. Thus, the piercing of the corporate veil results in the *solidarity* of the patrimonial liability between what belongs to the company or the partners[91] [92], as recently reaffirmed by the Spanish Supreme Court[93]. In both cases, the practice of fraud by the partners was a common assumption.

4.3.4 Partial Considerations

Joint and several liability under Canadian and Spanish law are interesting for hypotheses in which the underlying reason for piercing the corporate veil is fraud. If the legal entity is intentionally instrumentalized for concealment, the persons responsible cannot request any protection from the limitation of liability rule, even if this protection were partial by the mechanism of subsidiarity [the benefit of order].

The inopportuneness of the legal person seems to substantiate the principle of objective good faith, preventing the practice of legally contradictory behavior. Fraud to a legal relationship cannot be cause for a request for protection of that same relationship, which would be a typical *venire contra factum proprium*.

However, the Brazilian legislative choice was diverse. If the literality of the Code of Civil Procedure were not enough, the doctrine is lavish in indicating that the application of the device is inherent to the incident of piercing the corporate veil[94]. Despite this, in its most emblematic decision on the matter (2018), the Brazilian Superior Court of Justice – the court with the highest hierarchical degree in the matter of interpretation of Federal Law - stated that the veil of legal personality could be

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[85] Art. 795, Paragraph 1.

[86] Cour Supérieure, Case n. 540-11-011116-201, judged in 6-10-2021; Cour Supérieure, Case n. 750-17-003019-175, judged in 24-10-2018; Cour Supérieure, Case n. 500-17-069891-128, judged in 16-10-2015.

[87] "*Solidarity between debtors is presumed, however, where an obligation is contracted for the service or operation of an enterprise. The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the operation of an enterprise*".

[88] "*The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual*".

[89] RENAUD, *Code Civil du Québec Annoté, Ob. Cit.*, p. 411.

[90] MARTEL, *La Société par actions au Québec: les aspects juridiques, Ob. Cit.*, p. 1-89; 1-90.1.

[91] ALONSO ESPINOSA, F. J. *Introducción a la teoria general del Derecho Español de Sociedades*, Universidad de Murcia, Murcia, 2011, p. 21;

[92] GARCÌA, *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria, Ob. Cit.*, p. 118.

[93] Case 2703, from 5-07-2021; Case 3610, from 4-10-2021.

[94] For all, *see* AMORIM ASSUMPÇÃO NEVES, D. *Novo Código de Processo Civil Comentado artigo por artigo*, Juspodvim, Salvador, 2016, p. 1.262.

lifted regardless of the availability of society's assets[95]. Once the abuse has been demonstrated, creditors can choose whether the acts of patrimonial constriction will fall on the assets of the partners or not, without any need for proof of non-existence or difficulty in locating or seizing the social assets.

Although the solution found in Canada and Spain is more compatible with a system that coherently harmonizes the conference of specific protection with the counterpart of responsibility, it must be recognized that the decision of the STJ was *contra legem*. The court's position is made even more uncomfortable by the inexplicable fact that the argument prohibiting a relationship of "solidarity" is extracted from art. 795/BCCP was not faced. The glaring mismatch between the law and the interpretation of the STJ results in the disregard for precedent by the State Courts, which continue to understand that the initial demonstration of the insufficiency of social assets is a requirement for the initiation of the veil piercing[96].

4.4 Partners subject to veil piercing

This topic aims to compare the degree of incidence of veil piercing on the equity of the company's partners. We investigated whether, after the lifting of the veil, any partner can have their assets called to liability and, if so, the quantitative measure of this liability about the social participation of each one.

4.4.1 Brazil

For years, Brazilian legislation did not inform about this problem. Only with the Declaration of Economic Freedom Rights (DEFR) of 2019 was the mention of the targets of veil piercing recorded in art. 50 of the Civil Code: partners must be directly or indirectly benefited by the abuse. The reason for this mention is known. Although there was already a strong doctrine that only the assets of partners who practiced abusive acts would be subject to response for company debts[97], case law on the subject has never been stable. Even the STJ had different precedents, sometimes limiting the effects of veil piercing to those responsible for the abuse, sometimes ignoring this assumption, and simply extending the effects of veil piercing to minority partners without any power of interference over administrative decisions[98].

With the 2019 reform, Brazilian Law established the criterion of "benefit" for punishment purposes in the case of veil piercing. In this case, it would not matter the guilt or liability of the partner in the face of the activities practiced, provided the evidentiary process concludes that the abusive act resulted in advantages.

4.4.2 Canada

The Canadian answer to the question posed is to hold only the participants responsible for the fraudulent act, considered from the theory of *alter ego* (*identification*), according to the existing relationship between the partner and the management of the company. This is evidenced by identifying two control mechanisms: *(i)* assets; and *(ii)* legal.

There is control of assets when the partner exercises substantial influence over the use of the company's assets – such as the presence on the Board of

[95] Case n. 1729554, published in 6-6-2018.
[96] TJSP, Case n. 2207066-52.2019.8.26.0000, published in 10-6-2020; TJDF, Case n. 0715171-52.2021.8.07.0000, published in 3-12-2021.
[97] Represented by Statement nº 7 of the I Jornada de Direito Civil: "The piercing of the corporate veil only applies when there is the practice of an irregular act and, limited, to the administrators or partners who have incurred it".
[98] FRAZÃO, A. "Lei de liberdade econômica e seus impactos sobre a desconsideração da personalidade jurídica", en (Salomão, L. F.; Cueva, R.; Frazão, A. org.), *Lei de Liberdade Econômica e seus impactos no Direito Brasileiro*, Revista dos Tribunais, São Paulo, 2019, p. 479-480.

Directors. This type of control can be exercised even by minority partners[99]. On the other hand, legal control is exercised through the right to vote[100]. The partner is - jointly and severally[101] - liable for acting directly for its dominant control[102] [103]. In this sense, jurisprudence indicates that it configured the constant manipulation of art. 317 of the QBCC, it is especially difficult for partners of sole proprietorships to disentangle their assets from a shared liability, given that there is total identification between ownership and command[104] [105].

4.4.3 Spain

The Spanish Courts share the Canadian solution, although differently, given the rarity of reference to the alter ego theory[106]. Possibly cited in the doctrine in comparison to countries of *common law*[107], the construction of the idea of *alter ego* is fractional in judicial decisions, appearing in only 18 among 16,247 judged on the subject – *0.11%* of the total.

The combination of malicious intent with the non-objectivity of the legal entity leads to joint and several liability only of the partners responsible for committing the fraudulent or abusive activity. In Spain, concerning sole proprietorships, it is also not the existence of a single partner that prevents the limitation of patrimonial liability for the autonomy of the legal personality but the management of the legal entity for the illicit purposes that lead to the lifting of the veil[108].

4.4.4 Partial Considerations

Unlike Canada and Spain, Brazil opted for the criterion of benefit rather than culpability. Bad choice. Instead of sheltering minority participants without administrative powers, the BCC's new wording gave them a burden. It was in this sense that a request for piercing the corporate veil was recently judged favorably on the assets of partners without interference in management[109], there was no explanation from the court as to what the concrete benefit would have been.

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[99] RENAUD, *Code Civil du Québec Annoté, Ob. Cit.*, p. 409 [*To identify the directing mind of a legal person, it is therefore necessary to determine who has been invested with decision-making power in the relevant field of activity. A minority partner can therefore be the directing mind in terms of management, day-to-day transactions and operations, if almost all of the operation of the company has been delegated to him*]. Free translation.

[100] ROUSSEAU y SMAÏLI, *La levée du voile corporatif em vertu do Code Civil du Québec: des perspectivs théoriques et empiriques à la lumière de dix années de jurisprudence, Ob. Cit.*, p. 830-831.

[101] Chapter 4.3.2.

[102] MACKAAY, E.; ROUSSEAU, S. *Análise Econômica do Direito*, 2. ed, Atlas, São Paulo, 2015, p. 611.

[103] MARTEL, *La Société par actions au Québec: les aspects juridiques*, *Ob. Cit*. p. 1-81 [*Shareholders not party to the contract could not claim this liability. There could be no question of lifting the corporate veil to allow them to do so*]. Free translation.

[104] MARTEL, *La Société par actions au Québec: les aspects juridiques, Ob. Cit.,* p. 1-92.

[105] RENAUD, *Code Civil du Québec Annoté, Ob. Cit.*, p. 411. In jurisprudence, *see* Cour du Québec, Case n. 500-32-704571-183, judged in 25-11-2020; Cour Supériere, Case n. 500-17-072965-125, judged in 10-6-2016.

[106] We used, respectively, the search keys "levantamiento del velo" and ""levantamiento del velo" + "alter ego", in the Judicial Centro de Documentação Judicial do Conselho Geral do Poder Judiciário da Espanha - available at https://www.poderjudicial.es/search/indexAN.jsp. Results as of June 20, 2022].

[107] As done by GARCÌA, *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria, Ob. Cit.*

[108] JALÓN y BALDA, *Responsabilidad de los administradores: levantamiento del velo, Ob. Cit.*, p. 142.

[109] TJPR, Case n. 0062446-23.2020.8.16.0000, published in 14-12-2021.

It should be emphasized that the criterion admits merely indirect benefits. Thus, minority partners can easily be held liable if the fraudulent actions of managing partners result in distributed profits.

It seems very serious that a partner without control, influence, or degree of knowledge of the abusive conduct can be liable – even if subsidiarily[110] - for the totality of damages arising from fraud to which they did not give a cause. The expected effect is that the new Brazilian regulation repels investments when it should attract them.

4.5 Group Relationships

This topic aims to compare the conditions under which corporate group relations can trigger a piercing of the corporate veil.

4.5.1 Brazil

Adhering to the jurisprudence signed by the STJ[111] [112], the DEFR stipulated that "*the mere existence of an economic group without the requirements established by the head provision*(...)" [deviation of purpose or commingling of assets]" (...) *does not authorize the piercing of the corporate veil*[113]".

The writing is not the best. The idea of an "economic group" stems from the economic direction or dominant influence of one company concerning another, regardless of capitalist participation[114]. Technically, one can only speak of "piercing of the corporate veil" if there has previously been a corporate link, that is, capitalist participation, of which patrimonial effectiveness leads one company to be a partner of another.

If there is an owner's capital, there is a *group of corporations* in which control relationships can be established. In this context, art. 50/Paragraph 4/BCC should be read: reciprocal social participation – even in control relationships – is not enough to lift the veil of legal personality between corporations of the same group.

4.5.2 Canada

The legislation of Quebec does not specify group relations other than those already addressed previously[115]. It reinforces the doctrinal and jurisprudential development in that it is not enough to have an identification relationship [*alter ego*] by

[110] Chapters 4.3.1 and 4.3.4.
[111] REsp 1775269, published in 1-3-2019; AgRg no AREsp 549850, published in 15-5-2018.
[112] Explicative note: in doctrine, *see* MULLER PRADO, V.; TRONCOSO, M. C. "Análise do fenômeno dos grupos de empresas na jurisprudência do STJ", *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, v. 40, p. 97-120, abr./jun. 2008; CAMPINHO, S. "A responsabilidade por dívidas de sociedades integrantes de um mesmo grupo de fato", *Revista Semestral de Direito Empresarial*, Rio de Janeiro, n. 11, p. 93-120, jul./dez. 2012.
[113] BCC, art. 50, Paragraph 4.
[114] OLIVEIRA, F.; ROSENVALD, N. *O ilícito na governança dos grupos de sociedades*, Juspodivm, Salvador, 2019, p. 159-166; VANDEKERCKHOVE, *Piercing the Corporate Veil, Ob. Cit.*, p. 18;
[115] Chapters 4.2.2, 4.3.2, and 4.4.2.

fact or legal control but the intentional manipulation in the sense of the practice of the acts contained in art. 317 of the QCC[116] [117] [118].

4.5.3 Spain

The regulatory gap in Spanish Law has also led to the majority understanding that the mere existence of a corporate group is insufficient for the piercing o the corporate veil[119] [120]. The dominant jurisprudence requires that, in addition to the corporate relationship, the existence of exceptional circumstances that allow overcoming the rule of limitation of liability between the companies belonging to the group be proven, which is usually linked to the proof of fraudulent misconduct[121]. Some exceptions to this rule are found in the Courts that judge employment relations[122].

4.5.4 Partial Considerations

Alone, the new protection provided by the DFER will have little contribution to the limitation of patrimonial liability in Brazilian corporate groups. When damages caused by business activity affect relationships outside the Civil Code[123] - especially consumer relations - the mere existence of a group relationship will attract the liability of all participants in the corporate chain, as the State Courts have been deciding[124].

In other relationships, the STJ has asserted its jurisprudence: the mere existence of a corporate group does not lead to piercing the corporate veil. To overcome this impasse and achieve the forced satisfaction of the credit, some State Courts have issued decisions of dubious legality, considering there to be abuse by "commingling of assets" – a legitimate hypothesis provided for by art. 50/BCC - by the simple characterization of *alter ego* financial relationships, as opposed to Canadian and Spanish practices[125].

5 Final considerations

This research conducted a functional comparison of the Brazilian regulation on the subject, making partial considerations on *(i)* the degree of legislative regulation, *(ii)* the exceptionality of its application, *(iii)* the need for specific intent, *(iv)* the subsidiarity of the patrimonial liability of the partners, *(v)* the criterion and degree of

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[116] BIRON, J. "Livre 1 – Des Personnes", *Code Civil du Québec: annotations – commentaires*, 5. ed, Editions Yvon Blais, Montreal, 2021, p. 310-311 [*The liability of a person who is a majority partner and director of a legal person may be held when he has used the legal person he controls as a screen to camouflage the fact that he has committed fraud or an abuse of rights or contravention of a rule of public order* (…). *Although the presence of an alter ego relationship is decisive in the application of article 317, this proof alone is not sufficient.*] Free translation.

[117] MACKAAY y ROUSSEAU, *Análise Econômica do Direito, Ob. Cit.*, p. 611.

[118] RENAUD, *Code Civil du Québec Annoté, Ob. Cit.*, p. 411.

[119] BOLDÓ RODA, *Levantamiento del velo y persona jurídica en el Derecho Privado Español, Ob. Cit.*, p. 456.

[120] GARCÌA, *La doctrina del levantamiento del velo como supuesto de responsabilidad tributaria, Ob. Cit.*, p. 134-136.

[121] Spanish Supreme Court, Case 738, de 13-12-2012.

[122] In which some decisions consider the existence of the group – HURTADO COBLES, *La doctrina del levantamiento del velo societario en España e Hispanoamérica*, *Ob. Cit.*, p. 69-74

[123] Chapter 4.1.1.

[124] TJPR, Case 0004381-64.2022.8.16.0000, published in 27-4-2022; TJSP, Case 0100259-14.2021.8.26.9040, published in 18-5-2022; TJDF, Case 7052936920228070000, published in 13-6-2022.

[125] TJPE, Case 5237407, published in 20-9-2019; TJSP, Case 21557303820218260000, published in 22-11-2021

liability of the partners subject to veil piercing, and *(vi)* the impact on group relationships.

Alongside the Canadian and Spanish systems, Brazil can be considered a persistent regulator of the phenomenon of piercing the corporate veil. Strictly speaking, the changes brought by the DEFR on the Civil Code were the latest in a series of attempts to mitigate the effects of a culture of contempt for patrimonial autonomy initiated in 1990 by the Consumer Protection Code by allowing the lifting of the veil for any breach of contract or illegal act. For fear of jurisdictional creativity in the elasticity of interpretation of concepts such as "deviation of purpose" and "commingling of assets," it reached the point of considering legal definitions dispensable in the comparative systems.

Brazil over-legislates for fear of its judges. Even in a *Civil Law* system, the stability of Canadian jurisprudence, with decades of a culture of understanding the importance of the limitation of patrimonial liability, did not allow the criticized opening given by the QCC to allow the lifting of the veil in cases of "abuse of rights" to be read in such a way as to dispense with intent. Likewise, Spanish jurisprudence has led, from 1984 to the present day, to a restrictive and exceptional application of the institute without having created even one line on the subject in its Civil Code.

This fundamental difference of understanding in applying the Law led the Brazilian legislator to a counterattack contrary to international practice, conferring the benefit of subsidiary liability even to those who intentionally abuse legal personality. Without an understanding of local history, a Canadian or Spanish jurist would have difficulty understanding why a parliament chose to protect fraudsters by giving them company assets [their victims] as a shield. The answer is: because, looking at Brazilian legislation from a macroconsumerist labor, environmental, competitive, and tax perspective[126] -, it is easy to see that the commission of fraud, of acts "*to mask*," is a minority – and, perhaps, fractional-hypothesis of cases of piercing of the corporate veil.

Indeed, the limitation of equity liability is widely known as an incentive for risky investments and activities. This in itself does not give it an absolute, or even a priority, status in the regulation of the exercise of economic activities by the State. Nations usually regulate the direct liability of managers for the practice of illicit acts. Even among partners, some organizational models give them unlimited and/or subsidiary liability for the obligations assumed by the corporate personality, which can be used before specific incentives in achieving credit, constitution facilities, maintenance costs, and even reputational gains.

On the other hand, the regulation of a limited liability model presupposes stability and security regarding patrimonial liability. These characteristics do not confer carte blanche for negligence with fiduciary duties but function as a state guarantee that, obeying certain premises – or not practicing certain acts previously considered as abusive – the separation between personal and business assets will be guaranteed.

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[126] In the latter, the liability of the partners is direct, and it is not exactly a case of piercing the corporate veil [Brazilian National Tax Code, arts. 134 and 135].

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