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## COMPARATIVE LAW REVIEW

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# ANATOMY AND TERMINOLOGY OF BUSINESS ORGANIZATIONS: A BRIEF COMPARISON AND ASSIMILATION BETWEEN CHINESE AND ITALIAN COMPANIES<sup>1</sup>

*Andrea Sebastiani*

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*The aim of this article is to remove the initial confusion that could occur in the comparison between Italian and Chinese business organizations. The analysis focuses mainly on company types, classification adopted, sources, and terminology used, in both countries. In this wide and general juxtaposition, it is proposed to use an assimilation method through which the main features of Italian and Chinese business entities have been compared regarding various aspects, in order to better understand differences and similarities arising from these two legal systems. One consequence of resorting to this method was the need to use certain general English notions – such as people's organization, business organization, company – to clarify the comparison. For instance, the term company itself has been used to outline a wide group of business entities which include not only the Limited Liability Companies or Joint Stock Companies (gongsi) - as it might appear reasonable at a first look at the Chinese system - but even other form of partnerships, in accordance with the Italian and Roman concept of "società and societas", which even comply to the notion offered by the Black's law dictionary.*

## I. ISSUES IN THE CLASSIFICATIONS OF PEOPLE'S ORGANIZATIONS AND THEIR LEGAL STATUS: DIFFERENCES BETWEEN FAREN 法人 AND PERSONA GIURIDICA.

Internationally used English terms as corporations, companies, legal persons, may create confusion, especially while comparing two highly different systems. It should be borne in mind that Companies – as far as the general internationally used English term is concerned – are just one type of different organizations available in every legal system. In every society, simpler kind of organizations, which represent even the embryonic stage of modern corporations have been used since a long time. Therefore, the importance of the term *organization* to include all types of legal entities under a same concept arises in this analysis, in order to clarify both internal classification and external comparison between the Italian and Chinese systems. That said, in every system, the purpose of these classifications for people's organizations is to make society aware of which entity is more suitable for the aim projected and they are usually constructed on a criterion of purpose and function.

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Moreover, it is important to remark that the concept of *legal person* represents the cornerstone of these classifications. Accordingly, it is essential to understand its terminology and meaning used in both legal systems. Indeed, as we shall see, this term may be used differently, in a wider or stricter sense.

Given these brief considerations, as far as our comparison is concerned, remarkable differences between the Italian and Chinese systems arise in the meaning of legal person, thus accordingly in the classification adopted to distinguish different kind of people's organizations, namely companies and other legal entities.

Furthermore, before the following detailed analysis, roughly speaking it should be pointed out that whereas in China, it was the legislator who by law directly gave a classification and legal definition of legal persons, in Italy it was the doctrine to accomplish to these duties. This last remark highlights a first important difference between those two systems, since in Italy more importance is likely given to the doctrine, opposite to China where the legislator keeps solid bases and a strong role in offering definitions through detailed laws.

In the Chinese system, according to article 57 of the new Civil Code of the People's Republic of China (that came into force on January 1, 2021) “a legal person (*Faren* 法人) shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law”<sup>2</sup>. Furthermore, pursuant to Article 60 “a legal person shall independently assume civil liability to the extent of all of its assets” whereas Article 58 states that a legal person shall satisfy the following conditions: 1. it is incorporated in accordance with laws; 2. it has necessary assets or funding; 3. it has its own name, structure and premises; 4. it assumes civil legal liabilities on its own.

For the present analysis, the main relevant consideration to highlight in this definition is that a legal person can assume civil liability independently.

Comparing this Chinese definition with the Italian one could be slightly tricky. Indeed, the major Italian doctrinal meaning of legal person is much wider and general than the Chinese legal definition.

According to most of the Italian legal doctrine, legal person (*persona giuridica*) simply means “an organised grouping of persons and assets with the purpose to reach a certain objective,

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<sup>2</sup> Civil Code of the People's Republic of China (Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020, as came into force on January 1, 2021).

and to which the legal system expressly recognized the status of subject of law (“*soggetto di diritto*<sup>3</sup>”).

Therefore, we can notice that the interesting consequence in comparing these concepts, is that whereas the Italian definition of legal person seems to include even those organizations without limited liability as partnerships and professional groups, in China those last are qualified as “other subjects” and they are not strictly speaking legal persons, namely *Faren* (法人).

Indeed, unlike the Italian system, according to Chinese law the discriminating factor is the *limited liability*, deemed as an essential peculiarity of legal persons. *In this regard*, the disadvantages and problems of the Chinese approach could arise in qualifying and classifying the partnership. The solution found by some scholars is to deem partnership as a *semi-legal person*, even if doubts could arise to this regard.

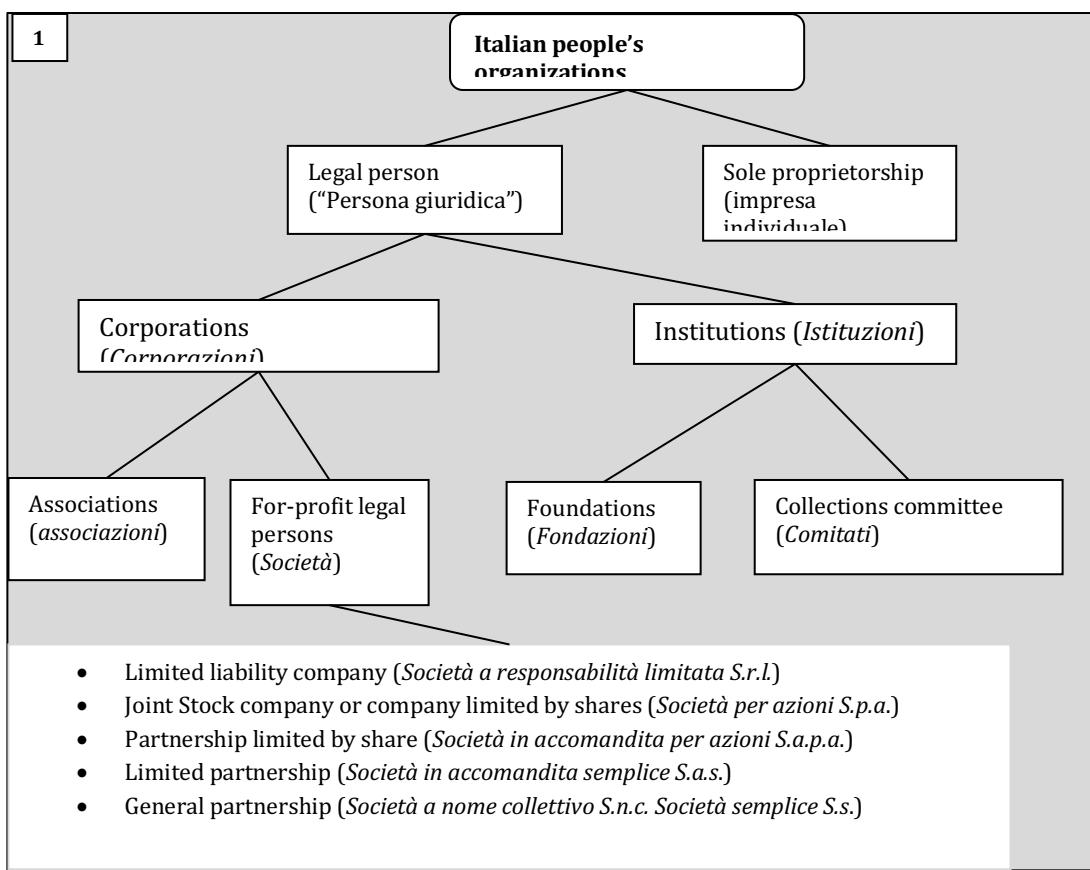
Shown below are some graphs and their brief explanation about the most common Italian and Chinese classifications.

Except for the Sole proprietorship, the proposed Italian legal person's classification (graph n.1) distinguishes corporations from institutions in accordance with a criterion which takes into consideration the predominance of peoples or assets within the organization. This approach likely derives from the ancient Roman legal system. Corporations are those organizations in which people are the predominated factor (*so-called universitas personarum*). Institutions are those organizations where more importance is given to assets (*so-called universitas bonorum*) as the predominant factor compared with people<sup>4</sup>. Therefore, for instance while foundations are qualified as institutions, given the fact that assets are an essential element for their existence and scope, associations are qualified as corporations, since assets are less important and only the associates are deemed as the core of the organization. Sometimes the aforementioned classification appears confused, given the fact that the predominance of the *universitas personarum* rather than the *universitas bonorum* is not always clear in term of percentages. However, another classification is usually proposed, distinguishing public and private legal persons.

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<sup>3</sup> Subjects of law are those entities (like *natural person* or *legal person*) that can enter and keep legal relationships within a certain legal system. Thus, the term “*subject of law*” is very wide including all kind of legal person as partnership and corporations.

<sup>4</sup> F. Ferrara, Teoria Delle Persone Giuridiche, Eugenio Margheri - Unione Tip. Editrice Torinese, 1915, p. 723 ss.; P. Zaiotti, *L'eco dei tribunali*, 2, Giornale di Giurisprudenza Civile, Tipi di eco dei Tribunali, Venezia, 1861, p. 171

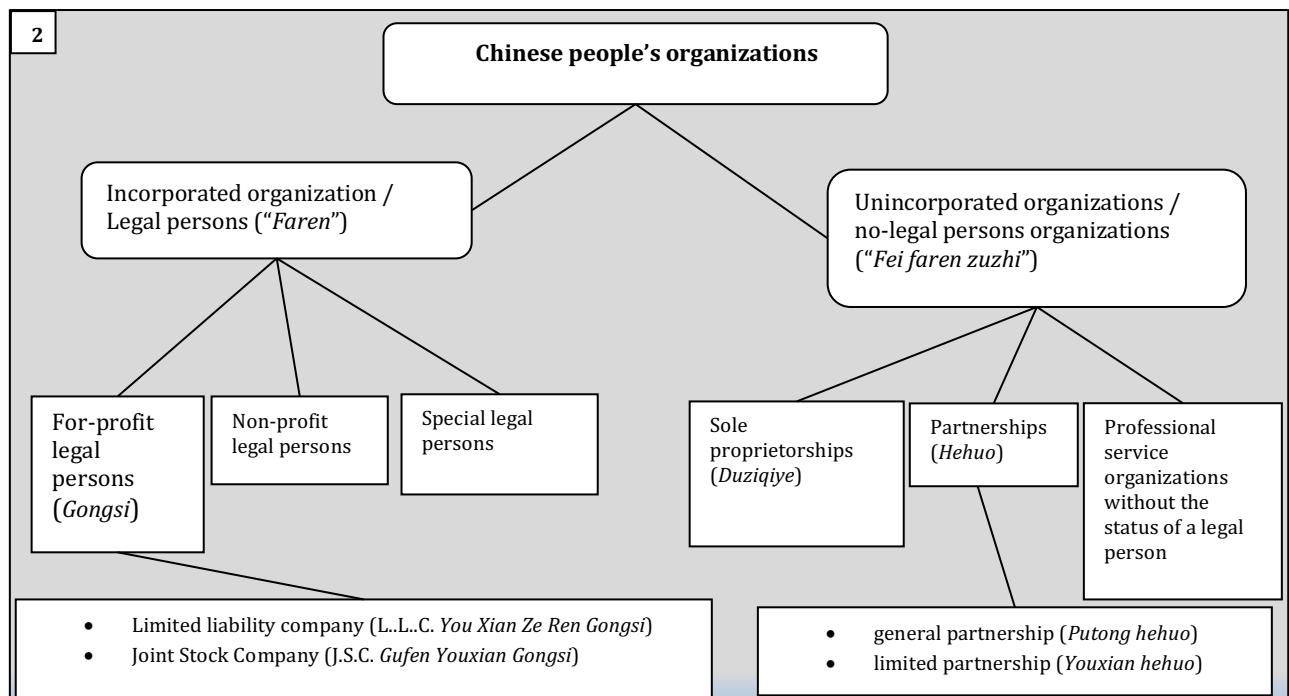


As far as the Chinese classification is concerned (graph n.2), as mentioned above the *limited liability* and the *organization's scope* are the main criteria used to distinguish and typify each legal entity. This way companies as the L.L.C. and J.S.C. are included in the For-profit legal persons with limited liability, while partnerships (*Hebnuo*), sole proprietorship (*Duziqiye*)<sup>5</sup> and professional services without legal personality are included within unincorporated or no-incorporated organizations (非法人组织, *Fei faren zuzhi*). The last provision is in accordance with Article 102 of the new Chines Civil Code - which clearly defines unincorporated organizations as those without the status of legal persons and for which partners bear unlimited liability in case the property of the organisations is insufficient<sup>6</sup>. The Chinese approach is certainly more recent and would seem more reasonable, efficient and less philosophical than the Italian one. However, it could collide with new challenges

<sup>5</sup> The term *sole proprietorships* indicate forms of business in which one person owns all the assets of the business.

<sup>6</sup> Article 104 If the property of the non-incorporated organisations is insufficient to pay off the debts, the promoters shall bear unlimited liability, unless otherwise provided for by law. *Civil Code of the People's Republic of China (2020)*.

concerning the qualification of partnership and all other entities generally classified as "other subjects", which are not legal persons.



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## II. CLASSIFICATION OF BUSINESS ORGANIZATIONS: *SOCIETÀ, GONGSI (公司)* AND *HEHUO* (合伙)

Companies have been the instrument of progress for years. Since individuals started collaborating together sharing their assets, skills, know-hows and better implementing the rule of division of labour, the development and wealth of society radically increased. Therefore, given the importance of these organizations characterized by the will of making profit, even the terminology used to define them is relevant. However, the term *company* and *corporation* are generally used interchangeably, though they may sometime have different meaning depending on the legal system.

To avoid any confusion and in order to find a proper definition to include all those profit-making vehicles that play a principal role in the economic growth and sometime wealth of a country, the general term *business organization* is used.

Accordingly, even the sole proprietorship is included within business organizations, as well as the partnership and all remaining types of companies.

<sup>7</sup> The classification has been made following the criteria provided by the *2017 General Rules of the Civil Law of the People's Republic of China*, as now substitute by the new Chinese Civil Code (2020).

As far as the Italian system is concerned, the paper provides an *ad hoc* regulation for the enterprise (“*impresa*”), according to which business organizations can be classified into two groups: 1) sole proprietorship or individual enterprise (*impresa individuale*), namely an unincorporated business owned by a single individual; 2) a collective enterprise (*impresa collettiva*), which is an unincorporated or incorporated business owned by more than one natural or legal person and run by a separate entity<sup>12</sup>.

This last type of enterprise takes the name of *società*, a word deriving from the term *societas*, an ancient Rome form of bilateral or plurilateral agreement in which the contractors were obliged to carry out a given activity or to confer assets in order to achieve a common interest, subsequently dividing gains and losses<sup>8</sup>.

However, nowadays, after the introduction of the one-person company (*società unipersonale*), we cannot say that a *società* is to be necessarily founded through more subjects. The distinction between sole proprietorship (*impresa individuale*) and *società* seems to be the recognized separation of identity between the legal entity and the subjects who form it.

According to the Italian doctrine and as deducted from Art. 2249 of the Civil Code, *società* (collective enterprises) can be divided in two categories: 1) *società di capitali* (*capital corporations*), where the objective element represented by the capital has a conceptual and normative prevalence with respect to the subjective element represented by individuals. In most of the cases they enjoy limited liability; 2) *società di persone* (*corporations of people*), where the subjective element represented by individuals prevails with respect to the objective element represented by the capital. In most of the cases they have unlimited liability.

The following types of enterprises are qualified as *società di capitali*: Limited liability company (*Società a responsabilità limitata S.r.l.*), Joint Stock company or Company Limited by Shares (*Società per azioni S.p.a.*), Partnership Limited by Shares (*Società in accomandita per azioni S.a.p.a.*). Whereas the following types of enterprises are qualified as *società di persone*: Limited partnership (*Società in accomandita semplice S.a.s.*), General collective partnership (*Società a nome collettivo S.n.c.*), General partnership (*Società semplice S.s.*).

As far as the Chinese system is concerned, in accordance with the aforementioned Legal Persons General Rules as provided by the Chinese Civil Code, we can classify *business organizations* under three categories: 1) Sole Proprietorships (*duziqiye* 独资企业), which can

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<sup>8</sup> A. Lovato, S. Puliatti e L. S. Maruotti, *Diritto privato romano*, Torino, G. Giappichelli Editore, 2014.

take the form of individual industrial and commercial households (*geti gongshang hu*) or private enterprises (*sijing qiye*); 2) Partnerships (*hehuo* 合伙), which can take the form of Limited Partnership (*youxian hehuo qiye*) enterprises and General Partnership enterprises (*putong hehuo qiye*); 3) Incorporated companies (*Gongsi* 公司), which are the Limited liability companies (*You Xian Ze Ren Gong Si*) and the Joint Stock companies or companies limited by shares (*Gufen Youxian Gongsi*).

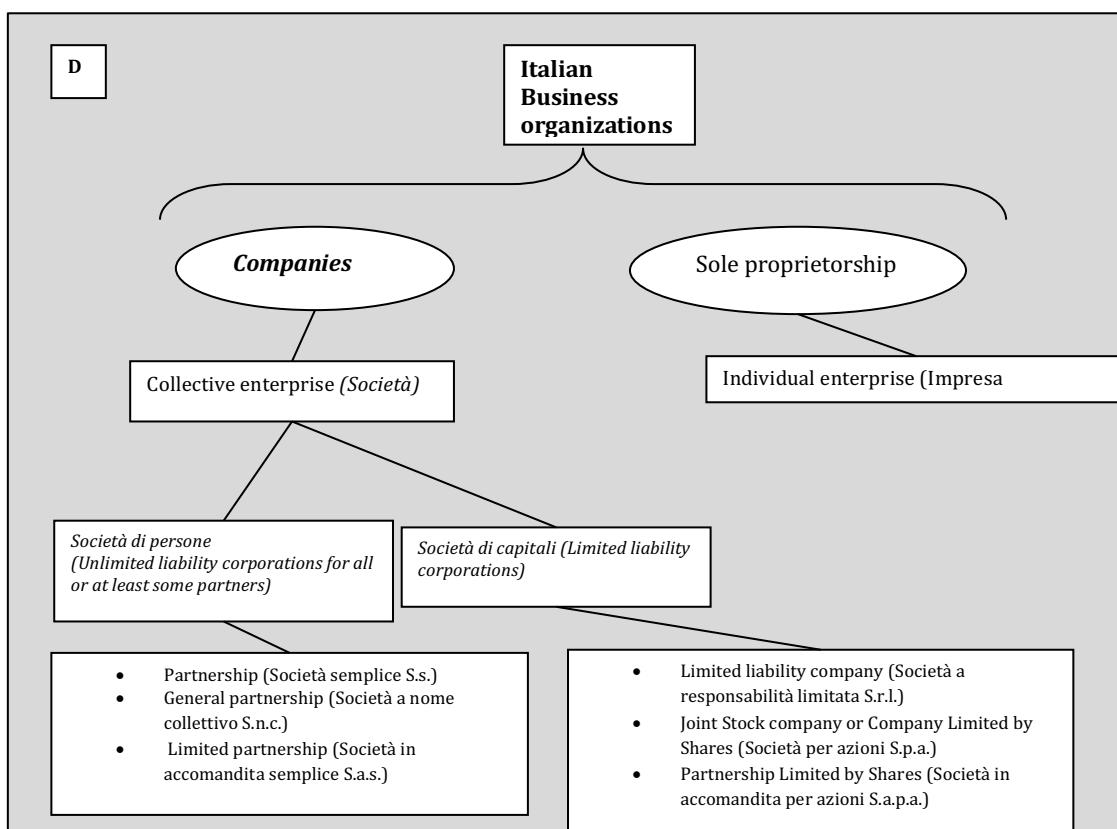
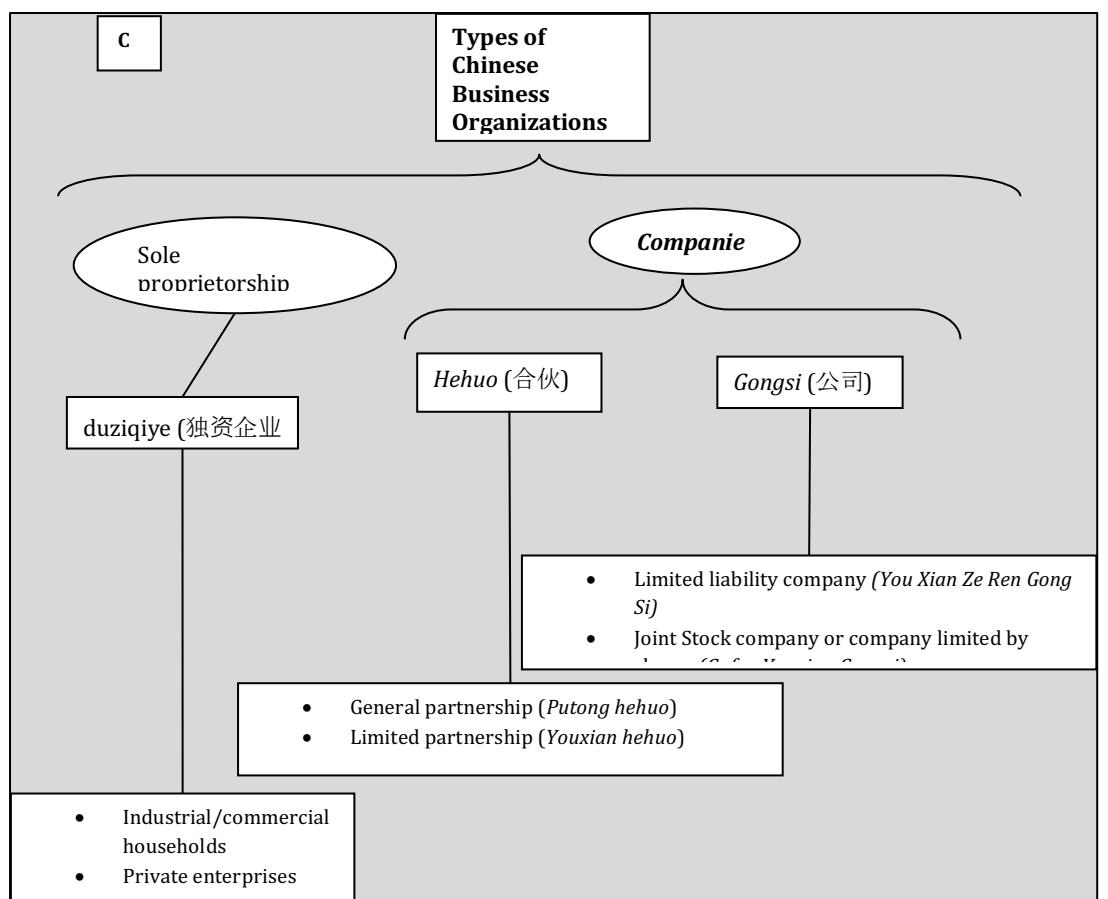
This brief general framework makes us aware of the confusion that could arise in comparing business organizations in these two systems. The Italian system provides for a larger differentiation of company types, compared to China. However, what should be mainly noticed is that the Italian concept (*società*) includes several entities as partnerships and incorporated companies, whereas in China those are under different name (*gongsi*, *hehuo*) and have separate specific regulations. Indeed, in accordance with article 2 of the Chinese Company Law, only the L.L.C. and the J.S.C. are deemed as *gongsi*.

Accordingly, given the fact that the Italian system differs markedly from the Chinese one in classifying some *business organizations*, to make an assimilation and for a better comparison between these systems, we could bring under the same English concept of “*companies*” those terms as follow:

*Companies* = *Società* = *gongsi* 公司 + *hehuo* 合伙.

Therefore, the chosen term of *company* is in accordance with the Italian system for which the Chinese classification has been adapted. Furthermore, the term *company* is used even to precise the object of the present analysis, which includes various forms of partnerships, one-person companies, while not regarding those individual business organizations as the sole proprietorship, namely the *impresa individuale* in Italy and the *duziqiye* in China.

Graphs C and D are shown here below to better clarify these terms and their respective comparison.



### III. SHORT COMPARISON ON BUSINESS ORGANIZATIONS DEFINITIONS

According to Article 2247 of the Italian Civil Code, “*by company contract, two or more persons confer goods or services for the joint operation of an economic activity with the purpose to share the profits*”. Although this article refers to a contract, the doctrine extrapolated from it a proper definition of *società*, which indicates every kind of business organization, included partnership. Accordingly, as deducted by the doctrine, from the aforementioned article in the Italian system three main elements seem to characterize business organizations. They are: 1) capital contributions by partners; 2) joint exercise of an economic activity; 3) purpose to share the profits. The simultaneous presence of these three elements allows distinguishing companies from other kind of entities like consortiums<sup>9</sup>.

As far as the Chinese system is concerned, there would appear to be no available specific definition for *gongzi*. Article 2 of the Chinese Company Law only states that “*for the purpose of the Law, the term “gongzi” refers to limited liability companies and companies limited by shares established within the territory of China pursuant to the Law*”. However, even from this Chinese definition three elements appear to characterize this entity. 1) These entities are outlined by a typological criterion through which exclusively LLCs and the CLSs can be considered as *gongzi*. Thus, those entities characterized by *limited liability* would seem to have been implicitly considered as *gongzi*. 2) A second element is the establishment within the territory of China. 3) As a third element, compliance with the law is highlighted. The effort to extrapolate these features does not seem sufficient to clarify this definition. This silence approach in defining companies is adopted even in Hong Kong, while the Taiwanese Company Law provides a clear notion<sup>10</sup>. Likely the reasons are that the legislator wants to leave greater freedom for future developments<sup>11</sup>.

About *hehuo*, a definition is contemplated in Article 2 of the Partnership Law of the People’s Republic of China, pursuant to “*for the purpose of this Law, hehuo shall mean general partnerships and limited liability partnerships established in accordance with this Law by natural persons, legal persons or other organizations within the territory of China*”. Accordingly, in the wake of *gongzi* definition, it seems to provide the same elements with regard to partnership. However, through the aforementioned typological criterion, the *hehuo* is characterized by the unlimited liability of all or at least some of their partners.

The following table have been constructed according to the assimilation method which takes into account the most common characteristics of these entities for comparison. The

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<sup>9</sup> G. F. Campobasso, *Manuale di diritto commerciale*, 7, Utet Giuridica, 2017

<sup>10</sup> In accordance with Article 1 of the Taiwanese Company Law *a company is an organization with legal person status organized, registered and established in accordance with this Law for the purpose of profit*.

<sup>11</sup> G. Minkang, *Understanding Chinese Company Law*, Hong Kong University Press 2006, p. 18 (2010)

aim is also to help foreign observers to refer to their own and familiar autochthonous corporate structures, when comparing. The table exposes the types of business organizations available in the two systems.

<b>Italy</b>	<b>China</b>
Partnership (Società semplice S.s.)	General partnership ( <i>Putong hehuo</i> )
Special type of general partnership (Società a nome collettivo S.n.c.)	
Limited partnership (Società in accomandita semplice S.a.s.)	Limited partnership ( <i>Youxian hehuo</i> )
Partnership Limited by Shares (Società in accomandita per azioni S.a.p.a.)	
Limited liability company (Società a responsabilità limitata S.r.l.)	Limited liability company ( <i>You Xian Ze Ren Gong Si</i> )
Joint Stock company or Company Limited by Shares (Società per azioni S.p.a.)	Joint Stock company or company limited by shares ( <i>Gufen Youxian Gongsi</i> )

## CONCLUSION

The abstract concept of legal person and legal personality might create confusion especially regarding the classification used to distinguish the different business vehicles as provided in the analysed systems. These classifications have been elaborated in different ways. Whereas in China was mainly the legislator who keeps solid bases and a strong role in offering definitions through detailed laws (currently laid down in Chapter 3 of the new

Chinese Civil Code), in Italy it was the doctrine to accomplish to these duties. Another important difference to be highlighted is the idea of legal person. Indeed, the major Italian doctrinal meaning of legal person is much wider and general than the Chinese legal definition. According with the Italian concept of subject of law (“*soggetto di diritto*”), a legal person (“*persona giuridica*”) might simply means an organised grouping of persons and assets with the purpose to reach a certain objective, while in China - as stated by statutory provisions - a legal person (*Faren* 法人) is an organization that, as well as having capacity for civil rights and civil conduct, independently enjoys civil rights and assumes civil obligations. Therefore, this brings automatically to interesting consequences from a theoretical perspective which do not exclude repercussions on a practical level, namely, the Italian definition of legal person seems to include even those organizations without limited liability as partnerships and professional groups whereas in China those last are qualified as “*other subjects*” and they are not strictly speaking legal persons even according to the new Chinese Civil Code. As well as for the concept of legal person and legal personality, the two systems divert in classifying the different entities, in other words, while the Italian doctrine focus on the distinction between corporations from institutions in accordance with the Roman concepts of *universitas personarum* and *universitas bonorum*, in the Chinese classification *limited liability* and the *organization's scope* are the main criteria used to distinguish and typify each legal entity. The Chinese approach seems to prefer to include companies as L.L.C. and J.S.C. within the For-profit legal persons with limited liability, while partnerships (*Hehuo*), sole proprietorship (*Duziqiye*) and professional services without legal personality are included within unincorporated or no-incorporated organizations (非法人组织, *Fei faren zuzhi*).