

# JUNHE SPECIAL REPORT



December 15, 2020

## THE RECENT JUDICIAL DEVELOPMENT OF “PIERCING THE CORPORATE VEIL” IN CHINA

### 1. Summary of “Piercing the Corporate Veil” and the relevant regulations

“Piercing the corporate veil” (also known as “forward disregard of corporate personality”, hereinafter referred to as the “**forward disregard**”), originated in the United States. The doctrine is used to prevent shareholders from abusing the separate legal personality of a company and the limited liability of the shareholders from evading liabilities and harming the interests of the creditors of the company in question. Under this doctrine, when the aforementioned situation occurs, the company’s separate personality should be denied, with the company’s veil lifted (pierced) and the shareholder to be held liable for the company’s debts. The value of such a doctrine is to address an inherent problem in the limited liability system, to balance the interest between the shareholders and the creditors, and to promote good faith in transactions.

Article 20 Section 3 of the “Company Law of the People’s Republic of China” (hereinafter “People’s Republic of China” referred to as “**PRC**”) sets forth the *Forward Disregard* doctrine. Based upon this provision, and after exploring and consolidating years of judicial practice, the Supreme People’s Court of PRC (hereinafter referred to as “**Supreme People’s Court**” or “**SPC**”) issued the “Notice by the Supreme People’s Court of Issuing the Minutes of the National Courts’ Civil and Commercial Trial Work Conference” (hereinafter referred to as “**Jiu Min**

**Minutes**”<sup>1</sup>) on November 8, 2019, of which Section II (4) lists *three* common acts deemed to be abusing the separate personality of the company and the limited liability of its shareholders, *i.e.*, *confusion of personalities* (failure to maintain separate identities [of companies]), *excessive domination and control* (failure to maintain separate identities of the company and its shareholder[s]), and *significant capital inadequacy*. The *Jiu Min Minutes* made the decision making rules regarding *forward disregard* clearer to interpret.

Despite these written provisions under the *Jiu Min Minutes*, different courts have different interpretations of the legal facts and the laws. Therefore, we believe a case study would help the parties to better understand and follow the rules of law, discover the legal principle and logic supporting the judgment and evaluate with greater certainty the legal risks involved.

In addition to ‘*forward disregard*’, there is also ‘*reverse disregard*’ and ‘*horizontal disregard*’ in Chinese judicial practice.

Reverse piercing the corporate veil (hereinafter referred to as “**reverse piercing**” or “**reverse disregard**”) means holding the company liable for its shareholders’ debts. To evade their debts, shareholders sometimes ignore the company’s separate personality and transfer their own property to the subsidiary company. Under such circumstances, the creditors may petition to

<sup>1</sup> *Jiu* means the ninth (9<sup>th</sup>), which refers to the sequential number of the national conference of such nature. *Min* is short for the Civil and Commercial Trial Work Conference.

disregard the corporate personality, so that the subsidiary company is held jointly and severally liable to its parent's debts.

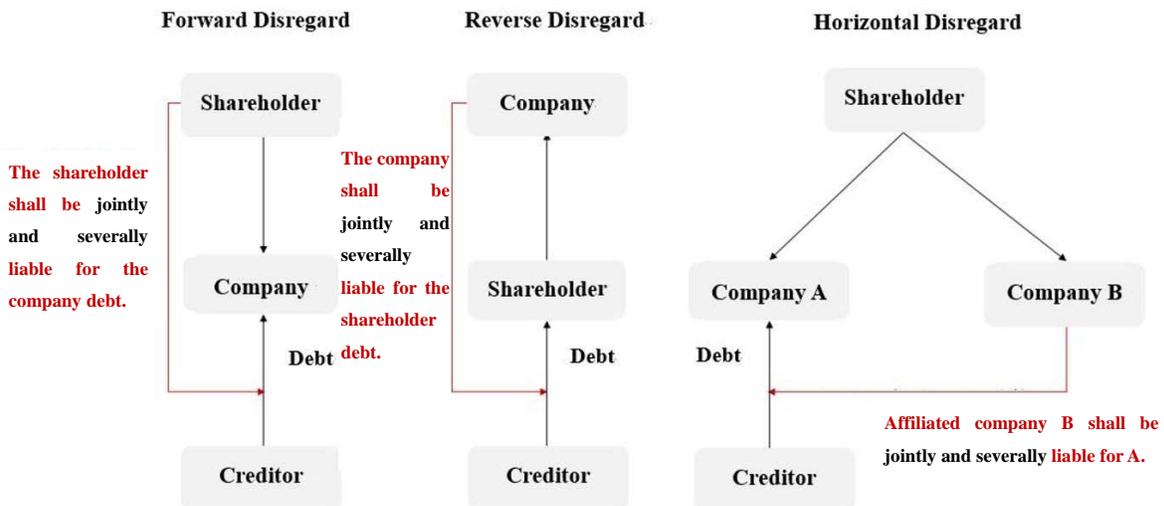
The horizontal piercing of the corporate veil (hereinafter referred to as “**horizontal piercing**” or “**horizontal disregard**”) means the disregard of the corporate personality between the *affiliated* companies that do not hold directly the shares of each other. The same shareholder or the person in control, by taking advantage of his or her control over affiliated companies, abuses the separate corporate personality and transfers one company's property or interest to another to evade individual debt. The question then is whether the creditor may disregard the personality of the affiliated companies and hold these affiliated companies liable for the original debt. Guiding Case No.15, published by the Supreme People's Court, is instructive, providing the judicial rules under the *horizontal disregard*. While they are not yet part of any statutes, as a matter of practice, the *reverse disregard* and *horizontal disregard*, along with the traditional *forward disregard*, constitute the framework of

the multi-dimensional doctrine of the disregard of corporate personalities in judicial practice.

## 2. Current judicial practice of disregarding the corporate personality

As mentioned above, due to the complexity of the transactional relationship between the parties, the shareholder's abuse of the separate corporate personality varies from case to case, and the written legal system is not adequate to provide complete and sufficient rule guidance. Chinese written law has not set forth specific provisions concerning the reverse disregard and horizontal disregard. Thus we believe it is necessary to review, recapitulate and summarize how all three disregard doctrines, *i.e.*, *forward disregard*, *reverse disregard* and *horizontal disregard*, developed in judicial practice, by means of a case study.

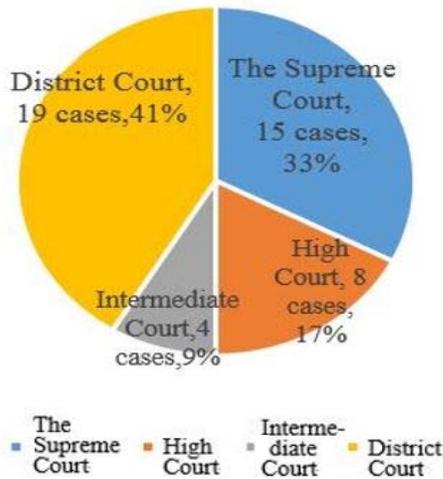
For ease of understanding, we have constructed a diagram to show the legal relationships and liabilities allocated among parties for these three types of disregard of personality:



We started by doing a search of the key words “disregard of personality”, “piercing the corporate veil”, “affiliated company” and “joint and several liability”, on databases such as China Judgments Online, Wolters Kluwer, Pkulaw.com, Faxin.com, and Wusong.com. After excluding the cases involving limited liability companies with a sole

shareholder, we selected 46 cases regarding personality disregard, sorted by their relevance and representativeness. The preliminary statistics collected according to the locations and levels of the courts, types of personality disregard, and nature of judgments, etc. is set out as below:

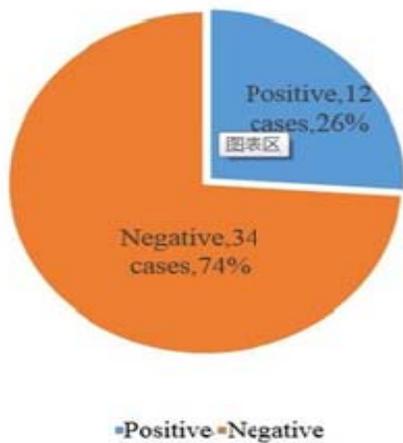
Court Level



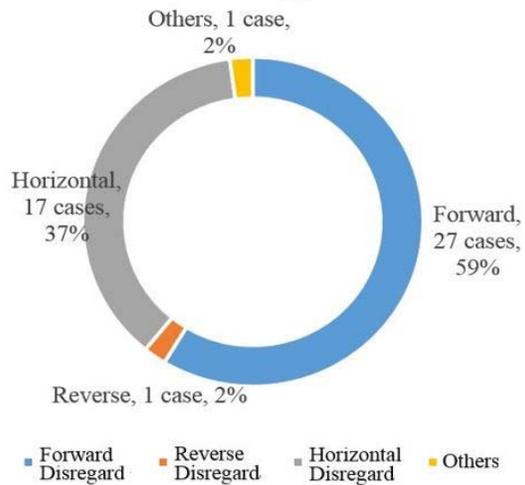
Location



Judgment



Case Type



In the cases we selected, the percentage of the judgments in favor of the creditor who brought up the corporate disregard lawsuit accounted for approximately 26%.<sup>2</sup> We believe that a court's attitude on this issue may be related to its location and its level, the type of personality disregard and other *prima facie* elements. However, when diving deeper into this issue, we discovered that the court's decision bears a closer relationship with elements such as judging principle, constitutive element and burden of proof. The following will illustrate this more specifically.

### 3. Judging rule in judicial practice – An analysis of the judging principle, constitutive element and the burden of proof

Through study and analysis of the searched cases, we made the following preliminary summary of the main rules handling the *forward disregard* and *horizontal disregard*, including but not limited to the judging principles, constitutive elements, and burden of proof, etc., discussed respectively below.<sup>3</sup>

#### 3.1 Judging principles

Influenced by the statutory law tradition, there are two basic principles when the courts rule on the personality disregard issue while adhering to the judicial restraint in commercial law field. The application of these two principles is theoretically undisputed and strictly followed in practice.

##### 3.1.1 Strict rule

“Strict rule” is a judicial attitude in China, the logic behind which lies in the adhesion and respect to the limited liability of shareholders. Article 20, Section 3 of the Company Law is an illumination of such an attitude, by using phrases such as

“abusing”, “evade the payment of its debts” and “seriously injures” [as thresholds for piercing the corporate veil may be considered]. Section II (4) of the *Jiu Min Minutes* uses “only if” to illustrate the conditions of applying the “strict rule”. The life of the law is in its application. The “strict rule”, as a general principle, is materialized through various specific but strict constitutive elements and burden of proof in practice. In the case Civil No.656 [2018], Retrial, Civil Division, Supreme People's Court, the SPC explicitly ruled that the “(the court) should be strict on deciding the corporate personality disregard issue”, which specifically means being strict in examining and interpreting the multiple aspects of the “transaction process”, “company address”, “employees”, “company business”, “financial settlement”, and “tax receipt issuance”, etc., in transactions between the parties concerned. In another case Civil No.3168 [2016], Retrial, Civil Division, Supreme People's Court, the SPC ruled that “for the affiliated companies that do not hold shares of each other, the confusion of personalities and asking affiliated companies to take the joint and several liability, requires solid evidence proving that the involved companies confused their superficial personality elements with each other (*i.e.*, employees, business, and finance, etc.) to the severe extent that each individual company's property may not be distinguished, resulting in a loss of separate personalities, which shall be deemed the confusion of personalities. Such confusion made it difficult for the creditor to identify the true debtor, allowing the affiliated company to evade the debt in a huge amount, which eventually jeopardized the creditor's interest.”

[Case Summary]

The disregard of corporate personality should be scrutinized and determined strictly with the

---

<sup>2</sup> The percentage here is based only on the cases selected by us.

<sup>3</sup> It should be noticed that there are relatively fewer cases involving the reverse disregard issue. However, considering that the legal theory is essentially identical to the balance of interest behind the personality disregard doctrine, we deem the following rules applicable to all types of personality disregard cases despite the fact that they were mostly extracted from the forward and horizontal disregard cases.

relevant rule applied with discreet.<sup>4</sup>

### 3.1.2 Individualized decision

According to the interpretations in Section II(4) of the *Jiu Min Minutes*, individualized decisions in a case include the following three rules: 1) the disregard of corporate personality is not overall, complete or permanent, but rather a judgment where the persons hiding behind the corporate veil assume the liability as an exception in one individualized decision based upon the specific facts and legal relationships. 2) The judgment deciding the disregard of corporate personality is only binding on the parties involved in that individual case, which shall not affect the continuance of the separate independent legal status of the company. 3) The disregard in one single case does not automatically apply to the other lawsuits involving that particular company. However, if other creditors file a lawsuit requesting to disregard the corporate personality, the facts admitted by an effective ruling can be used as evidence in later cases.<sup>5</sup>

#### [Case Summary]

One of the legal characteristics of disregard of corporate personality is it disregards the independent personality in one specific case only, not an overall, complete or permanent disregard.<sup>6</sup>

### 3.2 Constitutive elements

We have found four constitutive elements as

follows through our analysis and summarization of the searched cases. To secure a favorable judgment, the plaintiff (often the creditor) needs to prove that these four elements are satisfied.

#### 3.2.1 Subject

Subject element includes mainly two aspects: one is the party who abuses the corporate personality; the other is the party who is entitled to file the corporate personality disregard lawsuit. According to Article 20, Section 3 of the Company Law of PRC, after a decision of a *forward disregard* is made, there is no doubt that the shareholder (including the natural person shareholder or legal person shareholder) will have to take a joint and several liability with the company. This is clearly articulated in the written statutes. Besides, Article 13 of the *Jiu Min Minutes* expressly provides the legal standings of the shareholder and the company. Looking forward, it seems necessary that the scope of the subject needs to expand. Specifically, whether we should be permitted to file a lawsuit of disregard of corporate personality against the actual controlling person (not the shareholder on record) as the defendant? Can an affiliated company be the defendant in such a lawsuit? In Guiding Case No.15, the court decided to disregard the separate personality of the affiliated companies and ordered the companies involved to bear joint and several liability with each other, reasoning that the confusion between the affiliated companies “violated the purpose of establishing the separate legal personality and the principle of honesty and good faith. The nature and the damage of such an act is equivalent to those specified in Article 20, Section 3 of the Company Law of PRC, referring to which the court made this decision to disregard independent legal personalities of affiliated companies.” Guiding Case No.15 is

<sup>4</sup> See Civil No.656 [2018], Retrial, Supreme People’s Court; Civil No.3168 [2016], Retrial, Supreme People’s Court; Civil No.198 [2015], Final Civil Division I, Supreme People’s Court; Civil No.8168 [2019], Final, Civil Division II, Second Intermediate, Shanghai.

<sup>5</sup> Article 93 of “Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China” provides that “A party need not provide evidence for the following facts: ... (5) Facts confirmed by effective rulings issued by people’s courts”.

<sup>6</sup> See Civil No.1746, No.1747 [2020], Retrial, Supreme People’s Court.

quite typical and instructive, with its “referring to” ruling being respected and followed by many courts<sup>7</sup>. For example, in the case Civil No.12622 [2018], Final, Civil Division, the First Intermediate Court, Shanghai, the court ruled that Article 20, Section 3 of the Company Law of PRC can be expanded to address the confusion of personalities issue between the affiliated companies, citing Guiding Case No.15.

[Case Summary]

Although *horizontal disregard* has no statutory basis, when there is confusion of personalities, after having identified the opposing party of the transaction and the liability allotted among the affiliated companies, the corporate personality may also be disregarded and the affiliated companies should assume liability for each other, by referring to Article 20, Section 3 of the Company Law of PRC.<sup>8</sup> It is worth noting that, in 46 selected cases, there is one case involving *reserve disregard*, where the creditor requested the company to bear a joint and several liability for the shareholder’s individual debt, based upon Article 20, Section 3 of the Company Law of PRC. The court denied the request, explicitly stating that even with a confusion of property, “there is no such provision in the existing laws that allows the *reverse disregard* of corporate personality. Thus, the condition is not satisfied in the current case to apply the disregard of corporate personality rule”.<sup>9</sup>

The message sent in the above case is that judicial practice focuses more and more on innovation and substantial fairness and does not ignore the demands of voices in practice or stay

<sup>7</sup> See the Guiding Case No.15, *i.e.*, Civil No.0107 [2011], Final, Commercial Division, High Court, Jiangsu.

<sup>8</sup> See Civil No.S292 [2012], First, Civil Division II, District Court, Putuo; Civil No.S5 [2014], Retrial, Civil Division II, District, Putuo.

<sup>9</sup> See Civil No.60 [2019], Retrial, Civil Division, High Court, Jiangsu.

comfortable with the limitations of legislated languages. We believe that while most of the subjects who abuse the corporate personality and damage the creditor’s interest are indeed shareholders, the subject in the corporate personality disregard case should not be rigidly limited to the shareholders, which is not a mandatory element in the statute. We believe, out of a concern for substantial fairness, the *reverse disregard* will be gradually recognized and admitted in future judicial practice.

### 3.2.2 Act

The core and the most difficult benchmark to determine corporate personality disregard is the element of *act* – what exactly is an act of “abuse”? To what extent does “abuse” warrant “piercing”? Does the element of “abuse” also imply some subjective fault with intent? We noted that most decisions that do not support piercing were because the creditor had failed to prove the abusive *act* of the shareholder. Summarizing the judicial practice, the *Jiu Min Minutes* listed three common abusing acts of shareholders: *confusion of the personalities* (Article 10), *excessive domination and control* (Article 11), and *apparent capital inadequacy* (Article 12).

[Case Summary]

(1) In practice, courts mostly take their considerations from the employees, business and finance perspectives to decide whether there is a confusion of personalities,<sup>10</sup> and we have formed the following opinions with analysis of the respective specific situations:

A. As to the confusion of employees, it is not

<sup>10</sup> See Civil. No.4065 [2017], Retrial, Civil Division, Supreme People’s Court. See Civil. No.419 [2014], Retrial, Civil Division, Supreme People’s Court. Civil. No.1746, No.1747 [2020], Retrial, Civil Division, Supreme People’s Court. Civil. No.3168 [2016], Retrial, Civil Division, Supreme People’s Court.

the confusion of personalities for the shareholder to appoint the same director or the same chairman of the board, or to hold a concurrent post not forbidden by law at both the parent and the subsidiary company.<sup>11</sup> However, if the same employees are employed by multiple [related] companies and these cross-employed employees sign documents on behalf of these companies for an extended period of time, these combined elements are likely to lead the court to decide that there is a confusion of personalities.<sup>12</sup>

B. As to the confusion of business, mere identical business scope [of two related companies] is not equivalent to the confusion of business.<sup>13</sup> However, if it is combined with the overlapping domicile and business place (versus registered addresses), the court is likely to decide that there is a confusion of business.<sup>14</sup> The standard of determining whether there is a confusion of business is that the party of the transaction has difficulty identifying the counterparty.<sup>15</sup>

C. As to mixing the property, even if the shareholder pays through its individual bank account for the company transaction, it may be part of his or her corporate duty, or an act to pay off the corporate debt in time, and such an act is not identical to mixing the property.<sup>16</sup> That the consideration is not actually paid for by the equity transfer is not equivalent to mixing the property.<sup>17</sup>

---

<sup>11</sup> See Civil. No.4065 [2017], Retrial, Civil Division, Supreme People's Court; Civil. No.656 [2018], Retrial, Civil Division, Supreme People's Court; Civil. No.2149 [2014], Retrial, Civil Division, Supreme People's Court; Civil. No.353 [2017], Retrial, Civil Division, Supreme People's Court; Civil No.51, No.58 [2018], Retrial, Civil Division, High Court, Beijing; Civil No.805[2015], First, Civil Division II, District, Putuo.

<sup>12</sup> See Civil No.419 [2014], Retrial, Civil Division, Supreme People's Court.

<sup>13</sup> See Civil No.4065 [2017], Retrial, Civil Division, Supreme People's Court.

<sup>14</sup> See Civil No.419 [2014], Retrial, Civil Division, Supreme People's Court.

<sup>15</sup> See Civil No.0107 [2018], First, Civil Division, District, Putuo.

<sup>16</sup> See Civil. No.106 [2019], Retrial, Civil Division, Supreme People's Court.

<sup>17</sup> See Civil No.1376 [2013], First, Civil Division II, District, Fengxian.

The use of a small amount of the company assets by the shareholder without substantially jeopardizing the financial foundation of the company is not equal to mixing the property.<sup>18</sup> Usual business practices such as setting up a co-managed account to supervise the use of the purchase payment or frequent transfers back and forth does not constitute mixing the property.<sup>19</sup> However, not having an independent financial management system, mixing the accounts, account books and the funds may be deemed as mixing the property.<sup>20</sup>

(2) Even if the company has not been conducting any actual business, it does not mean it is not entitled to the separate status.<sup>21</sup>

(3) Legal and publicly announced revision of the articles of association agreed to by the shareholders and not against any individual creditor, does not constitute excessive domination and control.<sup>22</sup>

(4) That the registered capital is less than the total debt is normal business practice to “throw a sprat to catch a whale” and is not equivalent to significant capital inadequacy. As long as a shareholder has paid its capital contribution and passed the verification of capital contribution, it should not be deemed as false or inadequate capital contribution. The *apparent capital inadequacy* is usually related to false capital contribution, inadequate contribution or unlawful taking of the contribution made by shareholders.<sup>23</sup>

---

<sup>18</sup> See Civil No.268 [2014], Retrial, Civil Division, Supreme People's Court.

<sup>19</sup> Civil No.51, No.58 [2018], Retrial, Civil Division, High Court, Beijing; Civil No.5954 [2018], First, Civil Division, District, Xuhui.

<sup>20</sup> See Civil No.22207 [2018], First, Civil Division, District, Putuo.

<sup>21</sup> See Civil No.2149 [2014], Retrial, Civil Division, Supreme People's Court.

<sup>22</sup> Civil No.805 [2015], First, Civil Division II, District, Putuo.

<sup>23</sup> See Civil No.00111, No.00112 [2011], Final, Civil Division II, high Court, Anhui.

(5) There are some cases that do not fall into any of the above three representative types but were decided directly as the abuse of corporate personality and the limited liability of the capital contributor, based on some specified facts. For example, in Civil No.2302 [2020], Retrial, Civil Division, Supreme People's Court, the SPC decided that "the subsidiary does not have right to assets disposal. The financial assets completely come from the Group, and the Group distributed the employee benefit. It has not met the threshold for independent operation and self-financial independence."

(6) Element of *act* does not only include the objective aspects, but also includes the element of *fault*. Because the word "abuse" implies malicious intent to evade debts and harm the creditor's interest, the implication of which shall also be taken into account by the court in determining if there is an "abusive" act.<sup>24</sup>

The act of "abuse" is not a closed concept, and the three common representative types are not meant to be exhaustive. The determining standard still depends on if there is an act of debt evasion and harm to the creditor's interest, and on the result and causation, etc. This is the primary reason why such a rule is hard to apply and always in dispute. Now that we have managed to summarize the representative types of acts through a study of the current cases and have grasped their essence and nature, we believe that with the development of the judicial practice, the standard for deciding the acts will become clearer.

### 3.2.3 Result

As the name implies, the *result* element is to

---

<sup>24</sup> See Civil No.37 [2016], Retrial, Civil Division, Supreme People's Court; Civil No.106 [2019], Retrial, Civil Division, Supreme People's Court.

address the problem of whether the harm to the creditor caused by an abusing act actually impacts the settlement of the debt. To wit, whether the result thereof is so severe that it is necessary to "pierce" the veil. The *result* element actually includes two aspects: the first is that the creditor's interest is severely harmed due to the confusion of personalities of the affiliated companies, and the second is that there is no other means to protect the creditor's interest but to apply the disregard of corporate personality.

The SPC ruled in Civil No.3168 [2016], Retrial, Civil Division, Supreme Court, that the creditor "failed to present evidence to prove that Kun He Company abused the separate corporate personality and the shareholder's limited liability or evaded the debt to Yuan Feng Company thus severely harming the interest of the creditor, *i.e.*, Zhu Kongwen." In Civil No.00076 [2013], Retrial, Supervisory Division, High Court, Hubei, the court ruled that "meanwhile, the harm to the creditor is the prerequisite for applying disregard of corporate personality." In Civil No.805 [2015], the Second Civil Division, District Court, Putuo, the court ruled that "the defendant company, in spite of its default, is still capable of paying off the debt," and decided "there was insufficient evidence to support a disregard of corporate personality." In Civil No.1908 [2013], the Second Civil Division, District Court, Fengxian, the court ruled further on this issue, deciding that "even with the confusion between the company and the shareholder, if the company's capability to pay off its debts is not determinatively ruled out, it is not appropriate for the court to disregard the corporate personality."

[Case Summary]

The abusing act must have severely harmed the creditor's interest, making it impossible to collect

the debt. If the company is capable of paying off the debt with its own assets, then there is no need to disregard the corporate personality.<sup>25</sup>

As mentioned previously, the determination of the *act* element is the key point for the corporate personality disregard dispute. Many legal professionals place their attention on the *act* element but ignore the *result* element which is almost of equal importance. We believe that even with the *act* element satisfied, if there is no adverse impact on the company's ability to pay off the debt, it is not appropriate to make one end suddenly outweigh the other end of the scale. To wit, it is unnecessary to break the balance and challenge the separate company personality.

#### 3.2.4 Causation

The disregard of corporate personality requires special constitutive elements and conditions for application. Nevertheless, this type of case is a tort dispute in essence. Therefore, traditional elements for tort liability are still indispensable in the personality disregard dispute. To prove *causation* is always the most delicate step in a tort case, because whether the causation chain can piece up the scattered elements essentially determines whether there is a connection between the shareholder's act and the creditor's damage and will determine whether the shareholder should be liable for the company debt.

According to the case study, the courts mainly adopt the *substantial causation* theory as the standard to prove causation (*i.e.*, the causation, as an element of any tortious act, requires only a

---

<sup>25</sup> See Civil No.3168 [2016], Retrial, Civil Division, Supreme People's Court; Civil No.00067, No.00042 [2013], Final, Supervisory Division II, High Court, Hubei; Civil No.12622 [2018], Final, Civil Division I, First Intermediate, Shanghai; Civil No.5954 [2018], First, Civil Division, District, Xuhui; Civil No.805 [2015], First, Civil Division, District, Putuo; Civil No.805[2015], First, Civil Division II, District, Putuo; Civil No.1908 [2013], First, Civil Division II, District, Fengxian.

certain fact which, according to the common experience, is sufficient to bring about the same result as the damage shown in the case fact. Besides, many of the courts also require the parties to prove the causation between the act and the scope of damage. Successful proof of causation would not only answer the question of whether the shareholder is liable, but also would determine the damages that the creditor may finally be awarded, which carries significant weight to the creditors.<sup>26</sup>

### 3.3 Burden of proof

In fact, the analysis of the aforementioned four elements embodies our analysis on the burden of proof, including exactly what kind of act to prove, how to prove such an act, how to prove malicious intent, and how to prove the extent of the damage, etc. We will discuss the principle of and exception to the burden of proof in the following separate subsections.

#### 3.3.1 The Principle – the pleader bears the burden of proof as to its own contention

According to Article 64, Section 1 of the Civil Procedural Law of PRC, a party shall have the burden to provide evidence for its claims. This is a common principle for any usual civil procedural issue, which should be applied to the corporate personality disregard case as well.

#### 3.3.2 The Exception – the plaintiff bears the initial burden of proof and the defendant bears the shifting burden of proof

Nevertheless, the internal documents, materials and data required to prove any confusion

---

<sup>26</sup> See Civil No.530 [2018], Final, Civil Division, Supreme People's Court; Civil No.12622 [2018], Final, Civil Division I, First Intermediate, Shanghai; Civil No.14248 [2016], First, Civil Division, District, Fengxian; Civil No.5929, No.5956, No.4565, No.11173 [2017], First, Civil Division, District, Chongming.

between the shareholder and the company, or the shareholder's excessive domination and control over the company, or significant capital inadequacy, are usually under the possession or control of the defendant company and the shareholder. Besides, the proof relating to an office system or email correspondence usually requires cooperation from the company or the shareholder to provide the password or grant the authority.<sup>27</sup> Furthermore, the law does not expressly provide whether the shifting burden of proof or presumption of fault can be applied to the corporate personality disregard case. As a result, creditors often have difficulty to collect sufficient evidence to prove its own corporate personality disregard contention.

In light of the above difficulties, the judicial practice is becoming more flexible on this issue. Specifically, the plaintiff, *i.e.*, the creditor, only needs to provide the preliminary proof to lead the court to a reasonable doubt, and the court would request the defendant, *i.e.*, the shareholder or the company, to provide the contradicting proof to clear the doubt and prove that there is no abusing act.<sup>28</sup> Generally, the shareholder and the company can establish the company's separate personality by providing the complete and standardized internal control process and standards, the employment contract of the employee and the payment record of social insurance, independent financial system and financial report, and so on. Such flexibility, on the one hand, makes it less difficult for the creditors to discharge their burden of proof; on the other hand, it avoids imposing too much

unnecessary pressure on the shareholder or the company. This is of great help for fact finding and identifying legal relationships [in the disputed case]. The "Several Opinions of the Second Civil Tribunal of Shanghai Higher People's Court on the Trial of Cases of Denial of Corporate Personality" expressly admits such a variation in practice. Yet, based on the selected cases mentioned in this essay, this local practice in Shanghai courts has not been adopted nationally, but has the potential to become a nationwide practice.

#### 4. Conclusion and advice

The shareholder's limited liability rule is the cornerstone of the Company Law. Yet, there are more and more decisions in favor of the disregard of corporate personality. After the *Jiu Min Minutes* elaborated on the relevant rules, a lot more disregard cases are emerging. As a special post-event adjustment mechanism, the disregard of the corporate personality can provide a special relief for creditors.

Through the case studies and combined with our experience in many lawsuits involving corporate personality disregard issue, we have shared our thoughts based on our observation of the Chinese judicial practice and hope it can be inspiring. On one hand, the summary of these rules will help parties in a litigation to anticipate the legal risks, to adopt an effective strategy when initiating or defending lawsuits, to collect evidence and to make a breakthrough in a lawsuit; on the other hand, the summary of these rules can also help companies to comply appropriately, to take necessary precautionary measures, and to avoid the potential legal risk of corporate personality disregard as early as possible.

---

<sup>27</sup> China's discovery rules are very different and consequence of failing to provide discoverable documents usually has not little consequence or no consequence.

<sup>28</sup> See Civil No.4620 [2018], Retrial, Civil Division, Supreme People's Court, Civil No.14328 [2019], Final, Civil Division, Intermediate, Shenzhen; Civil No.14246, No.14247 [2016], First, Civil Division, District, Fengxian; Civil No.3602 [2018], First, Civil Division, District, Hongkou.

During the process of improving the system regarding the disregard of corporate personality, lawyers can take advantage of their front-line experience and play an active role in practice,

making important contributions to the refinement of the judicial rules and the improvement of corporate governance.

Zhenyong (Allan) Ye	Partner	Tel: 86 21 2208 6235	Email: yezhy@junhe.com
Sien BI	Associate	Tel: 86 21 2208 6381	Email: bisien@junhe.com
Jin WANG	Intern	Tel: 86 21 2283 8352	Email: wangj_Roxanne@junhe.com

---

The authors give special thanks to Mr. Adam Li, our partner, who edited extensively the English version of this article.

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of JunHe Law Offices. For more information, please visit our official website at [www.junhe.com](http://www.junhe.com) or our WeChat public account “君合法律评论”/WeChat account “JUNHE\_LegalUpdates”.

The same article will be published on XBMA.org forum. XBMA-The International Institute for the Study of Cross-Border Investment and M&A is a joint venture between the Guanghua School of Management at Peking University, the Stern School of Business at New York University, and Judge Business School at the University of Cambridge with the purpose to promote the high-level study and analysis of cross-border mergers, acquisitions and strategic investments. Its members include world-wide top investment banks, funds and elite law firms. The members actively participate the events hosted by XBMA and work together to shape the important cross-border M&A transactions

