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THE INCORPORATION OF THE SPECIFIC PURPOSE COMPANY IN THE PUBLIC-PRIVATE PARTNERSHIPS AND ITS EQUITY AUTONOMY

A CONSTITUIÇÃO DA SOCIEDADE DE PROPÓSITO ESPECÍFICO NAS PARCERIAS PÚBLICO-PRIVADAS E SUA AUTONOMIA PATRIMONIAL

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ABSTRACT

This article deals with a research on public-private partnership incorporated in Brazil by way of Law No. 11,079/2004, which public policy model sought inspiration in Anglo-Saxon Law. In addition, although the legal institution of the special purpose company

is already internalized in the Brazilian law even before the approval of the above-mentioned rule governing public-private partnerships, it was exactly after this regulatory framework that the incorporation of this company subspecies was established as an essential requirement for the conclusion of the State-company partnership contract. This paper sought to deepen the studies on the legislator's perspective by the incorporation of the special purpose company, analyzing its intention to promote the isolation of the risks inherent to the activities of the partners of this business subspecies, including the controlling entity of this company. The research made efforts to understand the specific purpose company's equity shielding in order to secure the economic matrix of the public-private partnership contract itself, including as a motive to add legal safety to the contract and maintain the economic and financial balance of the idealized partnership Company-state.

KEYWORDS: Special Purpose Company; Public-private partnership; Equity; Autonomy.

RESUMO

Trata o presente artigo de uma pesquisa acerca das parceiras público-privadas, instituídas no Brasil por intermédio da Lei nº. 11.079/2004, cujo modelo de política pública buscou inspiração no Direito Anglo-Saxão. Adicionalmente, apesar do instituto jurídico da sociedade de propósito específico já estar internalizado no sistema jurídico brasileiro, antes mesmo da aprovação da sobredita norma de regência das parcerias público-privadas, foi exatamente após este marco regulatório que se estabeleceu a obrigatoriedade de constituição desta subespécie societária, como requisito intransponível para a celebração do contrato de estabelecimento da parceria Estado-empresa. Este trabalho buscou aprofundar os estudos acerca da perspectiva do legislador pela constituição da sociedade de propósito específico, analisando a sua intenção de promover o isolamento dos riscos inerentes às atividades dos sócios dessa sub-espécie empresarial, inclusive da pessoa jurídica controladora dessa sociedade. A pesquisa engendrou esforços para compreender a blindagem

patrimonial da sociedade de propósito específico, com o fim de garantir a própria matriz econômica do contrato de parceria público-privada, inclusive como mote para agregar segurança jurídica ao contrato e manter o equilíbrio econômico-financeiro da idealizada parceria Estado-empresa.

PALAVRAS-CHAVE: Sociedade de Propósito Específico; Parceria Público-Privada; Patrimônio; Autonomia.

1 INTRODUCTION

This article will deal with the special purpose company, analyzing its specific characteristics in the field of corporate law, approaching the Anglo-Saxon model as inspiring this business portrait in Brazilian law.

The study will also seek to identify which corporate models allow the choice of specific purpose designation for business activity, noting that the special purpose company was not instituted as a new corporate species but as a business subspecies focused on a particular activity, and it may be incorporated for a certain and determined period.

Therefore, the hypothesis of optional and compulsory incorporation of the special purpose company for the accomplishment of public works and services will be compared, addressing the aspects of its formation for selected purposes in the public-private partnerships.

The reason why the Brazilian legislator sought inspiration in the Anglo-Saxon System to demand the incorporation of the special purpose company in public-private partnerships will be investigated, especially regarding the need to isolate the risks of this type of negotiation between the State and the company, giving the State more effective mechanisms for surveillance and transparency.

This study will also focus on the necessary separation, especially in public-private partnerships, of the parent company and the special purpose company incorporated for the execution of the partnership contract, avoiding the confusion of

equity between them, listing the hypothesis that the legislation allows the disregard of legal personality of the companies and their consideration for the purposes of equity solidarity.

The negative aspects of the disregard of the equity independence of the special purpose company and the parent company will be investigated, studying its effects on the impacts that this measure may have on the public-private partnerships and their economic matrix, that is, which impacts the confusion of equity between these companies and may influence the financial and economic equilibrium established in the State-company relationship.

The law applied to this subject will be studied and analyzed in relation to the set of all current Law and associated with the specific rules of Law that are pertinent to it, using, for example, the analogy and the general principles of Law as means of interpretation and integration of the legal system.

It is evident that the research was based on the systematic interpretation of the Brazilian legal system and comparative Law, setting these premises as the methodological route adopted and highlighting the epistemological path of coherence to be followed. The intention is to demonstrate the role played by the specific purpose company in Brazilian law, with its specific characteristics in public-private partnerships, also seeking to investigate the jurisprudential direction on the subject.

2 THE SPECIFIC PURPOSE COMPANY IN BRAZILIAN LAW AND COMPARED LAW

According to current legislation, the special purpose company – SPC (in Portuguese “SPE”) is not a new type of company and can be incorporated into one of several existing corporate models, from a limited liability company to a listed corporation.

What differentiates the specific purpose company, regardless of the type of corporate model adopted is its corporate object focused on a specific activity.

The real objective of the special purpose company, with particular deference in its use in public-private partnerships, refers to the Brazilian legislator that followed the Anglo-Saxon model and sought to promote the isolation of the financial risks of the developed activity.

The Civil Code in its article 981 clearly allows the incorporation of a company that restricts its activities to the accomplishment of one or more determined businesses:

> Art. 981. A partnership contract is executed by persons who mutually undertake to contribute, with goods or services, to the exercise of economic activity and the sharing among themselves of the results. Sole Paragraph. The activity may be restricted to conducting one or more specific businesses. 1

The adoption of the special purpose company is present in the daily practice of large companies, mainly because it is a type of joint venture, although it can also be used in small businesses; however, they are traditionally adopted in large engineering projects and necessarily in public-private partnership contracts.

The legislator, aiming to expand the applicability of the special purpose company, and thinking in facilitating the proceeding for small companies to adopt the same business modalities, enacted the amendment of article 56 of Law No. 123/20062 to enable micro, small companies and companies opting to the tax system called 'Simples Nacional', to do business in the purchase and sale of goods in the national and international market, by way of this corporate subspecies.

The purpose of making it a special purpose company is to divorce the new company from all parallel commitments and obligations of the parent company, whether past or future.

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[1] BRAZIL. Law No. 10,406, dated Jan. 10, 2002. Enacts the Civil Code. Available at: <http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm>. Access on: Oct. 28, 2019.

[2] BRAZIL. Law No. 123/2006. Enacts the Microcompanies and Small Companies National Statute, amends Laws No. 8,212 and 8,213, both dated July 24, 1991, the Labor Laws Consolitation (CLT), approved by Decree-Law No. 5,.452, dated May 1, 1943, Law No. 10,189, dated February 14, 2001, Law No. 63, dated January 11, 1990; and revokes Laws No. 9,317, dated December 5, 1996 and Law No. 9,841, dated October 5, 1999. Available at: <http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp123>.htm. Access on: Oct. 27, 2019.Available at: <http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp123.htm>. Access on: Oct. 27, 2019.

With regard to the utilization of the special purpose company in public-private partnerships, its primary objective is to isolate the risks of the partner and to promote the fulfillment of the goals set in the bidding process, which stage even precedes the incorporation itself of the special purpose company, due to the fact that its incorporation is only required after termination of the bidding process.

In addition, the special purpose company, which may be incorporated in one of the current company models, will have as its motto the raising of investments for the execution of the public project, which equity will never be confused with the business of shareholders or the parent company, or rather, the company incorporated for a specific purpose will have a distinct legal personality from its members, having broad equity autonomy.

André Luiz Santa Cruz Ramos states:

> The equity and legal autonomy that characterizes a company is based on the concept of separate assets and the consequent configuration of a differentiated legal interest, which is nothing but the interest of the company itself. The company has its own and distinctive interests, which are totally different from the partners individually, and it is upon this specific subjective sphere that the theory of legal personality is constructed.3

When the legislator opted for the requirement of the incorporation of this corporate mode, it aimed to avoid the potential contamination of the core activities of its shareholders with the scope and financial health of the public-private partnership project.

It is important to highlight that the special purpose company allows its incorporation through a project finance, that is, counting on assets of several shareholders, whether individuals or legal entities, or rather, it is not tied only to the capital of the parent company.

The utilization of project finance in the public-private partnership is very common; however, considering that the parent company becomes the winner of a bidding process, it should certainly be one of the shareholders of the company that will manage the partnership, especially because the partnership contract can only be

[3] RAMOS, André Luiz Santa Cruz. **Direito Empresarial esquematizado**. Rio de Janeiro: Forense; São Paulo: Método, 2011, p. 318.

signed with a new company incorporated under the terms of a special purpose company, as required by Law No. 11,079/2004:

> Article 9 - Prior to the conclusion of the contract, a special purpose company shall be set up to implement and manage the object of the partnership. Paragraph 1 - The transfer of control of the special purpose company shall be subject to the express authorization of the Public Administration under the terms of the notice and the contract, subject to the provisions of the sole paragraph of art. 27 of Law No. 8,987, dated February 13, 1995. Paragraph 3 - The special purpose company shall comply with the corporate governance standards and adopt standardized accounting and financial statements, as per regulation. Paragraph 4 - The Public Administration is forbidden to hold the majority of the voting capital of the companies referred to in this Chapter. Paragraph 5 - The prohibition provided for in Paragraph 4 of this article shall not apply to the eventual acquisition of the majority of the voting stock of the special purpose company by a financial institution controlled by the Government in the event of default of financing agreements.4

The keynote of Law No. 11,079/2004 is to ensure that the public-private partnership project is fully executed and is not influenced by the parallel or adjacent business of the special purpose shareholders of the company, as it is intended to ensure the real public interest in the work or service to be executed by the private partner, with the consequent neutralization of any indebtedness of its shareholders.

The legislator acted positively by requiring the incorporation of the special purpose company in the public-private partnership, considering that such solution was already provided for in the Common Concessions Law5, however, in this case, the requirement for the incorporation of the special purpose company must be expressly provided for in the bidding notice.

As for the requirement of incorporation of an SPC in the public-private partnership, Juan Luiz Souza Vazquez positively analyses the guidelines adpted by the legislator:

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[4] BRAZIL. Law No. 11,079, dated Dec. 30, 2004. Enacts general rules for bidding and public-private partnershihp in Public Administration. Available at: <http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm>. Access on: Oct. 27, 2019.

[5] BRAZIL. Law No. 8,987, dated Feb. 13, 1995. Enacts the concession and permission regime of presentation of accounts provided in art. 175 of the Federal Constitution. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L8987cons.htm>. Access on: Nov. 4, 2019.

> In our opinion, the legislator acted positively in demanding the SPC in the public-private partnership, considering that such solution was already used in the contracts executed with the Public Administration, by means of the inclusion in the bidding public notice of a clause determining to the winner the incorporation of an SPC to exploit the concession. The aim has always been to become transparent the partnership with the State, preventing confusion over the resources that flow through the company's assets. In fact, the bidding company exploits other activities, assuming various other obligations to third parties that will not be related to the partnership, entering various resources into its assets. If this company were directly responsible for the exploitation of the partner, it would not be possible to separate the values related to its own activity from those derived from the partnership. And, to top it all off, the exploitation of the partnership could still be compromised by contamination of the risks arising from those other businesses practiced by company. In short, the corporate governance would be seriously undermined.[6]

As already highlighted in this study, both the Brazilian model of public-private partnership and the enhancement of the corporate subspecies known as the special purpose company were inspired and literally copied from the Anglo-Saxon model, which they named Vehicle for Special Purposes (SPV) or Special Purpose Entity (SPE).

Especially in England, these legal institutes were based on a solid premise that they are autonomous legal entities incorporated by a parent company, but clearly considered separate companies, considering that the eventual insolvency of the parent company would not affect the financial health of the special purpose company.

On the other hand, if there is an abuse of rights by the company, not only the Brazilian legislation grants a solution to the issue, but also the doctrine and jurisprudence established a understanding to curb the abuses of the parent company that incorporated the company for a specific purpose; mainly when they cause damage to third parties, the joint liability of the parent company due to the reckless business of the special purpose company incorporated by it is clearly considered.

Otherwise, the opposite cannot be true, under penalty of distortion of the legal nature itself and of the purpose adopted by the legislator when instituted this business

[6] VAZQUEZ, Juan Luiz Souza. **A SOCIEDADE DE PROPÓSITO ESPECÍFICO NAPARCERIA PÚBLICO-PRIVADA**: UMA ANÁLISE DE DIREITO SOCIETÁRIO. Master's degree dissertation, Universidade Cândido Mendes. Rio de Janeiro, 2009, p. 216. Available at: <http://www.dominiopublico.gov.br/download/teste/arqs/cp119788.pdf>. Access on: Oct. 29, 2019.

subspecies, especially if compared with the factual and legal reality that was built the ideal itself of public-private partnership in Brazil.

Considering that the legislative construction and the implementation of public-private partnerships originated exactly to complete a clear financial gap of the State, which is unable to make all the public investments necessary for Brazil's socio-economic development, the legislator would not have aimed to raise greater risks in this relationship.

In the following topic it will be analyzed the aspects and purposes of the special purpose company, highlighting its role in public-private partnerships, although, as has been said previously, this corporate subspecies pre-exists the contractual model provided for in Law No. 11,079/2004, being very common its use in the sphere of private relations in the field of construction.

3 THE OBJECTIVES OF THE SPECIAL PURPOSE COMPANY

In comparative Law, a special purpose company may take the form of limited partnerships, trusts, corporations or limited liability companies, aimed at sharing risk, securitization, transfer of assets, financings and capital raising, which conceptual design comes closer to the ideal of the Brazilian legislator.

By sharing risks, the company intends to reallocate part of the financial risks of the parent company to its subsidiary (special purpose company). The risk is shared among various investors. The objective is to isolate the financial risk in the event of bankruptcy or default.

In securitization of credits, the company is used to securitize loans or other credits. In addition, it can promote the transfer of assets because some by law or contract are non-transferable or difficult to transfer, meaning that the special purpose company is incorporated and sold as an independent package.

In public-private partnerships, the special purpose company, which must be legally incorporated, is commonly used to leverage project financing (ventures).

In the event of raising funds to structure the public-private partnership, the incorporation of this company mode will not increase the debt burden of the parent company, allowing investors to invest their revenues in specific projects without investing in the parent company.

Moreover, the special purpose company is widely used as a financing structure to raise additional capital at more favorable lending rates. Credit quality is based on the guarantees of assets of the company and not of its parent.

In view of this, there is no doubt that the main logic behind the incorporation of the special purpose company is to ensure that it will be treated separately from the parent company; however, basically the guarantee is that the company will be a new entity with an operating history very limited, which means a separate legal entity capable of holding assets managed by independent directors of the parent company to avoid confusion of interests and management conflict.

The activities of the special purpose company need to be restricted as a motto to reduce the risks of assumption of liabilities originated outside those related to securitization. The corporate activities of the company are kept separate from those of other parts of the transaction. In short, the company should not provide any guarantee for the obligations of any other company.

In addition to all the above mentioned singularities, the incorporation of this company bias will facilitate the settlement of specific disputes, clearly separating the assets and liabilities of the parent company from its own, allowing the supervision that can be performed by the Public Administration (cash flow), for example, in contracts of public-private partnership.

4 EQUITY CONFUSION BETWEEN THE PARENT COMPANY AND THE SPECIFIC PURPOSE COMPANY AND THE RISKS TO THE MAINTENANCE OF THE PUBLIC-PRIVATE PARTNERSHIP

The incorporation of the special purpose company is considered as one of the essential factors to attest the economic-financial balance itself of the public-private

partnership contract, preventing any eventual confusion of assets between the parent company and the new company from giving rise to unforeseen factors in the idealization and execution of the partnership, i.e., that are not foreseen in the allocation of business risks between the Government and the private sector, including the structuring of Value for Money.

The granting of contractual guarantees is modulated to the specific characteristics of the partnership, demonstrating this aspect the importance of preserving the autonomy of the special purpose company, under penalty of the literal collapse of the public project that it proposed to fulfill.

Maurício Portugal Ribeiro and Lucas Navarro Prado define the main objectives related to the incorporation of a specific purpose company:

> The main objectives of requiring the establishment of an SPC are the risk segregation and increase of management transparency. The same company often operates in more than one sector of the economy. And, in the same sector, there is a probability of facing business quite different. There is a serious risk of governance. This is because business risks other than the concession could contaminate it.[7]

In a formal point of view, the company in question assumes the distinct character of a joint venture, upon incorporation of a distinct legal entity from the pre-existing one to carry out an activity with the purpose and objective determined and common between the partners.

It is interesting to mention that the Ministry of Planning's guidelines on public-private partnerships and the target to incorporate the special purpose company, considering that such contractual modality, was defined as a priority of the Federal Government due to the shortage of public resources for investment in infrastructure works, or rather, it is a serious national public policy:

Mauricio Portugal Ribeiro and Lucas Navarro Prado clearly explained the concerns of the SPC:

[7] RIBEIRO, Mauricio Portugal e PRADO, Lucas Navarro. **Comentários à Lei de PPP – Parceria Público Privada**: fundamentos econômico-jurídicos. São Paulo: Malheiros, 2007.

> What is the target of the special purpose company (SPC)? The target of this legal requirement is to prevent the confusion of assets between SPC and other companies of its economic group, which could occur if the assets and revenues related to the PPP8 services were used in other businesses of SPC's partner companies. Law No. 11,079/2009, art. 9, introduces specific rules to special purpose companies in the context of public-private partnerships, but does not originate a new corporate type. The SPCs are only ordinary business companies of any type (limited company, corporation or other type provided by law), with a delimited corporate purpose (implementing and managing the object of the partnership - Law No. 11,079/2004, art. 9). The SPC also performs other useful functions in the context of PPPs. The separation between the project executor (SPC) and its owners (the concessionaires) offer a higher degree of accounting transfer to the PPP operation, allowing diagnoses about the real profitability of the project, financial soundness, operational efficiency and other useful information in the management of the contract. The existence of the SPC also facilitates the assumption of the concession by the project financiers in case of default, hypothesis authorized by Law No. 11,079/2004, art. 5, par. 2, I).[9]

In spite of the natural divorce of the activities of the parent company from those of the special purpose company, court decisions routinely arise, most frequently in the labor sphere, which choose to make the latter's financial resources unavailable to the detriment of commitments assumed or not fulfilled by the former.

It appears at first to be impracticable the attachment or any kind of unavailability of possessions or quotas of the company of specific purpose for facts unrelated to its typical activity, unless it is proven that there was abuse of legal personality, characterized by misuse of purpose or confusion of equity.

The abuse of legal personality by the managers of the special purpose company incorporated for the purpose of achieving the public-private partnership, can be characterized when engaged in an activity that is outside the contract that it intended to perform or the exercise of business activity aimed at the practice of unlawful acts.

Except if the abuse of the legal entity is proven, it will be detrimental to subject the company of a specific purpose to the commitments of the parent company,

[8] Parceria Público-Privada, which means Public-Private Partnership.
[9] BRAZIL. Ministério do Planejamento. Available at: <http://www.planejamento.gov.br/assuntos/desenvolvimento/parcerias-publico-privadas/referencias/copy_of_perguntas-frequentes>. Access on: Oct. 28, 2019.

originating a serious risk of deconstructing the structural basis that was designed to the public-private partnership and the respective execution of the work or public service by the company in favor of the Granting Authority.

To allow debts from the parent company to be executed against the incorporated company for specific purposes deconstructs the conceptual basis itself and the purpose of establishing this business subspecies, especially if it is a public-private partnership.

The confusion of assets between the parent company and the special purpose company violates the economic matrix of the partnership State- company, therefore, the judge decision determining the attachment of credits of the latter to cover expenses of the former is wrong.

An alternative doctrinal lesson emerges and admits the possibility of seizure of the shareholdings of the parent company, however, the first paragraph of article 9 of Law No. 11,079/2004 expressly states that the transfer of control of the special purpose company will be subject to the express authorization of the Public Administration.

> Article 9 [...] Paragraph 1. The transfer of control of the special purpose company shall be subject to the express authorization of the Public Administration, under the terms of the notice and the contract, subject to the provisions of the sole paragraph of art. 27 of Law No. 8,987, of February 13, 1995.

If the transfer of control of the company must be preceded by express authorization from the Public Administration, it is also shown that the credits coming from the State-company partnership also follow the same iter, as these values will be applied exclusively to the contract that binds them, besides being most of the time originated from tax collection.

In this point of view only the possibility of determining the eventual profit of the company's shareholder of the specific purpose company would arise if there were the possibility of withdrawal of profit, leaving only the attachment of part of these values, protecting enough for business survival, because the socioeconomic content of the company must be appraised.

It is worth to emphasize that this last solution is very complicated in practice; in the public-private partnership the company usually invests very high values in infrastructure works in favor of the Government, and rarely are the company's own resources, i.e., resources arising from fund-raising, either from financial institutions or capital markets.

In view of this, as the public-private partnership is nothing more than the financing by the private initiative of public infrastructure that the State proves unable to realize, in the end, the company expects to recover its investment plus profit. The financial return will generally come many years after the partnership is concluded, due to the amount of resources that are already employed at the beginning of the partnership.

Therefore, to imagine, the unavailability of credits of the quotaholder company consistent with the profit of the first years of private-public partnership is far too reckless, given the legal nature itself of this State-company relationship and the logic established in its contractual term of at least five and a maximum of 35 years, profit is certainly not something that is earned in the early years of the contract.

Moreover, due to the reported confusion of assets, another factor may be detrimental to the company to the extent that te Government may challenge the continuity of the public-private partnership with the private initiative due to the outflow of public funds to cover expenses which are strange to the company partnership, as it may directly impact the investments that need to be made in this contractual model. This shows not only damage to the company, but the negative reflexes that may resound to the fulfillment of the public interest.

5 HYPOTHESIS OF JOINT LIABILITY

Although technically the special purpose company represents the true longa manus of its founder (parent company), especially in the public-private partnership, it is certain that legally the parent company incorporates new legal entities, with their own legal personality, their own bookkeeping and other characteristics common to

limited companies or corporations, depending on the corporate model that is conceptually constructed.

Thus, the equity of the special purpose company may account for the parent company's individual debt only when its legal personality is disregarded. In this regard, but in the opposite direction, that is, when the parent company is responsible for the default of the company for specific purposes. José Edwaldo Tavares Borba clarifies that:

> The company has its own distinctive interests, which are totally different from the individual partners, and it is upon this particularized subjective sphere that the theory of legal personality is constructed. The disregard occurs exactly when the legal personality is distorted, ceasing to protect the company to which it corresponds to serve as a barrier to the performance of third parties, especially controlling shareholders. It is the abuse of form that leads to the imputation of responsibility to those who used the company as a mere instrument of their interests. S.P.C. or S.P.E. corresponds to a typical hypothesis of disregard of legal personality, so much so that these companies, when they are incorporated solely and exclusively to develop an action or a project of exclusive interest of their controlling shareholder.[10]

It is clear that, despite the peculiar characteristics of this type of company, it is certain that its own legal personality offers real shielding against the debts of its parent company, with redirection only in case of abuse of legal personality, as provided for in article 50 of the Civil Code:

> Article 50. In the event of abuse of legal personality, characterized by misuse of purpose or confusion of assets, the judge may, at the request of the party, or the Public Prosecutor, intervene in the proceedings, disregard it, so that the effects of certain relations of obligations are extended to the private property of managers or partners of the legal entity directly or indirectly benefited by the abuse.

Following the intellection adopted, it is concluded that, in principle, the assets of the special purpose company, including any existing cash in the current account, are only liable for the debts of the controlling partner in the event of abuse of legal personality by the management of the company for a specific purpose and not the other way around.

[10] BORBA, José Edwaldo Tavares. **Direito Societário**. 6. ed. São Paulo: Renovar, 2001, p. 493/ 495.

It must be fully proven the misuse of purpose or confusion of assets between the parent company and its creature, even if there was abuse of legal personality by the latter.

In the public-private partnership, it should be noted that the credits of the special purpose company come from public funds, and may even be the product of taxes, which are used as consideration for the State-company partnership contract.

The mere fact of incorporation of a special purpose company cannot be considered a legitimate reason for the judicial decree of disregard of legal personality, since such procedure is expressly allowed by law, even in the public-private partnership its incorporation is mandatory.

Due to this obligation, the interested party to receive any credit to fully has to demonstrate the abuse of incorporation of the specific purpose company. Juan Luiz Souza Vazquez asserts that:

> In addition, the obligation to set up an SPE is also justified by the provisions of Articles 5, Item IX and 27, both of Law No. 11,079/2004, as it would be extremely difficult to control the limit of investments made by public companies or mixed economy companies in such partnership. It would not be possible to establish whether the reduction in credit risk stemmed from the project itself or from characteristics strange to the business. The incorporation of the SPE also favors the private partner, as it limits its responsibility in the company incorporated, being worth remembering that the disregard of the legal personality is considered an exceptional measure, reason why the incorporation of the SPE will shield as the eventual failure of the activity.[11]

Jurisprudence has been following the position of the doctrine, although the collection of data from the Judiciary does not bring significant cases regarding public-private partnerships, precisely due to the practical novelty of this public procurement model, despite Law No. 11,079 being edited in 2004, only now has it been defined as a clear Government policy, except for specific cases in some Brazilian states.

As may be noted in the interlocutory appeal transcribed below, Rio Grande do Sul Court of Justice dismissed the disregard of legal personality and the advance of the effects of the conviction of companies that belong to the same economic group:

[11] VAZQUEZ, Juan Luiz Souza. Op. Cit., p. 216/217.

> INTERLOCUTORY APPEAL. PRIVATE LAW NOT SPECIFIED. COMPLIANCE WITH SENTENCE. REDIRECTION. ECONOMIC GROUP. DISREGARD OF LEGAL PERSONALITY. ART 50 OF CIVIL CODE. NO REQUIREMENTS. The disregard of legal personality requires the gathering of evidence that the company has been wrongly dissolved or that it is merely an alter ego of a sole trader, that is, an individual acting on his own behalf through a legal entity. In the present case, not being present the authorizing requirements of the redirection of the executive phase to other companies of the same economic group, the aggravated decision will be maintained. Interlocutory appeal not accepted. (TJRS. Interlocutory Appeal No. 70053046918, Twelfth Civil Chamber, Court of Justice of the RS, Rapporteur: Umberto Guaspari Sudbrack, Judged on May 9, 2013).

The decision reproduced above supported its position exactly in the hypothesis provided for in article 50 of the Civil Code, while the Federal District Court deals specifically with the possible distortion of the purpose itself of the incorporation of the special purpose company:

> CIVIL APPEAL. CIVIL PROCEDURAL AND CONSUMER LAW. PROMISE OF PURCHASE AND SALE OF PROPERTY IN THE PLANT. COMMERCIAL ROOM. INCORPORATOR (S) - CONSTRUCTOR (S) - INTERMEDIATOR (S). JFE 21 EMPREENDIMENTOS IMOBILIÁRIOS LTDA (SPECIFIC PURPOSE COMPANY). JOÃO FORTES ENGENHARIA S.A (CONTROLLER). CONTRACT RESOLUTION. BLAME (INITIATIVE). CONSUMER. PURCHASER BUYER (s). PRELIMINARY. ANSWERS. PLAINTIFF. PRINCIPLE OF DIALETICITY. NON-OBSERVANCE. DEFENDANT. NON OCCURRENCE. PRELIMINARY REJECTED. APPEAL. PLALINTIFF. RETAINED APPEAL. NOT ACCEPTED. CONVICTION. ECONOMIC GROUP. EXTENSION. IMPOSSIBILITY. COMPOSITION. PASSIVE PARTY. NON-OCCURENCE. SUMMONS. PARENT COMPANY. NON-EXISTENCE. RESPONSIBILITY. KNOWLEDGE PHASE. IMPOSSIBILITY. [...] 5. This does not allow the conclusion that there is no solidarity of the parent company with the obligations of the SPE established by it, under penalty of distortion of the legal institute created to increase consumer safety, and not empty the responsibility of the developer. However, without having properly integrated the lawsuit, through valid summons, there is no way to extend, in the knowledge phase, the liability to third parties. A different situation is one in which, in the execution phase, fulfilling its own requirements, it is possible to reach the equity of other company (s) participating in the same economic group. (TJDF. Judgment 928326, 20140111872545APC, Rapporteur: ALFEU MACHADO, Reviewer: ROMULO DE ARAUJO MENDES, 1st CIVIL CLASS, date of judgment: Mar. 17, 2016, published on DJE: Apr. 4, 2016. p. 111-139) .

The above decision deals precisely with the possible solidarity between the parent company and the special purpose company, emphasizing that it is not appropriate to discuss, in the context of a knowledge action, the liability of third parties,

pointing out that only such bias would be possible in the phase of execution of the sentence.

6 FINAL CONSIDERATIONS

The unavailability of credits arising from the public-private partnership contract to guarantee the payment of debt of the parent company may lead to the economic-financial imbalance of the partnership, directly affecting the concession contract, violating the principle of legal safety.

Legal safety is based on the breach of financial market reliability regarding investments in public works and utilities, inhibiting potential investors and entrepreneurs in view of a scenario of consistent uncertainty in the constraint of special purpose company credits.

In this direction, any judicial decision that states the unavailability of assets arising from the public-private partnership contract may cause irreparable damage not only to the company but also to the financial health of the contract, including with negative effects on the population that may be deprived of private investments provided for in the State-company partnership.

The idea of isolating contractual risks in the public-private partnership is right, not only giving the State more effective mechanisms of oversight and transparency, but also the guarantee for investors who invest large private resources in favor of the community, exactly when the State proves itself unable to meet the public interest.

Therefore, systematically analyzing the legislation in force, the intention of the legislator when editing Law No. 11,079/2004 in conjunction with other rules governing business corporations, it was clear that it sought to avoid the confusion of assets between the parent company and the special purpose company, listing the hypothesis that the legislation allows the disregard of legal personality of companies and their consideration for purposes of asset solidarity.

Allowing the trivialization of the disregard of the assets independence of the special purpose company will result in negative impacts on public-private partnerships,

affecting their own economic matrix and the financial-economic equilibrium established in the State-company relationship.

Finally, it was shown that the research was based on the systematic interpretation of the Brazilian legal system, seeking the origin of the legal institutes studied in comparative Law, delimiting the role played by the special purpose company in Brazilian *law, with their specificities in public-private partnerships*

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