

**PIERCING THE CORPORATE VEIL OF GROUP COMPANIES: A
CRITICAL LEGAL ANALYSIS UNDER THE COMPANIES ACT OF
TANZANIA**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR DEGREE OF MASTER OF LAWS (CORPORATE &
SECURITY BANKING) OF THE OPEN UNIVERSITY OF TANZANIA**

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CERTIFICATION

The undersigned certify that she has read and hereby recommend for acceptance by the Open University of Tanzania a dissertation entitled: ***“Piercing the Corporate Veil of Group Companies: A Critical Legal Analysis under the Companies Act of Tanzania”*** in partial fulfillment of the requirements for the Degree of Master of Laws (Corporate & Security Banking) of the Open University of Tanzania.

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DECLARATION

I, **Karoli John Mrema**, do hereby declare that this dissertation is my original work and that it has not been presented and will not be presented to any other university for similar or any other degree award.

.....

Signature

.....

Date

DEDICATION

This dissertation is dedicated to my parents and family for their prayers and love throughout my Master programme.

ACKNOWLEDGEMENT

I thank the almighty God for protecting me throughout my Master programme. I would like in a very special way to express my heartfelt appreciation to my supervisor Dr. Helen B. Kiunsi for her intellectual guidance throughout the entire period of my Master programme.

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ABSTRACT

Mushrooming of multinational corporations conducting business through Group Companies in Tanzania has perpetuated illegalities and illicit behaviours invoking for corporate veil piercing. Although corporate veil piercing is the most discussed area in the corporate law, the scholarship is mostly dominated by foreign jurisdictions like United Kingdom, United States of America, and Australia while little is known in Tanzania. Lack of standardized, principled, coherent approach in corporate veil piercing process intensifies the problem leading to confusions, chaos, noisy, messy and vibrant decisions in the overall exercise. This situation puts Tanzania in a risk of conducting business with sham multinational corporations operating business in group context. Hence, the current study addresses the problem in order to unpack the underlying vague practice over the doctrine in Tanzania context by conducting analysis of corporate veil piercing in the context of group companies. The main focus being the risks of having unprincipled, non-standardized and distinct approaches in piercing of the corporate veil of group companies in Tanzania. However, this is attributed to failure of properly addressing the adequacy of the Companies Act of Tanzania in piercing corporate veil in a manner sensitive to the local contexts as well as providing balance with international standards. To achieve the target, the study employed doctrinal legal research methodology supplemented with comparative method. The study disclosed that the Companies Act of Tanzania is inadequate to pierce the corporate veil in the group context while the overall practice remains to be imprecise, unprincipled and inconsistent. Among others, the study recommends the Companies Act of Tanzania to be amended in order to cater for the local and international standards of corporate veil piercing of the group companies.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
Ch.	Chapter
CJ	Chief Justice
Corp.	Corporation
ER	England Report
FLR	Federal Law Reports
HL	House of Lords
ICSID	International Centre for Settlement of International Disputes
IMF	International Monetary Fund
Inc.	Incorporated
IRC	Inland Revenue Commissioners
J	Judge
KB	Kings Bench
LJ	Lord Justice
LLC	Limited Liability Company
Ltd	Limited
PLC	Public Limited Company
Pty	Proprietary
QB	Queens Bench
U.S	United States
UK	United Kingdom
V	Versus
WLR	Weekly Law Reports
WWW	World Wide Web

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CHAPTER ONE

THE CONTEXTUAL FRAMEWORK OF PROBLEM

1.1 Background to the Problem

Tanzania is the largest¹ of all East Africans² countries and it is endowed with abundant resources. In recent years, it has witnessed an ongoing discovery of untapped natural resources such as gas, minerals and oil.³ Such situation has led to mushrooming of local⁴ and foreign companies⁵ conducting business in different forms including Group Companies.⁶ However, it should be understood that conducting business through group companies is not a new phenomenon in corporate law because people have been establishing business in that way.

Companies represent a fundamental part of everyday life of human beings despite their fictitious background; people live with these entities in unity, most of the time.⁷ Small, medium or multinational corporations employ people, develop communities and nations, and have become common methods of doing business.⁸ Multinational corporations have, to a large extent, superseded small and medium sized businesses all over the world, as they have been driving economic globalization across the

¹ That is, in terms of square kilometers, Tanzania 945, 087 km², Kenya 582,757 km², Uganda 241,037 km², Burundi 27,834 km² and Rwanda 26, 338 km²

² East African countries refers are Tanzania, Kenya, Uganda, Burundi and Rwanda.

³ Kiunsi, H.B., Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Perspective, A Thesis Submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Law of the Open University of Tanzania, 2017, p.1.

⁴ Local companies refer to those companies established and registered in Tanzania.

⁵ Foreign companies refer to those companies established outside but registered as a foreign company.

⁶ Group means a parent or holding company and its subsidiaries as per Section 2 of the Companies Act of Tanzania [Rev. Ed. 2002].

⁷ Horvathova A, Stanescu CG. *Piercing The Corporate Veil US Lessons From Romania And Slovakia. Chicago-Kent, Journal of International and Comparative Law.* 2016; 17(1):7

⁸ Ibid 7

world.⁹ Most of these multinational corporations operate in group context, that is, parent-subsidiary relationship.

The principle set out in *Salomon v Salomon & Co Ltd [1897]*, that a the body of corporate is a separate entity from its members, led to the use of phrase the veil of incorporation which is said to hang between the company and its members and in law at least act as a screen between them.¹⁰ Similarly, a company¹¹ as a juristic person, separate from its members and its property is not the property of its members; its debts are not the debts of its members; and have perpetual succession.¹² The independent legal status of the corporate entity is said to cast a veil between the company and its human constituents termed as the corporate veil.¹³

From the date and time of registration of its incorporation, a company is considered a juristic person, and exists continually until its name is removed from the companies' register in terms of the Act.¹⁴ Its existence is therefore noted formally in a register until its dissolution or deregistration.¹⁵ This legal personality enables many entrepreneurs to create entities in order to operate their businesses, to facilitate commercial ventures, and to shield themselves from personal liability whereby the business maintains a separate and distinct identity from that of its owners or related

⁹ Ibid 7

¹⁰ Keenan, D. Smith & Keenan's, *Company Law*, 20th Ed. London: Pearson Education Ltd, 2002, p.25

¹¹ Company means a company formed and registered under this Act or an existing company as per section 2 of the Company Act of Tanzania [Rev. Ed. 2002].

¹² Marobela, M.M. "Piercing of the Corporate Veil in a Holding/Subsidiary Relationship." PhD Dissertation, University of Pretoria, 2017, p. 5.

¹³ Griffin, S. *Company Law: Fundamental Principles*, 4th Ed. 2006. p.13

¹⁴ Marobela, M.M. "Piercing Of the Corporate Veil in a Holding/Subsidiary Relationship." PhD diss., University of Pretoria, 2017, p. 5.

¹⁵ Ibid 5

entities.¹⁶ If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons as per *U.S. v Milwaukee Refrigerator Transit Co., [1905]*¹⁷

In Tanzania, any two or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of the Act in respect of their registration form an incorporated company¹⁸, with or without limited liability.¹⁹ By this doctrine (limited liability), a shareholder can only lose only what he or she has contributed as shares to the corporate entity and nothing more²⁰ but if malpractices occur such that shareholders become accountable despite what they have invested in the corporation. Nevertheless, a corporation remains to be a juristic person that in most instances is legally treated as a person, and empowered with the attributes to own its own property, execute contracts, as well as ability to sue and be sued.²¹

Importantly, when a company is registered and thereby acquires legal personality, a hypothetical blanket or shroud drops over its shareholders and directors for

¹⁶ Jimerson & Cobb P.A, *The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts*, 2016, p.3.

¹⁷ Cohen, M. *A Brief History of Piercing the Corporate Veil*, 2010.p.6

¹⁸ The word “company” as provided in Section 2 of the Companies Act of Tanzania [R.E 2002] means a company formed and registered under this Act or an existing company.

¹⁹ Companies Act, s 3(1)

²⁰ Forji, A.G., *The Veil Doctrine in Company Law*, 29 Sep 2007, <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>.

²¹ Griffin, S. *Company Law: Fundamental Principles*, 4th Ed. 2006. p.12

protection from external accountability.²² According to the principle of separate legal personality, which represents the division between the existence of the legal entity and that of its owners, the obligations of the corporation are not imputed to the owner or shareholders of the corporation²³.

This attribute of the separate corporate personality enables the corporation's stockholders to limit their personal liability to the extent of their investment but the corporate device cannot in all cases insulate the owners from personal liability²⁴. This consequently separates the new company from the people who formed it, and from those who go on to become its members and directors.²⁵ It is trite law that, a registered company is a legal persona distinct from the members who compose it.²⁶ A company's separate legal existence is therefore referred to as a veil of incorporation as long as there is no external interference.²⁷ However, the problem arises in the application of the veil of incorporation whereby the shareholders find themselves liable in the name of the incorporated company. This is sometimes caused by those who use the corporation fraudulently resulting into veil piercing.

Upon incorporation of a company, it acquires capacity of artificial person as such it can own property, become a party to a contract, act in a tortious manner and become tortiously liable, commit a crime, can sue and be sued, has a nationality and

²² Marobela, M.M.. "Piercing of the corporate veil in a holding/subsidiary relationship." PhD diss., University of Pretoria, 2017, p.16.

²³ Zindoga, W. T. Piercing of the Corporate Veil In Terms of Gore: Section 20 (9) of the new Companies Act 17 of 2008 (Doctoral dissertation, University of Cape Town). 2015.

²⁴ *Krivo Industrial Sup. Co. v National Distill. & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973).

²⁵ Marobela, M.M.. "Piercing of the corporate veil in a holding/subsidiary relationship." PhD diss., University of Pretoria, 2017, p.16.

²⁶ *Ibid* 16

²⁷ *Ibid* 16

therefore becomes domicile in nature and even has rights that could be attributed to a natural person though artificial in character²⁸. A company acquires the characteristics of a distinct legal person upon incorporation²⁹. In Tanzania, once incorporated it binds the company and the members thereof³⁰ and the certificate which is issued shall be evidence of the corporation.³¹ Thereafter, those responsible for the management of the corporation have to follow the formality of establishment of corporation contrarily, the corporate veil is pierced.

Nonetheless, the mere shell however of a corporate structure is not always enough to avoid personal liability.³² There is sometimes a tendency of owners of the company to act contrary to the formalities and core purpose of establishing the company. Such situation perpetuates breaking of the veil that exists between the shareholders and company, which require disregarding the legal personality of the company. Therefore, piercing the corporate veil is the legal jargon which is used to describe an action pursued against a company that ultimately leads to personal liability of the owners, shareholders, or members wherein the corporate structure being disregarded.³³ It means that the corporate structure is the veil that provides protection and if that veil is pierced, there is no more protection.³⁴ It opens the room to find out the real owners of the company in order for them to be accountable for the acts and omissions as the directing minds of the company.

²⁸ Bello, S. A., & Michael, O. C. Piercing the Veil of Business Incorporation: An Overview of what Warrants It. Review of Contemporary Business Research, 2014, p. 117-138.

²⁹ Ibid 117-138

³⁰ Companies Act, s 18(1)

³¹ Companies Act, s 16(1)

³² Jimerson & Cobb P.A. The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts, 2016, p.3

³³ Ibid 3

³⁴ Ibid 3

In majority of situations in which the veil is dislodged under common law or equity, it is merely pierced (as opposed to being totally removed) with the purpose of imposing some form of liability against the company shareholders or directors.³⁵ Where the veil is not completely removed, the separate legal existence of the company will subsist.³⁶ In other instances, the corporate veil of group companies may completely be removed, to the extent that individual corporate entities (subsidiary companies) will be treated as but a division of another corporate entity (holding company) and in such cases the holding company will be merged with its subsidiaries and the group of companies will for all practical purposes be treated as one economic entity.³⁷

There are both pros and cons of corporate veil piercing in Tanzania³⁸. Positively, it regulates the illicit behaviours of tax avoidance by multinational corporations in group context as per *Acacia Mining PLC, Bulyanhulu Gold Mine Ltd and Pangea Minerals Ltd v Government of Tanzania [2017]*.³⁹ It also fosters efficiency of the corporations by ensuring they are managed smoothly; it encourages investment as those investing in a corporation need not worry about a disregard of corporate structure as shareholders and directors may be liable in case of malpractices.⁴⁰ For example, a High Court of Tanzania⁴¹ in the case of *Musa Shaibu Msangi v Sumry High Class Limited and Another [2016] TLS LR 430* shows that directors can be held

³⁵ Griffin, S. *Company Law: Fundamental Principles*, 4th Ed. 2006. p.13

³⁶ *Ibid* 13

³⁷ *Ibid* 13

³⁸ Trembly Law, *Does Piercing the Corporate Veil Work? A Look at Possible Alternatives*, 2016, p.1

³⁹ ItaLaw, *Acacia Mining PLC, Bulyanhulu Gold Mine Ltd and Pangea Minerals Ltd v Government of Tanzania*

⁴⁰ Trembly Law, *Does Piercing the Corporate Veil Work? A Look at Possible Alternatives*, 2016, p.1

⁴¹ Velma Law, *Director liability for corporate debts (“lifting the corporate veil”)*, 2017, p.1

personally liable for the debts of their companies (even when no suggestion of a guarantee by a director exists). Moreover, corporate veil piercing encourages management risk-taking, facilitates stock markets, reduces agency costs, reduces monitoring costs and protects creditors.⁴² For instance, in the case of *Zebedayo Mkodya v Best Microfinance Ltd and others [2016]*, Songoro J stated that “...in special circumstances, shareholders and directors may be sued with their company and the circumstances permits lift of the corporate veil.”⁴³ Corporate veil piercing ensures stability in investment as well as management of the corporation by increasing perpetual existence and easiness in transferring ownership interests.⁴⁴

On the flip side, corporate veil piercing is a moral hazard, discourages extension of credit, provides for insider opportunism, externalization of risks, and may foster shareholder irresponsibility.⁴⁵ For example, the case of *Hamoud Mohamed Sumry v Mussa Shaibu Msangi, Sumry High Class Ltd, Sumry Bus Services Ltd, [2012] HC no. 20* where the court held that “Having regard to the relationship of the company at the time with the appellant as the managing director, the alleged concealment of the assets of the company by the appellant which was not denied in the counter-affidavit, this was a proper case in which the principle of lifting the veil of incorporation.”

Corporate veil piercing in Tanzania was established in the case of *Yusuf Manji v Edward Masanja & Another, Civil Appeal No. 78 of 2002*⁴⁶ where the Court of Appeal held that it would serve the best interests of justice to lift the corporate veil

⁴² Ibid 1

⁴³ *Zebedayo Mkodya v Best Microfinance Ltd and others [2016]*, High Court, Commercial Case no. 95, 2016

⁴⁴ Zatezalo, Z. *Piercing the Corporate Veil: Factors to Follow to Avoid Personal Liability*, 2018, p.1

⁴⁵ Trembly Law, *Does Piercing the Corporate Veil Work? A Look at Possible Alternatives*, 2016, p.1

⁴⁶ Breakthrough Attorneys, *Company Law Update: Responsibilities and Liabilities of Directors of a Company in Tanzania*.

and hold the directors of the company liable where it is apparent that the directors were concealing assets of the company in their own names. Such situation occurs when owners fail to take the appropriate steps to maintain the corporations as a separate entity run the risk of having the corporate veil pierced and being held personally liable for any corporate transgressions.⁴⁷ Thus, most of corporate veil piercing of group companies is lagging behind due to inadequacies contained in the Companies Act in dealing with the contemporary challenges associated with mushrooming of multinational companies operating their business in group context.

1.2 Statement of the Problem

This study addresses the mounting risks of failure of Tanzania Legislative authorities to craft effective law for regulating companies operating in group context triggering for corporate veil piercing. The failure is in three forms. First is failure to recognize the loss of revenue which is caused by multinational corporations operating in group context. Second is failure to be familiar with the problems of corporate veil piercing of the group companies. Third is failure to craft adequate and appropriate law to suit the local context.

The risk of losing revenue is intrinsic to most of Multinational Corporation as they endeavor into profit maximization. Some of these multinational corporations operating in group context use the loopholes available in domestic laws to avoid tax. For instance, in Tanzania, the inadequacies of the Companies Act intensify loss of revenue caused by companies operating in group context. This situation is likely to

⁴⁷ Zatezalo, Z. Piercing the Corporate veil: Factors to Follow to Avoid Personal Liability, 2018, p.1

cause more detrimental effects to the economy as most of group companies operate in shrewd way in order to maximize profit. Therefore, the risk under which the current study is trying to address evolves mostly from the loss of revenue which is currently a big challenge due to illicit behaviour of group companies operating dishonestly. Hence, Tanzania seems to benefit less with the presence of the multinational corporations in the country operating in the group context.

Thus, if crafting of workable law is not properly done in order to regulate management of these group companies then it is likely to intensify economic problems resulting from illicit behaviours of corporation operating in parent subsidiary-relationship. The fact is that the current Companies Act of Tanzania came into operation at the eve of liberalization whereby as country there was no much contemplation in enactment of laws to suit the local context. The move from protectionism to liberalism caused more harm than good to domestic laws including Companies Act of Tanzania which is inadequate in regulating the contemporary challenges including corporate veil piercing of the group companies. The pressures from IMF and World Bank made most of the developing countries including Tanzania to enact laws which were favourable to investors but unfit to the local contexts. Hence, most of the issues contained in the Companies Act can be said to have been copied from the former Indian Companies Act and others from United Kingdom. So the Act contains issues which have been crafted elsewhere but they are being implemented in Tanzania. This situation resulted into crafting the Companies Act inadequate to meet the local context which is currently surrounded by mushrooming of the multinational corporations operating through parent-subsidary

relationship. The risk of continuing with unworkable and inappropriate law in the contemporary era of where nations are at economic wars is putting the country into serious disaster at the national and international arena. This implies Tanzania will continue having poor economic performance in the global arena.

Moreover, the available evidences indicate that there is non-compliance to the laws, regulations and authorities by illicit behaviours of multinational companies operating through group companies in Tanzania⁴⁸. Such behaviours trigger for corporate veil piercing in order to get the real owners of the parent company. Thus, tolerating these illicit behaviours is to risk the lives of people which is also detrimental to the economic development of Tanzania. This situation depicts that corporate veil piercing in Tanzania is hardly made of solid and quantifiable rules which can regulate the current situation surrounded by dishonest companies operating in parent-subsidary relationship.

Until recently, the principle of corporate veil seems to be vague and it is silent in the company law of Tanzania sections. The presence of such loophole makes the practice of doctrine to lack a clear direction to different facts in issues. This ambiguity raises doubts over its clear application in different judicial cases leading to continuation of numerous malpractices in the corporation delayed and some judgments being vague in the courts of law like the BAE saga, EPA scandal, the Richmond case, Barick Gold Mining-Tanzania and its subsidiary Acacia and the

⁴⁸ Sebastian, S. Corporate Responsibility Under Companies Act: An Examination Towards Compliance With Companies Constitutions in Tanzania, 2017.

Meremeta Company Case.⁴⁹ There were also instances reported on cheating/fraud against the Indian Companies by Tanzania Companies in the field of cashew nuts.⁵⁰ Such issues related to companies operating in dishonestly in Tanzania add risks to the nation because of having inadequate Companies Act to regulate the prevailing malpractices.

1.3 Literature Review

There are numerous scholars who have written about the subject of piercing the corporate veil in different contexts. Nyombi investigates the cases where the veil of incorporation is lifted due to a breach of a statutory provision.⁵¹ He critically reviews the exceptions to the corporate personality doctrine, which amount to lifting the corporate veil. Nyombi found that courts are more willing to lift the corporate veil compared to before. He stressed that courts have moved away from the restrictive approach as demonstrated by the tendency to find new exceptions to the corporate personality doctrine such as the interests of justice argument or lifting the veil in tort cases. In terms of originality and value, Nyombi offers an up-to-date assessment of the exceptions to the corporate personality doctrine and highlights the growing tendency to finding new ways of lifting the corporate veil.

Similarly, Feng examines approaches for establishing liability in corporate groups.⁵²

He considers the problem that arises when an insolvent subsidiary's tort creditors

⁴⁹ United Republic of Tanzania, Current Affairs in Tanzania, Retrieved from <https://www.tzaffairs.org/2011>.

⁵⁰ APEDA, Cheating-Fraud retrieved from apeda.gov.in/aped_website/Announcements/Cheating-Fraud.pdf, June 5, 2015

⁵¹ Nyombi, C. *Lifting the Veil of Incorporation under Common Law and Statute*. International Journal of Law and Management. 2014 Feb 4; 56(1):66-81.

⁵² Feng, X. Corporate Liability towards Tort Victims in the Personal Injury Context. Diss. Queen Mary University of London, 2018, p.1.

suffer personal injury, and try to pursue recourse against other group companies – especially the parent company. Feng argues that courts have tried to provide answers regarding the parent company's liability for the torts of their subsidiaries, but have had limited success. He reveals difficulty in extending liability to the parent company by way of piercing the corporate veil. The author recounts the hesitation of the courts in broadening their perspective beyond individual companies, so as to take the group itself as the responsible entity.

Consistently, Mashiri assesses whether piercing of the corporate veil protects creditors and investors in cases where corporate identity is abused, especially in the context of company groups in South Africa⁵³. Mashiri argues that companies in South Africa have a separate legal existence and this gives shareholders limited liability. He argues that if a company cannot pay its debts, creditors will generally have no recourse against shareholders or directors in respect of those debts. Mashiri stressed that the real problem arises if the separate personality of the company has been abused by shareholders and/or directors. He remarks that the remedy of piercing the corporate veil was a common law remedy used by courts in an attempt to remedy the abuse of the corporate personality by directors and shareholders of the company.

Lo analyses the common law doctrine of piercing of the corporate veil in the context of tort liabilities of a company.⁵⁴ He states that it is generally accepted that the veil piercing doctrine can be applied where a company is used to evade existing legal

⁵³ Mashiri, P.T., A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law, With Special Reference to the Position in Groups of Companies. Diss. 2016, p.1

⁵⁴ Lo, Stefan H.C. "Piercing Of The Corporate Veil For Evasion Of Tort Obligations." Common Law World Review 46.1 (2017): 42-60.

obligations but not where a company is used to avoid future legal obligations. He emphasizes that in the tort context, the prevailing view is that it is permissible to establish a company to carry on activities to enable the controllers of the company to escape personal tort liabilities arising from the activities. However, the author argues that such a situation potentially involves the use (misuse) of a company to evade existing tort obligations and that there is greater scope than traditionally understood for piercing of the corporate veil to impose a company's tort liabilities on its controllers.

Oh posits that from the inception veil-piercing there has been a scourge on corporate law.⁵⁵ He remarks that exactly when the veil of limited liability can and will be circumvented to reach into shareholders own assets has befuddled courts, litigants and scholars alike. The author further argues that the doctrine has been bedeviled by empirical evidence of a chasm the theory and practice of veil piercing, notably veil piercing claims inexplicably seem to prevail more often in contract than tort a finding that flouts the engrained distinction between voluntary and involuntary creditors. Unlike predecessors, Oh examines the fraud, a long suspected accessory to veil the piercing as well as specific sub claims in contract, tort and fraud to provide a fine-grained portrait of voluntary and involuntary creditors. Oh found that most successful civil veil piercing claims lie in fraud or involve specific evidence of fraud or misrepresentation. He stresses that claims not only prevail more often in contract but also adhere to voluntary –involuntary creditor distinction. The author further

⁵⁵ Oh, P.B. Veil Piercing Tex, L. Rev.2010;89:81

explains that veil piercing presents a greater risk to individual shareholders than corporate groups.

Ramsay and Noakes remark that there is a significant amount of literature by commentators discussing the doctrine of piercing the corporate veil.⁵⁶ As regards to corporate veil piercing they disclosed that (i) there has been a substantial increase in the number of piercing cases heard by courts over time; (ii) courts are more prepared to pierce the corporate veil of a proprietary company than a public company; (iii) piercing rates decline as the number of shareholders in companies increases; (iv) courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or more individual shareholders; and (v) courts pierce more frequently in a contract context than in a tort context.

Orn argues that in determining whether to apply corporate veil piercing, courts in the United States commonly employ the instrumentality theory, as well as the alter ego and identity doctrines.⁵⁷ He exposes that corporate veil principles provide courts with methods of establishing whether the corporation can be considered a deception and the metaphors used include sham, shell, dummy or alias. Orn stresses that circumstances indicating the validity of such metaphors, and consequently of corporate veil piercing, have evolved in case law and legal theory. He observed that commonly, grossly inadequate capitalization, few shareholders, a disregard of corporate formalities, common directors and the intermingling of corporate assets

⁵⁶ Ramsay, I., & David N. "Piercing the Corporate Veil in Australia, 2001, p.1

⁵⁷ Örn, P. "Piercing the Corporate Veil-a Law and Economics Analysis." 2009, p.1

can be considered telltale indicators of corporate veil piercing. Orn concludes that thorough economic consideration should be the foundation of any usage of veil piercing. He stresses that it must be ascertained that the criteria for its applicability are in line with sound economic rationale, as well as the consequences of its application need to be analyzed from an economic point of view.

Siebritz argues that when a company is formed, a metaphorical veil is drawn between the company, its shareholders and its directors (or agents).⁵⁸ He posits that the veil protects the shareholders and directors from liability where the company commits a wrongful act and from the debts incurred by the company. Siebritz remarks that in principle therefore, the debts of the company are not the debts of the shareholders whereby the protection stems from the concept of a company being a separate legal entity, distinct from its shareholders and agents'. He discloses that when a decision is made by the court to pierce the corporate veil in terms of the common law, the protection afforded to the shareholders and directors falls away. He stresses that piercing places the focus on the substance of the company, or the controllers of the company and not on the company itself. He concludes that in this way, personal liability is attributed to the shareholder(s) or director(s), in respect of the debt or liability of the company.

Bello and Michael argue that If the company commits a civil or corporate crime such a company could be sued in its corporate name, if a judgment is obtained against such a corporation, it is only natural that the company complies with the decision of

⁵⁸ Siebritz, K.L "Piercing the Corporate Veil: A Critical Analysis Of Section 20 (9) of the Companies Act 71 of 2008." PhD diss., University of the Western Cape, 2016.

the court but where it fails, the veil covering the incorporation will be lifted to see those natural persons being the company and probably compel them to comply with the judgment of the court or be made to face the direct penalty of the law through committal to prison.⁵⁹ They conclude that a corporate veil could be lifted whenever the court wants to find out who is behind the fraudulent and improper conduct of a company.

Rządkowski explains the concept of piercing the corporate veil doctrine, which is widely, recognized in common law countries.⁶⁰ According to Rządkowski the doctrine allows the extension of liability for a company's debts to shareholders and officers, if any kind of fraud or unfairness is involved. The author focuses on differences between American and British attitudes towards the doctrine and analyses the grounds for what is known as judicial piercing and "statutory piercing". He questioned whether the piercing doctrine can be applied to the Polish legal system. The author found that officially piercing of the corporate veil has never recognised by Polish jurisprudence and courts. Rządkowski concludes that the current statutory measures in Poland can extend the liability of a company towards officers, directors etc. and can easily be compared with statutory piercing.

The literature reviewed discloses the challenges related to piercing of corporate veil. First most of literature on corporate veil piercing is dominated by scholars from foreign jurisdictions. Second there is lack of appropriate literature from Tanzania that

⁵⁹ Bello, S. A., & Michael, O. C. Piercing the Veil of Business Incorporation: An Overview of what Warrants It. *Review of Contemporary Business Research*, 2014, p.117-138.

⁶⁰ Rządkowski M. Piercing the Corporate Veil Doctrine in Poland?" A Comparative Perspective. *Comparative Law Review*, 2016, Oct 13;20:55-85

can shed light on corporate veil piercing at the local context. Third, courts have been reluctantly if not uncertain when it comes to piercing corporate veil of group companies. Fourth there are lack of solid rules in blurring the shield between the shareholders and the company. Fifth it is not known exactly as to what should be the standard measure for piercing group companies. Sixth up to now, it is not known as to what should be done differently to unravel the malpractices in corporations operating in group context. Most of the authors have presented what fits in their contexts but do not seem to provide a coherent approach/explanation on piercing of corporate veil of the group companies. Thus, the current study endeavored into addressing the problem in Tanzania context to see to it that the inadequacies contained in the companies Act are addressed to suit the local contexts.

1.4 Objectives of the Study

This section contains objectives and research questions of the current study.

1.4.1 General Objective

The main objective of this study is to provide an insight on the loopholes available in the Companies Act of Tanzania lagging behind the corporate veil piercing of group companies and suggest how it can be enhanced for future practices.

1.4.2 Specific Objectives

- (i) To examine corporate veil piercing problems posed by multinational corporations operating in group context;
- (ii) To analyze the adequacy, relevancy and appropriateness of the existing Companies Act in dealing with corporate veil piercing in a group context;

- (iii) To suggest strategies for assisting the legislative authorities of Tanzania to craft workable and appropriate Act which is suitable to the local context in piercing corporate veil of group companies.

1.4.3 Research Questions

- (i) What are the corporate veil piercing problems posed by Multinational Corporations operating in group context?
- (ii) How is the adequacy, relevance and the appropriateness of the existing Companies Act of Tanzania in dealing with corporate veil piercing of the group companies?
- (iii) What are the strategies to assist the legislative authorities of Tanzania in crafting workable and appropriate Act which is suitable to the local context in piercing corporate veil of group companies?

1.5 Research Methodology

The study used mainly doctrinal legal research methodology however it was supplemented by comparative method to address the problem. Analysis of both primary and secondary sources was conducted to achieve the target of this study. It involved critical legal analysis of relevant legislation, case laws, research studies, multinational corporations' reports, government reports, policies, books, journals, dissertations and thesis. In examining various laws, the researcher employed historical, analytical and applied perspective approach.⁶¹ Under historical

⁶¹Kiunsi, H.B., Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Perspective, A Thesis Submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Law of the Open University of Tanzania 2017, p.22

perspective, the researcher looked at history of corporate veil piercing and the rationale behind is to establish whether or not issues, mischief and material conditions of that particular time are still relevant to the contemporary corporate veil piercing in the group context.⁶² Under analytical level, the researcher analyzed whether or not existing corporate veil piercing rules give relevant answer(s) to the existing problems; then under applied level, the researcher critically examined the manner and extents the existing corporate veil piercing is sufficient enough to solve existing corporate veil piercing problem.⁶³

The sources of materials were obtained from the Open University of Tanzania library, University of Dar es Salaam library, law reports available at the High Court of Tanzania library, Court of Appeal of Tanzania library and United Nations Library in Dar es Salaam and websites with relevant materials. In building up the argument both deductive and inductive reasoning were applied to arrive at the proper critical analysis of the current study.

The researcher made a comparative analysis in order to supplement the doctrinal methodology. In particular, the researcher was interested to make comparison of the problem at the international arena so as to detect any positive trends from other jurisdictions towards complying with the Tanzania requirements in piercing the corporate veil.⁶⁴ This is due to the fact that the extent of the problem may not be the same in other jurisdictions in the world because some might have initiatives worth

⁶² Ibid 23

⁶³ Ibid 23

⁶⁴ Ibid 24-25

being followed by others.⁶⁵ The comparative analysis also aimed at discerning the best practices and experiences from other jurisdictions that might be applied in Tanzania in order to have workable corporate veil piercing in the group context.

1.6 Scope of the Study

The study is delimited to group of companies in Tanzania particularly those limited by shares as provided in Company Act.⁶⁶ The rationale of choosing these types of companies evolve from recurrent complaints and appalling situation multinational corporations operating in the group context which have made investments in different sectors in Tanzania attracting corporate veil piercing.

1.7 Organization of the Study

The study is structured into six chapters. Chapter one deals with the contextual framework of the study. Chapter two presents the origins, concepts and theories of corporate veil piercing. Chapter three focuses on international perspective on piercing of corporate veil under different jurisdictions. Chapter four deals with legal framework of corporate veil piercing in Tanzania. Chapter five deals with the key findings on corporate veil piercing framework in Tanzania. Finally, chapter six provides conclusions and recommendations of the study.

⁶⁵ Ibid 25

⁶⁶ Companies Act, s 3

CHAPTER TWO
THE CONCEPTS, ORIGINS AND THEORIES OF CORPORATE VEIL
PIERCING

2.1 Introduction

This chapter provides the concepts, origins and theories of corporate veil piercing. It begins by providing the meaning of corporation, consequences of incorporation and the legal basis of separate personality, which sets the foundation of the doctrine of corporate veil doctrine. The concept of piercing the corporate veil is analyzed in depth based on the corporate veil overview, veil piercing remedies, corporate veil intensification, when is it necessary to pierce the veil, scholarly legal perspective on veil piercing and general maintenance of corporate veil. The origins and theories are of corporate veil piercing are also presented under this chapter. Finally, the chapter provides conclusion to show the main insights.

2.2 Piercing of Corporate Veil Concepts

This subsection covers piercing of corporate veil concepts namely; corporation, consequences of incorporation; the legal basis of separate personality doctrine; limited liability; corporate veil piercing overview; the meaning of corporate veil piercing; corporate veil intensification; when is it necessary to pierce the corporate veil; scholarly legal perceptive; corporate veil maintenance and corporate veil in group context.

2.2.1 What is Corporation?

Corporation or to incorporate comes from Latin verb '*corporare*' which means to furnish with a body or to infuse with a substance and this is what the law does when

it creates or recognizes an artificial or juristic corporation: it furnishes an artificial construct with substance in the eyes of law with ability to have legal rights and incur legal liabilities.⁶⁷ A corporation is “an artificial being, invisible, intangible and existing only in contemplation of law as per *Trustees of Dartmouth College v Woodward*, 17 U.S. 518 [1819]; *CTS Corp. v Dynamics Corp. of America*, 481 U.S. 69 [1987].⁶⁸ Thus, a company is both a separate legal person and an association of its members and this is an underpinning feature of company law.⁶⁹ Similarly, the essence of a company is that it has a legal personality distinct from the people who create it.⁷⁰ This means that even if people running the companies are continuously changing, the company itself retains its identity and the business need not be stopped and restarted with every change in the managers or members (shareholders) of the business.⁷¹ Hence, in Tanzania issuing certificate of incorporation is conclusive evidence that all the requirements of the Companies Act in relation to incorporation have been complied with.⁷²

The idea that people might come together to form a distinct legal entity is not new: for examples, Code of Hammurabi (c. 2083) B.C. recognized “societies.”, Romans allowed for formation of collective bodies by imperial fiat that is the beginning of idea that government must sanction formation of entity), guilds, churches, British overseas trading companies, monopolies such as British East India Company (1600)

⁶⁷ McLaughlins, S. *Unlocking Company Law*. London: Hachette, 2009, p.9

⁶⁸ Cohen, M. *A Brief History of Piercing the Corporate Veil*, 2010, p.3

⁶⁹ Ridley, A. *Key Facts: Company Law*, 4th Ed, 2011, p.18

⁷⁰ Dine, J. *Company Law*, 4th Ed. Company law, New York: Palgrave, 2001, p.22

⁷¹ *Ibid* 22.

⁷² Ridley, A. *Key Facts: Company Law*, 4th Ed, 2011, p.18

and Hudson's Bay Company (1670), joint Stock Companies.⁷³ In 1837, Connecticut enacted the first general incorporation statute (Early corporations only did business in one state).⁷⁴ With railroads, corporations wanted to operate in more than one state for example, In *Paul v Virginia*, 75 U.S. 168 [1868], the Court held that a state can regulate a foreign corporation within its borders, but cannot prevent it from doing business in that state. Small states liberalized incorporation laws in what Justice Brandeis later called a "race to the bottom."⁷⁵

2.2.2 Consequences of Incorporation

The fundamental attribute of corporate personality from which all other consequences flow is that the corporation is a legal entity form its members.⁷⁶ Hence, it is capable of enjoying rights and being subject to duties, which are not the same as those enjoyed or borne by its members.⁷⁷ In other words, it has legal personality and is often described as an artificial person⁷⁸ in contrast with a human being, a natural person.⁷⁹ Incorporation gives the company legal personality separate from its members with the result that a company may own property, sue or be sued in its own corporate name-it will not die when it members die⁸⁰. Thus, the share capital once

⁷³ Cohen, M. A Brief History of Piercing the Corporate Veil, 2010, p.1

⁷⁴ Ibid 1

⁷⁵ Ibid 1

⁷⁶ Davies, P.L. Gower and Davies Principles of Company Law, 7th Ed. London: Sweet & Maxwell Ltd, 2003, p. 30

⁷⁷ Ibid 30

⁷⁸ Blacks Law Dictionary, Eight Ed.2004-According to this dictionary, artificial refers the existing only by virtue of or in the consideration of law. This term is used in reference to a company or a corporation

⁷⁹ Davies, P.L. Gower and Davies Principles of Company Law, 7th Ed. London: Sweet & Maxwell Ltd, 2003, p. 30

⁸⁰ Pettet, B. Company Law, 2nd Ed.2005, p.23.

subscribed must be maintained by the company, it no longer belongs to the members and cannot be returned to them unless except to stringent safeguards.⁸¹

Incorporation distances the owners of a company from its affairs and this protects owners from financial liability if a company fails or sued.⁸² As a corporate entity, any financial losses that occur come out of the company's assets and not the owners' personal assets.⁸³ The rule that for a wrong done to the company, the proper claimant is the company itself is similarly largely due to the principle of separate personality.⁸⁴ These same protections exist when a company is sued, if the corporation lacks money to pay off debts or liabilities, incorporation prevents creditors from going after the owners for monies owed.⁸⁵ Some incorporation strategies, such as incorporating as limited liability Company, offer pass-through taxation, which means funds are distributed to shareholders, who then report the income on their personal taxes.⁸⁶

An incorporated business is a separate entity from its owner or shareholders-that is involving issues like separate bank accounts and credit cards, providing business identification rather than just personal identification when withdrawing money from the bank.⁸⁷ The effects of incorporation subject a company and its owners to double taxation and this occurs at the corporate level and again at the shareholder or owners

⁸¹ Ibid 23

⁸² Jeanty, J. The Effects of Incorporation of a Company, 2019, p.1.

⁸³ Ibid 1.

⁸⁴ Pettet, B. Company Law, 2nd Ed.2005, p.23.

⁸⁵ Jeanty, J. The Effects of Incorporation of a Company,2019, p.1

⁸⁶Thomps,V. The Effects of Incorporation of a Company. 2019, p.1

⁸⁷ Ibid 1

level.⁸⁸ The owners pay taxes on profits at individual rates and as a separate entity, a corporation can enter into lease agreements, which enable owners to reduce the amount of taxes paid.⁸⁹ The assets of the company (including the share capital promised but still remaining unpaid), would alone be answerable for the claims of the creditors and in this way the shareholders are able to trade with limited liability.⁹⁰ Owners can lease assets, such as equipment, to a corporation, which allows them to charge rental fees.⁹¹ The company pays the rental fees while the owners receive rental income.⁹² By becoming a shareholder, the member contributes or promises to contribute a stated amount of money for the furtherance of common objects of the company.⁹³ However, if the company is limited liability company not only is the money owned by the company but also the members of the company are not liable for the debts of the company (except where the law has made the exceptions to this rule in order to prevent fraudulent or unfair practices by those in charge).⁹⁴ Members can be called upon to pay price of their shares, after that the creditor must depend on the company money to satisfy the claim.⁹⁵

Incorporated company is an association of its members and person separate from its members implying that it is the company, not its members that conduct the business

⁸⁸ Jeanty, J. The Effects of Incorporation of a Company, 2019, p.1

⁸⁹ Ibid 1

⁹⁰ Shodhganga, Chapter 3-Corporate Personality and the Doctrine of Ultra Vires, Accessed from <https://shodhganga.inflibnet.ac.in> › bit stream, 2020

⁹¹ Jeanty, J. The Effects of Incorporation of a Company, 2019, p.1

⁹² Ibid 1.

⁹³ Shodhganga, Chapter 3-Corporate Personality and the Doctrine of Ultra Vires, Accessed from <https://shodhganga.inflibnet.ac.in> › bit stream, 2020

⁹⁴ Dine, J. Company Law, 4th Ed. Company law, New York: Palgrave, 2001, p.22

⁹⁵ Ibid 22

of the company⁹⁶. The company can make contracts, sue, own property, and continue in existence despite changes in membership, in other words, it enjoys perpetual succession and can delegate management to the directors⁹⁷. When a company becomes a corporation, it functions as a separate entity, meaning it takes on an identity of its own, for instance, a corporation has no time limits in which to report profits or losses when filing taxes.⁹⁸ This means a company can carry profits over from year to year or list them on prior tax years and in doing so, companies can shift their tax costs in accordance with their earnings.⁹⁹

The fiction of corporate personality is introduced for the purpose of bestowing the character and features of individuality on a collective and changing body of men. Incorporation assimilates the complex form of collective ownership to the simpler form of ownership.¹⁰⁰ In case there are number of persons who are owners of the same property, difficulty arises as to its distribution as well as to its management.¹⁰¹ Much like an individual person, as a separate entity a company can do many of the same things an owner can do, such as own property, enter into contract obligations and pay taxes¹⁰². Instead of one or two people dictating how a company will run, a board of directors manages the affairs of a corporation.¹⁰³ In turn, the company's stockholders become the actual owners of the company and they elect its board of

⁹⁶ Ridley, A. Key facts: Company Law, 4th Ed, 2011, p.18

⁹⁷ Ibid 18

⁹⁸ Jeanty, J. The Effects of Incorporation of a Company, 2019, p.1

⁹⁹ Ibid 1

¹⁰⁰ Shodhganga, Chapter 3-Corporate Personality and the Doctrine of Ultra Vires, Accessed from <https://shodhganga.inflibnet.ac.in> › bit stream, 2020

¹⁰¹ Ibid 1

¹⁰² Jeanty, J. The Effects of Incorporation of a Company, 2019, p.1

¹⁰³ Ibid 1

directors.¹⁰⁴ Notwithstanding the separate personality of a company it may range of problems because although the company is regarded as a person in law it can of course, only function through those who are running the business in which the company is involved.¹⁰⁵ The law must regulate the relationships between the company and its creators and the members or shareholders as well as the relationship between the company and outsiders who do business with the company.¹⁰⁶ The most important purpose of incorporation is to enable traders to embark upon commercial venture with limited liability. This is possible only by the incorporation of the limited liability company.¹⁰⁷ The purpose of doing such regulation is to ensure that the company operates in line with the formalities of its establishment.

2.2.3 The Legal Basis of Separate Personality Doctrine

The essence of a company is that it has a legal personality distinct from the people who compose it, that is, the people who have subscribed for shares in the company or have given guarantees to the company and from the directors of the company.¹⁰⁸ In essence therefore, if a company in the course of doing business is involved in any legal action that imposes any liabilities on the company; the company shall be sued in its own capacity as an entity. Besides that there is corporate veil; a wall that separates directors and shareholders from general company liabilities.¹⁰⁹ The veil

¹⁰⁴ Ibid 1

¹⁰⁵ Dine, J. Company Law, 4th Ed. Company law, New York: Palgrave, 2001, p.22

¹⁰⁶ Ibid 22.

¹⁰⁷ Shodhganga, Chapter 3-Corporate Personality and the Doctrine of Ultra Vires, Accessed from <https://shodhganga.inflibnet.ac.in> › bit stream, 2020

¹⁰⁸ The Corporate and Commercial Department of Breakthrough Attorneys, Company Law Update: Responsibilities and Liabilities of Directors of a Company in Tanzania, 2019, p.1

¹⁰⁹ Ibid 1

may also be pierced if it is found that the company was established for fraudulent purpose or marked as sham.

The corporate entity principle was firmly settled at the end of the 19th century in the Salomon's case.¹¹⁰ The case of *Salomon v Salomon [1897] AC 22* is by no means the first case to depend on the separate personality of a company but it is the most widely discussed in the corporate law.¹¹¹ The case of *Salomon v Salomon (supra)* firmly established in the English law principle that a company is a legal person entirely separate and distinct from the members of that company.¹¹² It is trite law that a rather hefty veil is drawn between these two that can be lifted only in a limited number of circumstances that seem to fluctuate according to current judicial thinking.¹¹³ However, it is well established that the courts will not allow the corporate form to be used for the purposes of fraud or as a device to evade a contractual or other legal obligation, a principle which is referred to hereafter as the fraud exception to the Salomon principle.¹¹⁴ The principle of separate legal personality is a powerful device, allowing incorporations to manage commercial risk, but in a certain situations it can be used unfairly or fraudulently.¹¹⁵ Nonetheless if the corporation is engaged in such malpractices in the course of its operation then it is pierced in order to blur the wall that exists between the shareholders and the company.

¹¹⁰ Pettet, B. *Company Law*, 2nd Ed. 2005, p.23

¹¹¹ Dine, J. *Company Law*, 4th Ed. Company law, New York: Palgrave, 2001, p.22

¹¹² Payne J. *Lifting the Corporate Veil: A reassessment of the fraud exception*. *The Cambridge Law Journal*. 1997 Jul;56(2):284-90.

¹¹³ *Ibid* 284-90

¹¹⁴ *Ibid* 284-90

¹¹⁵ Ridley, A. *Key facts: Company Law*, 4th Ed, 2011, p.18

The concept of separate personality also extends to groups of companies, with its subsidiary in group having separate identity.¹¹⁶ Furthermore, a company is not an agent of its members, it follows that unless there is specific evidence of agency arrangement a subsidiary is not an agent of its parent company.¹¹⁷ The following are examples of affirmation of the Salomon principle by the courts¹¹⁸. *Macaura v Northern Assurance [1925]* where a shareholder had no insurable interest in property owned by the company. Note that in this case the principle was applied to the disadvantage of the shareholder; *Lee v Lee's Air farming [1961]* where a company can employ one of its members who will have all statutory and other rights against the company; *Secretary of State for Trade and Industry v Bottill [1999]* where a sole shareholder can be employed by the company and will have rights under employment rights acts 1996; *Secretary of State of Business, Enterprises and Regulatory Reform v Neurfeld [2009]*: the court of appeal reviewed the law and held that director of a company can be an employee as long as he is employed under a genuine contract of employment and not contract of services. Others are *R v Philippou [1989]*: The sole directors and shareholders withdrew funds from the company account in London and bought themselves a property in Spain.

The company went into liquidation leaving very large debts. They were charged with stealing from the company and argued that as they were the only directors, the withdrawal had consent of the company. The court of appeal refused to accept this argument; *Foss v Harbottle [1843]*: Since the company is a legal person separate

¹¹⁶ Ibid 18

¹¹⁷ Ibid 18

¹¹⁸ Ibid 18

from its members, a member cannot bring an action to redress a wrong done to the company, but not the statutory provisions.

It is also an elemental jurisprudence that a corporation is a creature of the law, endowed with personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders¹¹⁹. The recognition of corporations as an entity separate from its shareholders is well established and furnish theoretical basis for the idea that liabilities of corporation whether tort or contract are its liabilities and not the shareholders.¹²⁰ Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its presence without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it¹²¹.

For many years, jurists have struggled to rationalize the common law rules, which regulate the circumstances in which it is justifiable to override the principle of separate legal personality¹²². The concept of separate corporate personality as established by the principle of *Salomon v Salomon [1897]* and emphatically reasserted in the later some of which are cited above forms the corner stone of the company law.¹²³ However, such views are in accordance with the general principle.

¹¹⁹ Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 (5th Cir. 1972).

¹²⁰ Gelb, H. Piercing the Corporate Veil-The Undercapitalization Factor. Chi.-Kent L. Rev., 1982, 59, 1.

¹²¹ International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

¹²² Zindoga, W. T. Piercing of the corporate veil in terms of Gore: Section 20 (9) of the new Companies Act 17 of 2008 (Doctoral dissertation, University of Cape Town), 2015

¹²³ Sealy, L.S.Cases and Materials in Company Law, 2nd Ed. 1978, p.40.

Sometimes the principle may be rebutted if corporate owners perpetuate malpractices, which are dangerous to the corporate law.

Thus, the invention of the company as separate is vital as it means that it is free to develop as an instrument of business shaped by both the people involved in its running and those regulating its existence.¹²⁴ That different models of companies¹²⁵ have come to exist is a direct result of the fact that the company separate personality sets it apart from the individuals that are running it.¹²⁶

Furthermore, the concept of a company as a separate entity from its shareholders is well known and recognized in many common law and civil law jurisdictions.¹²⁷ Generally, it is regarded as a fundamental aspect of corporate law and for this reason courts are loath to depart from it.¹²⁸ This shows that the principle of separate personality is not absolute and in both common law and civil law countries as the courts have the power to depart from it and where this occurs, it is often said that the courts pierce or lift the corporate veil.¹²⁹ Such situations inevitably, lead to liability

¹²⁴ Dine, J. Company Law, 4th Ed. Company Law, New York: Palgrave, 2001, p.24

¹²⁵ Ibid 24-26, the models that exist include the contractual model¹ which regard the company as primarily if not solely the property of and co-existence with the owners. The constituency model² which exist in two variants, the first variant of the model sees the company as run in the interest of the shareholders, it being in the interests of shareholders to take into account of the interest groups because to ignore them would damage shareholder interests. In the second variant it is accepted that interests of other groups must be taken into account because such an approach directly benefits the company. The enterprise model³ differs from a constituency model in that the directors not only have to take into account the interest of others as well as the shareholders; those interests are regarded as part of the company having corporate governance role of their won inside the decision making process.

¹²⁶ Dine, J. Company Law, 4th Ed. Company law, New York: Palgrave, 2001, p.22

¹²⁷ Tan, C.H., Jiang, Y. W., & Christian H. "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives." (2018).p,11

¹²⁸ Ibid 11

¹²⁹ Ibid 11

being imposed on another person, perhaps in addition to the corporate vehicle.¹³⁰ In other words, the liability is shifted to the shareholders.

Despite all that can be said about corporations, as a general principle, corporations are recognized as legal entities separate from their shareholders, officers, and directors¹³¹. Corporate obligations remain the liability of the entity and not of the shareholders, directors, or officers who own and/or act for the entity¹³². However, it will depend on the shareholders if they are adhering to the formalities. There is a major exception to the general concept of limited liability. There are certain circumstances in which courts will have to look through the corporation, that is, lift the veil of incorporation, otherwise known as piercing the veil, and hold the shareholders of the company directly and personally liable for the obligations of the corporation.¹³³ The veil doctrine is invoked when the court blur the distinction between the corporation and the shareholders.

Corporate legal personality is not a doctrine without challenges, it can be ignored by piercing the corporate veil, and thus liability of the company could be found to be liability of its members.¹³⁴ It is significant to consider that once the company acquires a separate legal existence through incorporation the veil allows the company

¹³⁰ Ibid 11

¹³¹ Thompson, R. B. *Piercing the Corporate Veil: An Empirical Study*. Cornell L. Rev., (1990). 76, 1036.

¹³² Ibid 1036

¹³³ Forji, A.G., *The Veil Doctrine in Company Law* 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/> p.2

¹³⁴ Marobela, M.M.. "Piercing Of the Corporate Veil in a Holding/Subsidiary Relationship." PhD diss., University of Pretoria, 2017, p.16.

directors¹³⁵ to operate the company without external interference, unless they use the company for illegal purposes.¹³⁶ This is accompanied by the underlying notion of limited liability in order to encourage shareholders to provide capital and take on risky investments.¹³⁷ In this way, the risk is shifted towards third parties and costs are externalized and the overall, this investor attitude encourages economic development¹³⁸.

It needs to be understood that one of the main motivations for forming a corporation or company is the limited liability it offers to its shareholders.¹³⁹ This is due to the fact that most people prefer to do business through corporations in order to shield themselves from personal liabilities. This situation leads to the emergence of two personalities, that is, the companies having artificial personality whereas the people within the companies are being viewed as natural persons. Nevertheless, the mere shield provided in the companies Acts does not suffice to provide people with a chance of avoiding liabilities in their registered businesses in case there are malpractices, which are detrimental to the corporate law. The business being referred here is the organized efforts of enterprise to supply consumers with goods and services for a profit through corporation.¹⁴⁰ That is any form of trade, commerce,

¹³⁵ Companies Act, s 2 provides that a director includes any person occupying the position of director by whatever name called.

¹³⁶ Marobela, M.M.. "Piercing of the corporate veil in a holding/subsidiary relationship." PhD diss., University of Pretoria, 2017. p.16.

¹³⁷ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

¹³⁸ Ibid 1-27.

¹³⁹ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

¹⁴⁰ Pondium, 'Business Environment' "Accessed from www.pondiuni.edu.in/storage/dde/downloads/h1040.pdf p.1

craftsmanship, or specific profession carried on for profit, gain.¹⁴¹ Similarly, international and domestic laws require those establishing business to register them in order to provide opportunity for countries around the globe to discover on how each nation is excelling in its economy through its corporations. For example, in Tanzania every business must obtain certificate of registration from the Business Registration Center¹⁴² at each local authority¹⁴³. This situation helps to know the real owners whether national or international for the purpose of ensuring that corporate formalities are adhered to the certificate of its establishment.

The fact is that corporate law has been protecting shareholders from being subject to personal liability for the risks of conducting business.¹⁴⁴ The States through corporate laws creates a corporate fiction which is a separate legal entity and distinctive from the shareholders and which offers the primary advantage of limited shareholder liability.¹⁴⁵ This form of assurance tends to encourage people to buy shares in the corporations. Nonetheless, the management of most corporations has not been proper leading to some parties being aggrieved. It is worthy to note that through a separate legal entity, a company or corporation can only act through human agents who compose it and they may be liable¹⁴⁶ through direct liability (for direct infringement) and through secondary liability (for acts of its human agents acting in the course of their employment).¹⁴⁷

¹⁴¹Business Activities Registration Act, s 3 & Business Name Registration Act, s 2

¹⁴² Business Activities Registration Act, s 11(1)

¹⁴³ Ibid s 7

¹⁴⁴ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27.

¹⁴⁵ Ibid 1-27

¹⁴⁶ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>. p.4

¹⁴⁷ Ibid 4

Corporations enormously influence people's lives in a myriad of ways; like organizing tasks in their economic development but their role in society has always been a battleground of political debate and ideological affectation whereby selfish means of earning profit is practiced in the business world where the society becomes the victim of domination, exploitation and oppression¹⁴⁸. Such instances have attracted corporate owners to distance themselves from the core purpose of incorporation triggering the so-called piercing of veil by the courts.¹⁴⁹ This shows that corporate veil can be seen as the cornerstone of corporate law; however, as moral hazard comes into play, the externalization costs might exceed the benefits and, thus, damage third parties¹⁵⁰. In order to promote justice, the presumption of corporate veil must be occasionally rebutted and personal liability imposed on shareholders¹⁵¹. This implies the hallmark of corporations that the corporate entity and its shareholders are separate and as separate entities, shareholders are not liable directly for the actions of the corporation may be neglected¹⁵².

The case of *Solomon v Solomon [1897]* it is the landmark case which held that a company being a legal entity once it is registered one cannot sue the directors of the company for the act committed by the company.¹⁵³ However, human ingenuity started using the veil as a crack for fraud, improper conduct and perpetuation of

¹⁴⁸Mbirigenda, S. Corporate Social Responsibility in Tanzania: Experience of Misconception, Misuse and Malpractices. 2015, p.13.

¹⁴⁹ According to section 2 of the Companies Act of Tanzania [R.E 2002], the term "the court" is used in relation to a company, means the court having jurisdiction to wind up the company.

¹⁵⁰ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

¹⁵¹ Ibid 1-27

¹⁵² Manning, M.R. "There's a Change in the Status Quo: Corporate Veil Piercing in Ohio after *Dombroski v. WellPoint*." *Entrepreneurial Bus. LJ* 5, 2010, p.315.

¹⁵³ Nyaki, J. V. A critical Analysis of Tanzanian Corporate Governance Regulation and Its Impact on Foreign Investment (Doctoral dissertation, University of Western Cape). 2013, p.1.

criminal conducts; thus it becomes necessary for the court to break through and look for the persons behind the company who are really beneficiaries to the corporate, that is, lifting the corporate veil.¹⁵⁴ So lifting the corporate veil is the legal decision to treat the right and duties of the corporation as the rights and liabilities of its shareholders.¹⁵⁵ It is the strategy of exposing out the directing mind of the company.

It is further argued that corporations are often misused for money laundering, bribery and corruption, shielding assets from creditors, tax evasion, self dealing, market fraud and other illicit activities and the veil of secrecy they provide in some jurisdictions may also facilitate the flow of funds to the terrorist organizations implying that governments are required to combat such misuse by acting to ensure the availability of information and ownership and control.¹⁵⁶ The illegal acts and omissions in the corporations perpetuate the courts to blur the distinction that exists between the owners within the corporations. Similarly, the presence of malpractices in the corporations implies disregarding the veil. Hence, piercing the veil comes in as the means of providing justice to those who are offended in the corporations. When courts pierce the corporate veil, they disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.¹⁵⁷ Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to

¹⁵⁴ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>. p.4

¹⁵⁵ Nyaki, J. V. A critical Analysis of Tanzanian Corporate Governance Regulation and Its Impact on Foreign Investment (Doctoral dissertation, University of Western Cape). 2013, p.1

¹⁵⁶ Organization for Economic Cooperation and Development, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, 2018, p.1

¹⁵⁷ Karen V., Piercing the Corporate Veil: A Transnational Approach, 2018, p.17

identify the persons who are really guilty¹⁵⁸ referring to as lifting of the corporate veil¹⁵⁹.

On the other hand, there are problems¹⁶⁰ which are caused by the personality doctrine including the problem is experienced by those seeking to form a company in order to carry on business while they are completing formalities which will lead to registration of the company the consequent gain of legal personality for the company, its creators may wish to sign contracts for the benefit of the company when it is formed. Another problem is the one under Salomon's case where a limited liability company can be very powerful weapon in the hands of one determined on fraud and on defeating creditors' rightful claims.¹⁶¹

2.2.4 Limited Liability

One of the most fundamental reasons for incorporating a business is to achieve limited liability because of a great advantage it offers to the corporate investor or owner a cap on his liability, typically in the amount of his investment.¹⁶² Without such limited liability, corporations could not attract the amounts of capital needed to operate efficiently that is why, it is important today because our society is extremely litigious, and an investor's personal assets would otherwise be subject to seizure if not for the corporation being an artificial entity, which is distinct and separate from

¹⁵⁸ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School Of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

¹⁵⁹ Ibid 1

¹⁶⁰ Dine, J. Company Law, 4th Ed. Company law, New York: Palgrave, 2001, p.22

¹⁶¹ Ibid 22

¹⁶² Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa LJ. 1992; 28:869.

the investor.¹⁶³ However, with the privilege of limited liability comes the responsibility of operating the corporation so as to not wrongfully injure third parties with whom it deals.¹⁶⁴ When recognizing corporations as distinct entities from their owners would be inconsistent with public policy, courts will consider disregarding the corporate entity-known as "piercing the corporate veil."¹⁶⁵

Additionally, the most important ingredient that flows from the separate legal personality clause is that of limited liability.¹⁶⁶ According to firmly established legal principles corporation is recognized as a legal entity, separate and distinct from its shareholders the obligation of corporation are the responsibility of the corporate entity and not shareholders who are liable only for the amount voluntary they put in risk in the business venture and insulation of shareholders is known as limited liability¹⁶⁷. Corporation as a fictitious person was first recognized in the 13th century ecclesiastical writings of Pope Innocent IV but the origins of limited liability date to ancient times, found in some form in Roman, Islamic and Byzantine law.¹⁶⁸ Although limited liability was not the driving force behind the 17th-century inception of the secular corporate form in England and America, limited liability ultimately proved to be the dominant benefit of incorporation.¹⁶⁹ For instance, in

¹⁶³ Ibid 869

¹⁶⁴ Ibid 869

¹⁶⁵ Ibid 869

¹⁶⁶ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

¹⁶⁷ Barber, David H. "Piercing the Corporate Veil." *Willamette L. Rev.* 17 (1980): 371.

¹⁶⁸ Flora, C.E.. "When, How & Why of Piercing the Corporate Veil in Indiana." *Res Gestae* 60 (2016): 13.

¹⁶⁹ Ibid 13

USA, the first statute providing general protection for shareholders arose in Massachusetts in early 1809.¹⁷⁰

Until now, a corporation under company law is specifically referred to as a legal person- as a subject of rights and duties, that is, capable of owning real property, entering into contracts, and having the ability to sue and be sued in its own name.¹⁷¹

However, there cannot be legal personality without accountability. It follows from the fact that a corporation is a separate person that its members are not as such liable for its debts.¹⁷² Hence, in the absence of express provision to the contrary the members will be completely free from any personal liability.¹⁷³ The principle of limited liability is relatively new because early corporations did not arise from a desire for limited liability, but from a desire to facilitate a perpetual succession of individuals in a single enterprise.¹⁷⁴ Nowadays, one of the main motives for forming a corporation or company is the limited liability that it offers to its shareholders¹⁷⁵.

According to this doctrine, a shareholder can only lose what he or she has contributed as shares to the corporate entity and nothing more¹⁷⁶. This tenet attracts those who want to invest in the business. Most people do not prefer to pay more than what they have promised to offer to the corporation.

¹⁷⁰ Ibid 13.

¹⁷¹ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

¹⁷² Davies,P.L. Gower and Davies Principles of Company Law, 7th Ed.London: Sweet & Maxwell Ltd, 2003,p. 30

¹⁷³ Ibid 30.

¹⁷⁴ Cohen, M.A., Brief History of Piercing the Corporate Veil, 2016, p.6

¹⁷⁵Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

¹⁷⁶ Ibid 1

The recognition of corporation as entity separate from its shareholders is well established and furnishes a theoretical basis for the idea that liabilities of corporation whether tort or contract are not liabilities of corporation.¹⁷⁷ Limited liability is regarded commonly as a corporate attribute indeed an advantage of doing business in the corporate form and its significance to the shareholders may be diminished to the extent that creditors obtain personal guarantees from them.¹⁷⁸ The main importance of the limited liability concept is that it protects the company and its members, as well as to facilitate commercial ventures in which the company may be interested.¹⁷⁹

The concept of limited liability was invented in England in the 17th century, and prior to this period, people were scared to invest in companies because any partner in a general partnership could be held responsible for all the debts of the corporation¹⁸⁰. The principle of limited liability for shareholders of the corporate entity exists in nearly every developed legal system in the world.¹⁸¹ Limited liability is probably the most attractive feature of the corporation although it has come to be recognized primarily during the 19th century.¹⁸²

One of the most fundamental reasons for incorporating a business is to achieve limited liability.¹⁸³ The most a member in the company can lose is the amount paid

¹⁷⁷ Gelb, H., "Piercing the Corporate Veil-The Undercapitalization Factor." *Chi.-Kent L. Rev.* 59 (1982): 1.

¹⁷⁸ *Ibid* 1

¹⁷⁹ Forji, A.G., *The Veil Doctrine in Company Law* 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/1>

¹⁸⁰ *Ibid* 1

¹⁸¹ Kim, S.B., "A Comparison of the Doctrine of Piercing the Corporate Veil in the United States and in South Korea." *Tulsa J. Comp. & Int'l L.* 3 (1995): 73.

¹⁸² *Ibid* 73.

¹⁸³ Watt, K.B., "Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach." *Tulsa LJ* 28 (1992): 869.

for the shares themselves and thus the value of his/her investment.¹⁸⁴ Thus, creditors who have claims against the company may look only to the corporate assets for the satisfaction of their claims as creditors and generally cannot proceed against the personal or separate assets of the members.¹⁸⁵ This has the potential effect of capping the investors' risk whilst, consequently, their potential for gain is unlimited.¹⁸⁶ It is obvious that corporations exist in part, in the first place to shield their shareholders from personal liabilities for the debts of that corporation.¹⁸⁷

Most obviously, limited liability enables aggregation of large amounts of capital from numerous small investors however, if liability were not limited, even a small investment could render a shareholder liable for a substantial corporate obligation.¹⁸⁸

Man has, since time immemorial sought to explore mechanisms by which his assets remain protected¹⁸⁹. This has made corporation or company to remain a favoured and common asset protection mechanism, which serves to successfully externalise risk arising from business and other transactions¹⁹⁰.

Many people would be reluctant to risk their personal wealth in exchange for the prospect of only a modest return at best; even if the venture proves to be wildly successful, the small shareholder can claim only a small percentage of the

¹⁸⁴ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

¹⁸⁵ Ibid 7

¹⁸⁶ Ibid 6

¹⁸⁷ Ibid 6

¹⁸⁸ Milton, D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006;56:1305.

¹⁸⁹ Hameed, I., "The Doctrine of Limited Liability and the Piercing of the Corporate Veil in the light of fraud: A critical multi-jurisdictional study." (2012). p.1

¹⁹⁰ Ibid 1

corporation's gains.¹⁹¹ Because even a remote risk of a huge loss may overshadow small gains that are more likely, potential investors may forego investments that have a positive net present value.¹⁹² The means by which such externalization of risk is achieved is largely attributed to the legal nature of a corporation as being a distinct legal person capable of suing and being sued in its own name¹⁹³. This externalization manifests itself in varying forms and is achieved through the legal concept of limited liability, by which the members of the company would ordinarily not be personally liable for the debts or actions of the company¹⁹⁴.

As the capital needed to finance the largest projects grew, and along with it the necessity of raising money, investors are reluctant to invest because of the risk involved in essentially guaranteeing the entire debt of the business entity¹⁹⁵. The main rule of limited liability was originally introduced in the United States as a principle that was meant to have positive impact on economy and democracy¹⁹⁶. The attractiveness of no personal liability made these goals easy to achieve while in the late nineteenth century it was praised as one of the best discoveries thus far in history.¹⁹⁷ However, with these great possibilities and with the positive effect on welfare that was a result of introducing the principle, it was soon blamed for becoming too much of a tool serving high finance rather than normal sized

¹⁹¹ Milton, D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006; 56:1305.

¹⁹² *Ibid* 1305

¹⁹³ Hameed, I., "The Doctrine of Limited Liability and the Piercing of the Corporate Veil in the light of fraud: A critical multi-jurisdictional study." (2012). p.1

¹⁹⁴ *Ibid* 1

¹⁹⁵ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

¹⁹⁶ Knutsson, Philip. "Piercing The Corporate Veil: Limits Of Limited Liability." (2018).24

¹⁹⁷ *Ibid* 24

entrepreneurships.¹⁹⁸ Therefore, different theories started to arise that would make it possible to set aside the principle of limited liability.

Up to now, limited liability of business owners for the contracts, torts and other liabilities of their companies has been common place for over one hundred and fifty years.¹⁹⁹ This concept of limited liability means that a business owner's potential personal loss is a fixed amount.²⁰⁰ Limited liability is regarded commonly as a corporate attribute indeed an advantage of doing business in the corporate form and its significance to shareholders may be diminished to the extent that creditors obtain personal guarantee from them or insurance covers certain liabilities.²⁰¹ The main idea behind that the legal personality of a company is separate from that of its members.²⁰² It aims at giving investors minimum insurance in their business over their own private lives.²⁰³

The liability of the corporation is limited by the fact that the corporation is not real.²⁰⁴ It is no more than a name for a complex set of contracts among managers, workers, and contributors of capital. It has no existence²⁰⁵ Limited liability is a

¹⁹⁸ Ibid 24

¹⁹⁹ Matheson, J.H. "Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil." *Berkeley Bus. LJ* 7, 2010, p.1

²⁰⁰ Ibid 1

²⁰¹ Gelb, H., *Piercing the Corporate Veil-The Undercapitalization Factor*. *Chi.-Kent L. Rev.*, 1982. 59,1.

²⁰² Forji, A.G., *The Veil Doctrine in Company Law* 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/5>

²⁰³ Ibid 5

²⁰⁴ Easterbrook, F.H., *Fischel DR. Limited liability and the corporation*. *The University of Chicago Law Review*. 1985 Jan 1;52(1):89-117.

²⁰⁵ Ibid 89-117

standard feature of virtually every corporation with publicly traded shares.²⁰⁶ Creditors of limited liability firms acknowledge that debts will be paid only from the assets of the firm itself while the shareholders are not personally liable for more than they have²⁰⁷. The corporate form limits the liability of shareholders and other participants arising from the enterprise.²⁰⁸ This broad insulation shields corporate participants not only from vicarious liability for the acts of others, but even from liability for some of their own acts taken²⁰⁹

The modern rationale for giving individual investors limited liability emphasizes eliminating three types of transaction costs²¹⁰. First are the costs of individual shareholders or creditors monitoring the wealth position of other shareholders. Second the costs and other complexities of each shareholder or creditor monitoring the risks of management actions. Third, limited shareholder liability makes it less costly and easier for shareholders to diversify their investments. The result of limiting these transactions costs is that limited liability both encourages investment and facilitates the operation of equities markets and is part of a broader phenomenon of asset partitioning which serves important social interests by guaranteeing creditors that business assets will also be protected from investors' creditors²¹¹. However, a new consensus is emerging in the commentary that limited liability may well not be

²⁰⁶Woodward, S.E., Limited Liability in the Theory of the Firm. *Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics*. 1985 Dec 1(H. 4):601-11.

²⁰⁷ Ibid 601-11.

²⁰⁸ Thompson, R.B. Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise. *Vand. L. Rev.* 1994; 47:1.

²⁰⁹ Ibid 47:1

²¹⁰ Saxena, H. Lifting of Corporate Veil. *dspace.jgu.in*:8080, 2013, p.1-7

²¹¹ Ibid 1-7

justified in tort cases and, although with less unanimity, also when the claim is based on statutory duties rather than common law obligations²¹².

2.2.5 Overview of corporate veil-piercing.

The notion of piercing the corporate veil is a recognized concept of corporate law.²¹³ Yet, from a doctrinal point of view, the concept is underdeveloped and exceedingly murky.²¹⁴ This implies that piercing the corporate veil is the subject that raises many questions both at national and international level, both from academic point of view and from point of view of legal practice.²¹⁵ Besides that the doctrine of piercing the corporate veil has long been a debated phenomenon globally and remains to be unprincipled.²¹⁶ Such situation is attributed inconsistencies in the application of the doctrine.

Moreover, veil-piercing is actually an enigma of company law and its existence is almost universally accepted, yet it is not a principle reducible to distinct elements.²¹⁷ The doctrine, if it exists, is uncertain and ill-defined, constructed largely on invectives and metaphors that often furnish no more than moral indignation as reason for particular outcomes.²¹⁸ Saying something significant and universally true about the doctrine of veil piercing is similar to trying to nail something to the wall: it is a

²¹² Ibid 1-7

²¹³ Singhof, B. "Equity Holders' Liability for Limited Liabilities Companies' Unrecoverable Debts-Reflections on Piercing the Corporate Veil under German Law." *Loy. LA Int'l & Comp. L. Rev.* 22 (1999): 143.

²¹⁴ Ibid 143.

²¹⁵ Vandekerckhove, K., *Piercing the Corporate Veil*. *Eur. Company L.*, 4, 191. . (2007).

²¹⁶ Glazer, S. R. *Piercing the Corporate Veil of the Close Corporation with the Tax Administration Act* (Doctoral dissertation, University of KwaZulu-Natal, Durban). 2015.p.45

²¹⁷ Lee, P.W. "The Enigma of Veil-Piercing." *International Company and Commercial Law Review* 26.1 (2015): 28.

²¹⁸ Ibid 28

slippery, slightly messy prospect with a small chance of getting it completely right.²¹⁹ Such circumstances have perpetuated illegalities in the corporations. Lack of unified and coherent approach when using the doctrine has made some Companies Acts in numerous countries including Tanzania to remain silent on this doctrine. Apart from that, the courts rarely recognize the real thing when confronted with reverse pierce of corporate veil that is an attempt whereby corporation owner and corporation itself become a single identity after undergoing demarcation by the court.²²⁰ Nevertheless, the concept has endured, and its appeal remains palpable.²²¹

Notwithstanding that the act of piercing the corporate veil until now remains one of the most controversial subjects in corporate law, and it would continue to remain so, even for the years to come if there are no well defined legal measures to provide it with standard approach in various countries including Tanzania²²². In fact, piercing the corporate veil remains only an exceptional act orchestrated by courts of law²²³ while varying from country to country. In the opinion of two corporate law scholars, apparently, there is a general consensus that the whole area of piercing the corporate veil, is among the most confusing in corporate law.²²⁴ Such differences in the application of the doctrine have made it to remain incoherent and unprincipled in most jurisdictions.

²¹⁹ Manning, M.R. "There's a Change in the Status Quo: Corporate Veil Piercing in Ohio after *Dombroski v. WellPoint*." *Entrepreneurial Bus. LJ* 5 (2010): 315.

²²⁰ Gaertner, M. J. *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways*. *Wm. & Mary L. Rev.*, 1988, 30, 667.

²²¹ Lee, P.W. "The Enigma of Veil-Piercing." *International Company and Commercial Law Review* 26.1 (2015): 28.

²²² Forji, A.G., *The Veil Doctrine in Company Law* 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/p.8>

²²³ *Ibid* 8

²²⁴ *Ibid* 8

Additionally, corporate veil is the most litigated issue in corporate law yet it remains among the least understood²²⁵. It is corporate law's most widely used doctrine to decide when a shareholder or shareholders will be held liable for obligations of the corporation making it to be one of the most litigated and most discussed doctrines in all of corporate law²²⁶. Although there is near unanimity among the commentators that the present rules neither guide good decision-making nor produce consistent or defensible results, and there are many proposals for reform or abolition of the present law, one sees little discernable movement in the case law toward a better approach.²²⁷

The confusions and misunderstanding regarding piercing of the corporate veil open the door for the need of conducting critical legal analysis in terms of its parent-subsidary relationship. As such courts acknowledge that their equitable authority to pierce the corporate veil is to be exercised reluctantly and cautiously.²²⁸ It should not surprise one to learn that piercing claims constitute the single most litigated area in corporate law²²⁹. It is probably the area of corporation law that the attorney seeking to avoid corporate practice is most likely to confront²³⁰. It is therefore unfortunate area that despite hundreds of the opportunities to get it right judicial opinion in this area has made it one of the most befuddled²³¹. This is due to the fact that piercing the corporate veil is shrouded in misperception and confusion; on the

²²⁵ Thompson, R.B. "Piercing the Corporate Veil: An Empirical Study." *Cornell L. Rev.* 76 (1990): 1036.

²²⁶ Saxena, H. *Lifting of corporate veil*. dspace.jgu.in:8080, 2013, p.1-7

²²⁷ *Ibid* 1-7

²²⁸ Gevurtz, F.A. *Piercing the Corporate Veil: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*. *Or. L. Rev.* 1997; 76:853.

²²⁹ *Ibid* 76:853

²³⁰ *Ibid* 76:853

²³¹ *Ibid* 76:853

one hand, courts understand the fact that the corporate form is supposed to be a juridical entity with the characteristic of legal personhood²³².

Veil piercing is the most heavily litigated issue in corporate law, yet legal doctrine in this area is notoriously incoherent; courts typically base their decisions on conclusory references to criteria of doubtful relevance.²³³ Results are unpredictable and similar outcomes are now occurring in cases brought against the owners of various kinds of newly sanctioned limited liability entities, and so a bad situation is only going to get worse.²³⁴ Piercing as a principle is as ambiguous as the concept of corporate entity, and while legislators have taken a lead in developing directors and shareholders' rights, there has been little guidance or direction on fundamentally what a company is supposed to be²³⁵. Consequently, issues such as when a court should pierce the veil, what constitutional rights a company may have, or its social obligations, lack any direction or consensus amongst courts and observers when such matters arise²³⁶.

Sometimes the Salomon principle [supra] produces what appears to be unjust and purely technical results and in circumstances judges come under moral and /or intellectual pressure to sidestep it to produce results, which seem just.²³⁷ This shows that the separate personality of the company can have some unexpected and

²³² Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

²³³ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006;56:1305.

²³⁴ Ibid 1305

²³⁵ Parker, *Piercing the Veil of Incorporation: Company Law for a Modern Era*. Australian Journal of Corporate Law, D. (2006), 19(1), pp.35-64.

²³⁶ Ibid 35-64

²³⁷ Pettet, B. Company Law, 2nd Ed.2005, p.25-26

sometimes unwelcome effects leading to piercing of the corporate veil.²³⁸ The concept of piercing the corporate veil is one of the prominent issues in the corporate law. Piercing the corporate veil is actually a phrase used to consider the rights or activities of an entity as those of its members or shareholders.²³⁹ It provides protection to those who invest their business through corporation. It is a fundamental concept as it shows how investors are protected from the malpractices in some of the corporations.

Piercing or lifting the corporate veil is a legal concept or phrase used when taking into consideration the shareholding of the controllers or members of a company in determining legal disputes or for some legal purpose.²⁴⁰ It is also a phrase somewhat extensively used to describe a number of different things, and properly speaking, it means disregarding the separate personality of the company.²⁴¹ The existence of this doctrine provides protection to investors in the corporation. This is due to the fact that it is widely accepted that if a company is incorporated for no proper purpose, but as frontage in concealment of true facts, separate personality of a company is disregarded this may be in terms of either the common law or specific statutory provisions'.²⁴² Hence, piercing of the corporate veil indicates the corporation has acted contrarily to its core purpose of its establishment.

²³⁸ Dine, J. *Company Law*, 4th Ed. Company law, New York: Palgrave, 2001, p.22

²³⁹ Marobela, M.M.. "Piercing of the Corporate Veil in a Holding/Subsidiary Relationship." PhD diss., University of Pretoria, 2017. P.17

²⁴⁰ Ibid 17

²⁴¹ Ibid 17

²⁴² Ibid 17

The doctrine of corporate veil piercing is of crucial importance since it is the most litigated issue in corporate law.²⁴³ Regrettably, it is also among the most confusing areas of law.²⁴⁴ Piercing' seems to happen freakishly like lightening but it is rare, severe, and unprincipled.²⁴⁵ Behind the corporate veil concludes that the types of corporate entities that are most frequently misused are those that provide the greatest degree of anonymity to their beneficial owners.²⁴⁶ Piercing the corporate veil therefore involves disregarding the limited liability characteristic of a corporation in order to make its shareholders, individuals or parent corporations, answer for the corporation's liabilities.²⁴⁷

Corporate veil piercing as a legal concept separates the personality of a corporation from the personalities of its shareholders and protects them from being personally liable for the company's debts and other obligations²⁴⁸. Veil piercing allows litigants to disregard the corporate entity to personally hold shareholders responsible for corporate debts. However, the exception has taken on a life of its own²⁴⁹. Often the results are complicated by the fact that the same details appear in both cases allowing and preventing relief in an unpatterned mingling of relevant with neutral facts that has stymied constructive analysis.²⁵⁰ This trend has resulted from

²⁴³ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

²⁴⁴ Ibid 1-27

²⁴⁵ Ibid 1-27

²⁴⁶ Organization for Economic Cooperation and Development, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, 2018, p.4

²⁴⁷ Orn, P. "Piercing the Corporate Veil-a Law and Economics Analysis." (2009).

²⁴⁸ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

²⁴⁹ Manning, M.R. "There's a Change in the Status Quo: Corporate Veil Piercing in Ohio after Dombroski v. WellPoint." *Entrepreneurial Bus. LJ* 5 (2010): 315.

²⁵⁰ Ibid 315.

different tradition making the doctrine of corporate veil more confusing and even vague when it comes to the actual application.

A typical corporate veil piercing case involves a controlling shareholder who sets up an undercapitalized corporation to incur obligations to a third party.²⁵¹ While a company is a separate legal entity, the fact that it can only act through human agents that compose it, cannot be neglected²⁵². Besides the statutory provisions for lifting the corporate veil, courts also do lift the corporate veil to see the real state of affairs²⁵³. However, even though the legislature and the courts have in many cases allowed the corporate veil to be lifted, it should be noted that the principle of veil of incorporation is still the rule and the instances of lifting or piercing the veil are the exceptions to this rule²⁵⁴.

From the earliest period of judicial history lawyers and judges have reiterated the doctrine that a corporation is an intangible legal entity without body and without soul²⁵⁵. For instance, in one of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality²⁵⁶. Doing business through corporation has remained a common asset protection mechanism which serves to successfully

²⁵¹ Kryvoi, Y. "Piercing the Corporate Veil in International Arbitration." *Global Bus. L. Rev.* 1 (2010): 169.

²⁵² Chaitanya S., Kaushalya T.M, *Lifting the Corporate Veil* by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.3

²⁵³ Organization for Economic Cooperation and Development, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, 2018, p.4

²⁵⁴ *Ibid* 4

²⁵⁵ Machen Jr, Arthur W. "Corporate Personality." *Can. L. Times* 31 (1911): 565.

²⁵⁶ *Helvering v. Metropolitan Edison Co.*, 306 U.S. 522, 83 L. Ed. 957, 59 S. Ct. 634 (1939).

externalize risk arising from business and other transactions but the success of this model of risk externalization is largely due to the legal nature of a corporation being a distinct legal person capable of suing and being sued in its own name²⁵⁷.

In order to address legal challenges associated with abuse of separate legal personality by the shareholders or directors of an entity, the courts have come up with the doctrine of piercing the corporate veil, which allows a court to disregard the separate legal personality of the corporate entity and thereby hold such corporation's shareholders and directors personally liable for the obligations of the corporation under certain circumstances²⁵⁸. Despite this fundamental development, the doctrine of piercing the corporate veil is shrouded in misperception and confusions²⁵⁹. On the one hand, courts understand the fact that the corporate form is supposed to be a juridical entity with the characteristic of legal personhood²⁶⁰.

As such courts acknowledge that their equitable authority to pierce the corporate veil is to be exercised reluctantly and cautiously²⁶¹. Similarly, courts also recognize that it is perfectly legitimate to create a corporation or other form of limited liability company business organization such as group companies for the very purpose of escaping personal liability for the debts incurred by the enterprise²⁶². The act of trying to escape such liability escalates injustices to the shareholders and creditors

²⁵⁷ Hameed, I., "The Doctrine of Limited Liability and The Piercing of The Corporate Veil in the Light of Fraud: A Critical Multi-Jurisdictional Study." (2012). p.33.

²⁵⁸ Zindoga, W. T. (2015). Piercing of The Corporate Veil in Terms of Gore: Section 20 (9) of the new Companies Act 17 of 2008(Doctoral dissertation, University of Cape Town).

²⁵⁹ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

²⁶⁰ Ibid 3-14

²⁶¹ Ibid 3-14

²⁶² Ibid 3-14

demanding insulation for the purpose of getting the real owners of the business. Nevertheless, breaking the veil that exists between the owners and company demands sufficient grounds at the courts of law in order for piercing the corporate veil to occur.

In corporate law, the most litigated issue is piercing the corporate veil whereby it involves disregarding the separation between entities organized in corporate form with limited liability of shareholders.²⁶³ However, despite its active use, the underlying law is also one of the least understood doctrines²⁶⁴. For instance, in 1926 Benjamin Cardozo remarked that veil piercing is enveloped in the mists of metaphor.²⁶⁵ This is due to the fact that the doctrine of piercing the corporate veil does not contain uniform procedure and each state applies in the manner that it suits its domestic courts. Contemporary commentators have been less kind, often referring to legal decisions to pierce the corporate veil as irreconcilable and not entirely comprehensible, defying any attempt at rational explanation, and transpiring freakishly.²⁶⁶

The malpractices in the corporations continue to raise quarries over their fundamental role in the society. As per the survey results, asset misappropriation remains the most prevalent economic crime globally and it generally involves the theft or embezzlement of company assets by directors, employees or other

²⁶³ Lee, Pey Woan. "The enigma of veil-piercing." *International Company and Commercial Law Review*, 2015, 28.

²⁶⁴ Manning, M.R. "There's a Change in the Status Quo: Corporate Veil Piercing in Ohio after *Dombroski v. WellPoint*." *Entrepreneurial Bus. LJ* 5 ,2010, p. 315.

²⁶⁵ *Ibid* 315

²⁶⁶ *Ibid* 315

fiduciaries; it also involves the abuse of organization assets e.g. improper or irregular use of company vehicles and assets at the expense of the organisation²⁶⁷. Generally, illicit behaviours in the corporations are detrimental to both developed and developing country like Tanzania which has ambitions and long process strategies of attaining economic, social, and political reforms to improve the business environment, to increase economic growth and reduce poverty²⁶⁸.

The list of justifications for piercing the corporate veil is long, imprecise to the point of vagueness and less than reassuring to investors and other participants in the corporate enterprise interested in knowing with certainty what the limitations are on the scope of shareholders' personal liability for corporate acts²⁶⁹. For example, corporate veil piercing may be done where the corporation is the mere alter-ego of its shareholders, where the corporation is undercapitalized, where there is a failure to observe corporate formalities, where the corporate form is used to promote fraud, injustice or illegalities²⁷⁰. Such factors have to be adjudicated at the court of law while knowing that there is no standard point because the doctrine of piercing the corporate veil remains to be unprincipled.

There are many other reported examples of the courts having to grapple with applications of the Salomon doctrine in difficult cases for instance, in several cases the judges have openly stated that if justice requires then the precedent of Salomon

²⁶⁷ The Global Economic Crime and Fraud Survey Tanzania Report, Fraud: The Overlooked Competitor, 2018 p.11

²⁶⁸ Mfaume, R. M., & Leonard, W. Small Business Entrepreneurship in Dar Es Salaam-Tanzania: Exploring Problems and Prospects For Future Development. 2004, p.36.

²⁶⁹ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14.

²⁷⁰ Ibid 3-14

should be bypassed.²⁷¹ For example, in *Re A Company* [1985], a shareholder who wished to use S 459 of the CA of UK to bring an action against his fellow shareholders was denied a locus stand when it was discovered that the shares of the company which had been purchased of the shelf had never been transferred to the purchasers²⁷². Thus in *Re A Company* the court of appeal seemed to be taking the view that Solomon doctrine was of prima facie application only: In our view, the cases...show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice...²⁷³ and in *Creasey v Breachwood Motors Ltd [1993]*²⁷⁴ in which the director-shareholders transferred all the assets of the company to another company which they controlled in order to ensure that if C's legal claim against the company succeeded it would have no funds to meet the judgment. It was held that the court had a power to lift the veil to achieve justice where its exercise is necessary for that purpose. However, the judicial movement in support of piercing the corporate veil to achieve justice has been firmly suppressed in several influential Court of Appeal cases concerned with how the Salomon doctrine should be applied to the way in which group structures are organized.²⁷⁵

The available evidences indicate that there is non-compliance to the laws, regulations and authorities when it comes to the management of group companies; worse enough there is even divergence from their constitutions leading to hindering the rights and

²⁷¹ Pettet, B. *Company Law*, 2nd Ed.2005, p.25

²⁷² Ottley, M. *Company Law: Questions and Answers*, New York: Routledge, 2007, p. 3

²⁷³ Pettet, B. *Company Law*, 2nd Ed.2005, p.25

²⁷⁴ Ottley, M. *Company Law: Questions and Answers*, New York: Routledge, 2007, p. 11

²⁷⁵ Pettet, B. *Company Law*, 2nd Ed.2005, p.25

benefits of the shareholders²⁷⁶. These malpractices set grounds for the application of piercing the corporate veil which is the practice of disregarding the limited liability characteristic of a corporation in order to make its shareholders, individuals or parent corporations, answer for the corporation's liabilities²⁷⁷. Such context provides environment for piercing the corporate veil. Until now, piercing the corporate veil is hardly made up of solid rules or quantifiable tests which lead to easily predictable outcomes: instead, most decisions describe the outer limits of the doctrine by citing a formulaic test, followed by a laundry list of factors other courts have considered significant in one manner or another, and closing with a conclusive declaration stating the result with little explanation²⁷⁸. Therefore, in order to make the shareholders liable one needs to pierce the corporate veil by proving the two prongs namely: there is such unity of ownership and interest in the firm that separate personalities of the corporation and the shareholders no longer exist and the court refusal to allow piercing would promote injustice and sanction of fraud.²⁷⁹

2.2.6 The Meaning of Corporate Veil Piercing

Corporate veil piercing refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own²⁸⁰. For

²⁷⁶ Sebastian, S. (n.d) Corporate Responsibility under Companies Act: An Examination towards Compliance with Companies Constitutions in Tanzania

²⁷⁷ Örn, P. Piercing the Corporate Veil-a Law and Economics Analysis. 2009, p.18

²⁷⁸ Manning, M.R. "There's a Change in the Status Quo: Corporate Veil Piercing in Ohio after *Dombroski v. WellPoint*." *Entrepreneurial Bus. LJ* 5 (2010): 315.

²⁷⁹ Q & A with F.B Attorneys. Accessed from fbattorneys.co.tz/news, 2019.

²⁸⁰ Thompson, R. B. Piercing the Corporate Veil: An Empirical Study. *Cornell L. Rev.*, 76, 1036, 1990.

instance, in group companies²⁸¹, a number of cases have revolved around versions of this problem: “Company A has a subsidiary, Company B; Company A owns land on which stands a factory. Its subsidiary Company B operates the factory business. A local government authority makes a compulsory purchase of land. The statute under which it does this provides for compensation for the landowner in respect of disturbance to a business carried on by him on the land. In our problem applying the Salomon doctrine strictly, Company A cannot claim since it has no business which has been disturbed, nor can a Company B since although it does have a business which has been disturbed, it has no land. In reality the two companies function as a single unit but in law they are separate”.

The courts break the veil that exists between the corporations and go directly to the owners of the respective company. The boundaries of this exception are usually stated in broad terms that offer little guidance to judges or litigants in subsequent cases²⁸². This is sometimes caused by lack of standard measure from various jurisdictions including common law as regards to that which is universal and should be relied upon by the litigants when it comes to the cases related to the malpractices in corporations. For instance, in one reported case of *Smith, Stone & Knight v Birmingham Corporation [1939]4 ALL ER 116* the judge managed to decide that Company B was the urgent of Company A and so compensation was payable.²⁸³ This is due to the fact that Salomon case makes it clear that a company is not, without

²⁸¹ Pettet, B. Company Law, 2nd Ed.2005, p.24-25

²⁸² Thompson, R. B. (1990). Piercing the corporate veil: an empirical study. Cornell L. Rev., 76, 1036.

²⁸³ Pettet, B. Company Law, 2nd Ed.2005, p.24-25

more, the agent of its shareholder.²⁸⁴ Of course if there happens to be a genuine agency relationship between them, perhaps created by express contract, there is no conflict with Salomon, but in *Smith, Stone & Knight v Birmingham Corporation* it seems that the judge was merely inferring an agency relationship, on a very little evidence in order to get round with the Salomon principle.²⁸⁵

The doctrine of piercing the corporate veil is described as the judicial act of imposing personal liability on otherwise immune corporate officers, directors and shareholders of the corporations' wrongful act.²⁸⁶ Sometimes it is termed as disregarding the corporate entity whereby courts apply common law principles to pierce the corporate veil and hold the shareholders personally liable for the corporate debts or obligations.²⁸⁷ Despite the enormous volume of litigation in this area the case law fails to articulate any sensible rationale or policy that explains when the corporate existence should be disregarded.²⁸⁸ Indeed courts are remarkably prone to rely on labels or characterization of relationships (such as alter ego, instrumentality or sham) and the decisions offer little in the way of predictability or rational explanation of why enumerated factors should be decisive.²⁸⁹ In other words, when the court decides to pierce the corporate veil, that is, the wall that exists between the corporation and people is broken down in order to reach the real owners of the company. However, in the course of courts adjudicating issues related to piercing of the corporate veil, the

²⁸⁴ Ibid 24-25

²⁸⁵ Ibid 24-25

²⁸⁶ Garner, B.A. Blacks Law Dictionary.8th Ed.2004,p.1184-1185

²⁸⁷ Ibid 1184-1185

²⁸⁸ Ibid 1184-1185

²⁸⁹ Ibid 1184-1185

overall exercise has not been smooth due to lack of standard approach that could be utilized by judges.

The court, however, may look beyond the corporate for the defeat of fraud or the remedying of injustice.²⁹⁰ The reason for looking behind the shield is to find out the real owners of the incorporated company. That is why the concept of lifting the corporate veil of a company deals with the circumstances in which the legal rights, which are accorded, to companies may be disregarded so as to attack individual members or parent companies.²⁹¹ For instance, a more robust approach was tried by Lord Denning *MR in DHN Food distributors Ltd v Tower Hamlets London Borough Council [1976]*²⁹² where he suggested that the corporate veil could be lifted, the companies in reality a *group* and should be treated as one and so compensation was payable. In *Woolfson v Strathclyde DC [1978]* in analogous situation, the House of Lords held that corporate veil could only be lifted in this way in circumstances where the company is façade and they criticized Lord Denning approach, accordingly compensation was not paid.²⁹³

In most cases this doctrine is applied to protect the shareholder and creditors when the right of liability is misused. It helps them to recover from those intended to use this right to escape liability.²⁹⁴ Sometimes the doctrine may be used to protect

²⁹⁰ Hasibuan, F.Y. "Implementation of Pricing the Corporate Value in Indonesia." *European Research Studies* 20.3A (2017): 861.

²⁹¹ Rutabanzibwa, A.P. "Legal Perspectives of Joint Venture Companies in Developing Countries: A Case for Tanzania." (1994).

²⁹² Pettet, B. *Company Law*, 2nd Ed.2005, p.25

²⁹³ *Ibid*, p.25

²⁹⁴ Rutabanzibwa, A.P."Legal Perspectives Of Joint Venture Companies in Developing Countries: A Case for Tanzania."1994, p.9

companies or individual members.²⁹⁵ The doctrine is based on the concept that the corporate entity which is granted to the company should not be misused to hide certain dubious intentions.²⁹⁶ More importantly, veil piercing aims at providing justice to those who have invested in the business when indulged into unnecessary costs beyond the shares they have invested in the corporation.

The concept of piercing does not have a pre-eminent place in corporate law theory and practice, but related concepts of corporate entity and limited liability do²⁹⁷. This is due to the fact that veil piercing is the outcome of misusing the legal personality provided in the corporation when they are registered. Moreover, piercing as a principle is as ambiguous as the concept of corporate entity, and while legislators have taken a lead in developing directors and shareholders rights, there has been little guidance or direction on fundamentally what a company is supposed to be²⁹⁸. Consequently, issues such as when a court should pierce the veil, what constitutional rights a company may have, or its social obligations, lack any direction or consensus amongst courts and observers when such matters arise²⁹⁹. This shows that lack of appropriate standards when applying veil piercing has been a challenge to courts when faced with circumstances that required veil piercing.

2.2.7 Corporate Veil Piercing Remedies

Piercing the veil of a corporation has long been possible for a court using its equitable powers to hold equity owners liable for the obligations of the entity,

²⁹⁵ Ibid 9

²⁹⁶ Ibid 9

²⁹⁷ Parker, *Piercing the Veil of Incorporation: Company Law for a Modern Era*. Australian Journal of Corporate Law, D. (2006), 19(1), 35-64.

²⁹⁸ Ibid 35-64

²⁹⁹ Ibid 35-64

although it is a fact-specific inquiry.³⁰⁰ Piercing the veil of a corporation has long been possible for a court using its equitable powers to hold equity owners liable for the obligations of the entity, although it is a fact-specific inquiry.³⁰¹ Veil piercing is an equitable remedy; as there is no end to human ingenuity when it comes to concocting dishonest business schemes, courts in the three subject jurisdictions have correctly refrained from attempting to definitively state what the exact parameters of the doctrine are.³⁰² However, this understandable reluctance has resulted in a case by case type of approach in all of the subject jurisdictions that is not always consistent in its outcomes.³⁰³ One Australian judge commented that “there is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil³⁰⁴”.

Moreover, the entire universe of piercing cases can be explained as judicial efforts to remedy one of the following three problems³⁰⁵. *First*, piercing the corporate veil is used as a tool of statutory interpretation in the sense that piercing the corporate veil is done in order to bring corporate actors’ behavior into conformity with a particular statutory scheme, such as social security or state unemployment compensations schemes. Macey argues that sometimes the corporate form is ignored in order to accomplish the specific legislative goal of a government benefit program that distinguishes between owners and employees. Sometimes the corporate form will be

³⁰⁰Lidstone HK. Piercing the Corporate and LLC Veil. Available at SSRN 2207735. 2014 Feb 28.

³⁰¹ Ibid

³⁰² Levenberg PN. The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions. *Penn St. JL & Int'l Aff.*. 2019;7:115.

³⁰³ Ibid 2019;7:115

³⁰⁴ Ibid 115

³⁰⁵ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

respected where doing so is necessary to reach a result that is consistent with a particular state or federal statutory scheme³⁰⁶. This means that veil piercing aims at ensuring that there is formality in the corporation by exposing its malpractices existing between the company and the shareholders. The courts make it clear that disregarding the corporate form should be considered a “drastic remedy,” and the “corporate veils exist for a reason and should be pierced only reluctantly and cautiously.”³⁰⁷ The mere fact that corporate creditors would go unsatisfied because they cannot reach a shareholder’s personal assets does not, alone, justify piercing the corporate veil.”³⁰⁸

Second, piercing also is done by courts in order to remedy what appears to be fraudulent conduct that does not stick on the strict elements of common law fraud whereby specifically, it is used as a remedy for “constructive fraud” in the contractual context³⁰⁹. In many cases, once a party obtains a judgment against a corporation, the party then may attempt to pierce the corporate veil of liability protection and hold the dominant shareholders responsible for the corporate judgment³¹⁰. Simply put, if a court becomes convinced that a shareholder or other equity investor has, by words or actions, led a counter-party to a contract to believe that an obligation is a personal liability rather than (or in addition to) a corporate debt, then courts sometimes will use a piercing theory to impose liability on the

³⁰⁶ Ibid 3-14.

³⁰⁷ Lidstone HK. Piercing the Corporate and LLC Veil. Available at SSRN 2207735. 2014 Feb 28.

³⁰⁸ Ibid

³⁰⁹ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

³¹⁰ Kreisman, R. Piercing the Corporate Veil is a Remedy Not a Cause of Action, 2015.

individual shareholder rather than a fraud theory³¹¹. A firmly established corporate entity stands on its own unless its corporate veil is pierced for different reasons.³¹²

The *third ground* on which courts pierce the corporate veil is the promotion of what is termed as accepted bankruptcy values; in particular, bankruptcy law strives to achieve an orderly disposition of the debtors' assets, either through corporate reorganization or liquidation.³¹³ One way that bankruptcy law achieves these goals is by preventing shareholders from transferring corporate assets to themselves or to particular favored creditors ahead of creditors in times of acute economic stress.³¹⁴ Piercing the corporate veil is a practice in which a lawyer will prove that the corporation that would otherwise protect its shareowners from personal liability is really a façade or fiction that allows for the “piercing” of that veil to recover from the true owners.³¹⁵

Outside of bankruptcy (and sometimes in the context of bankruptcy proceedings as well), the goal of eliminating opportunism by companies in financial distress is accomplished by disregarding the corporate form³¹⁶. This is due to the fact that courts can in certain circumstances disregard the separate legal personality of a company from the shareholders and lift the corporate veil in which this doctrine is be invoked by the courts, but the principles on which the courts can do so are not clear

³¹¹ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

³¹² Kreisman, R. Piercing the Corporate Veil is a Remedy Not a Cause of Action, 2015

³¹³ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14

³¹⁴ Ibid 3-14.

³¹⁵ Kreisman, R. Piercing the Corporate Veil is a Remedy Not a Cause of Action, 2015

³¹⁶ Macey, J.R. The Three Justifications for Piercing the Corporate Veil-Yale Law School, 2014, p.3-14.

³¹⁷. However, corporate bankruptcy should be implemented through the distribution to participants of appropriately designed options.³¹⁸

Similarly, parties urging a court to disregard the veil between the corporation and its shareholders may be required to raise the issue early in the litigation or have it deemed waived or precluded; other jurisdictions may allow or require a prevailing party to request that judges exercise their equitable powers to grant relief, presumably doing so because there is no adequate remedy at law.³¹⁹ This dichotomy is complicated further in jurisdictions that either maintains the division between courts of equity and law or where their merger is incomplete.³²⁰ Analysts frequently assume that veil-piercing occurs at the end of prior litigation, as an “equitable remedy” applied when liability for a contract, tort or other action has been established.³²¹

If there is no harm to creditors or to the public stemming from such informal conduct, why should shareholders be punished by such a drastic remedy as veil piercing?³²² While veil piercing is a respectable, well-established remedy against the financially irresponsible, and the threat of it may help prevent some negative debtor behavior, it is reluctantly granted and may be costly to pursue.³²³ Most Courts hold that piercing the corporate veil is an equitable remedy – not a cause of action.

³¹⁷ Richards, D. Piercing the corporate veil: Supreme Court clarifies the English law position, 2013, p.1

³¹⁸ Bebchuk, L.A. Using options to divide value in corporate bankruptcy. *European Economic Review*. 2000 May 1;44(4-6):829-43.

³¹⁹ Halabi, S.F. *Veil Piercing Procedure*, 2015.

³²⁰ *Ibid*

³²¹ *Ibid*

³²² Gelb H. Limited Liability Policy and Veil Piercing. *Wyo. L. Rev.*. 2009;9:551.

³²³ *Ibid* 551

“Piercing Piercing the corporate veil is an equitable remedy, requiring balancing of the equities in each particular case.” *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485 (Colo. App. 2001); See also, *Equinox Enterprises, Inc. v. Associated Media Inc.*, 730 SW2d 872 (Tex. App. 1987)³²⁴

2.2.8 Corporate Veil Intensification

The concept of the corporate veil dates back to the landmark decision of the House of Lords in *Salomon v Salomon and Co Ltd* [1897] AC 22, where the legal separation between a company and its shareholders was established³²⁵ while in the view of Lord Halsbury LC, a limited company was to be viewed like any other independent person with its rights and liabilities appropriate to itself. However, in *Bank of Tokyo Ltd v Karoon* (Note) [1987] AC 45, Robert Goff LJ confirmed the difference between commercial reality and legal principle stating that “we are concerned not with economics but with law”³²⁶. Despite the importance of this distinction, the courts have always been wary that there must be some limit to the protection afforded by limited liability in order to ensure that business dealings remain honest.³²⁷ In other words, if a person invests in a limited liability entity and is not otherwise personally liable for a tortious action or other clear reason, that person’s risk should be limited to the amount of the investment.³²⁸ Further, piercing is a remedy, not a separate cause of action. “[A]n action to pierce the corporate veil is not a separate and

³²⁴ Cohen, M. A Brief History of Piercing the Corporate Veil, 2010.p.7

³²⁵ Guildhall Chambers. Lifting, piercing and sidestepping the corporate veil. Retrieved from www.guildhallchambers.co.uk/...2018, p.1-4

³²⁶ Ibid 1-4

³²⁷ Ibid 1-4

³²⁸ Lidstone HK. Piercing the Corporate and LLC Veil. Available at SSRN 2207735. 2014 Feb 28.

independent cause of action, but rather is merely a procedure to enforce an underlying judgment.”³²⁹

Piercing the corporate veil is not a cause of action but instead a “means of imposing liability in an underlying cause of action.”³³⁰ Piercing the corporate veil also relies on a degree of fairness in the dealings³³¹. This was recognised in the dicta of Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, where he said at page 712 that: “No court in this land will allow a person to keep an advantage which he had obtained by fraud; no judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything; the court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...”³³² In piercing the corporate veil, the objective is to reach assets of an affiliated corporation or individual shareholders.³³³

In *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1995] 1 BCLC 352³³⁴ the defendant was the sole director of a company. Despite this he was obliged to make disclosure of a personal interest in a resolution, which he passed purporting to terminate his contract of employment although the court held that it may be that the declaration does not have to be out loud.

³²⁹ Ibid

³³⁰ Kreisman, R. Piercing the Corporate Veil is a Remedy Not a Cause of Action, 2015

³³¹ Guildhall Chambers. Lifting, piercing and sidestepping the corporate veil. Retrieved from www.guildhallchambers.co.uk/...2018, p.1-4

³³² Ibid, p.1-4.

³³³ Kreisman, R. Piercing the Corporate Veil is a Remedy Not a Cause of Action, 2015

³³⁴ Dine, J. Company Law, 4th Ed. Company law, New York: Palgrave, 2001, p.28

Similarly in *Macaura v Northern Assurance Co.*[1925] AC 619³³⁵ the court refused to ignore the separateness of the company and lift the veil despite the fact that the consequence of so doing was to deny a remedy to someone whose personal fortune had gone up smoke. Thus, creditors need to analyze carefully the best ways to protect themselves from the harm of debtor default although as a practical matter, creditors in some situations may be able to take more self protective steps in considering the extension of credit and its ultimate collection.³³⁶ But limited liability is a privilege, and if its disregard will help a creditor against persons undeserving of that privilege, then veil piercing, a venerable and equitable remedy, is appropriately invoked³³⁷

Importantly, the courts normally treat a corporation as an entity distinct from its shareholders but they will disregard the corporate form if it is abused.³³⁸ In certain circumstances, the law will pierce the veil of incorporation but what are those circumstances and what does piercing the veil actually mean?³³⁹ It is well established that a company is a separate legal entity with all the rights and liabilities, which apply to natural legal persons or humans as they are better known³⁴⁰. For the individuals behind the company, its directors and shareholders, this separate personality is a key reason for setting up the company, as it allows them to trade without incurring personal liability.³⁴¹ Hence, the circumstances to pierce the

³³⁵ Ibid 28-29.

³³⁶ Gelb H. Limited Liability Policy and Veil Piercing. Wyo. L. Rev.. 2009;9:551

³³⁷ Ibid 551

³³⁸ Harvard Law Review Association. Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law. Harvard Law Review. 1982; 95(4).

³³⁹ Surguy, M. Piercing the corporate veil, 2015, p.1-3

³⁴⁰ Ibid 1-3

³⁴¹ Krendt CS, Krendl JR. Piercing the Corporate Veil: Focusing the Inquiry. Denv. LJ. 1978;55:1.

corporate veil vary from one jurisdiction to the other and piercing of the corporate veil would imply disregarding the wall that exist between the company and the shareholders.

An important legal principle exists that few stakeholders consider or understand and allows for shareholders and directors who use the company structure to hide their fraudulent or dishonest activity to be held personally accountable for their actions.³⁴² Veil piercing based on failure to observe corporate formalities is problematic because the punishment may not fit the crime.³⁴³ By itself, inattentiveness to the annual shareholders meeting charade, failure to maintain a board of director's minute book, or sloppy record keeping should not warrant potentially crushing personal liability.³⁴⁴ It makes little sense for shareholders to forfeit their limited liability for such relatively trivial omissions³⁴⁵

The shareholders can thus confidently commit limited capital to the corporation with assurance that they will have no personal liability for corporations' debts.³⁴⁶ This is based on the tenet that corporation is an artificial entity separate from the shareholder.³⁴⁷ Contrarily, the company is, in effect, a corporate veil, which shields the individuals behind it³⁴⁸. Companies' legislation requires details of directors and shareholders to be made public, as one of many conditions of the benefits brought by

³⁴² VMDA Attorneys, *Piercing the Corporate Veil and your Remedies*. 2019.

³⁴³ Milton D. *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*. Emory LJ. 2006;56:1305.

³⁴⁴ Ibid 1305

³⁴⁵ Ibid 1305

³⁴⁶ Krendt CS, Krendl JR. *Piercing the Corporate Veil: Focusing the Inquiry*. Denv. LJ. 1978;55:1

³⁴⁷ Ibid 55:1.

³⁴⁸ Surguy, M. *Piercing the corporate veil*, 2015, p.1-3

separate legal personality³⁴⁹. These conditions are necessary as, on occasion, these individuals abuse their position and use their company as a device to perpetrate their misdemeanours, whilst protecting themselves from liability.³⁵⁰ Solutions for such misbehaviours are to pierce the corporate veil.

The benefit of the company structure is that it provides for the limitation of liability of the participants in the business; however, this exclusion of liability of participants inside the business is not an absolute right. It is worth noting that sometimes the law will hold the individuals involved directly liable for their actions in the name of the company, particularly the directors and in these cases, there will be no need to pierce the veil or, to put it another way, disregard the separate legal personality of the company³⁵¹. In *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* and others the concept of piercing the corporate veil was explained as disregarding the division between a company and the person who controls it and then attributing liability to the person who misused the principle of a separate legal personality.³⁵²

However, it should be borne in mind that to preserve the integrity of the principle of legal personality, the Courts are of the persuasion that they will only lift the corporate veil in exceptional circumstances where no alternative remedy exists.³⁵³ The company may continue to be recognized as separate and may even, in

³⁴⁹ Ibid 1-3

³⁵⁰ Ibid 1-3

³⁵¹ VMDA Attorneys, *Piercing the Corporate Veil and your Remedies*. 2019.p. 6

³⁵² Ibid 6

³⁵³ Ibid 6

some cases, be directly liable jointly with its directors and/or shareholders.³⁵⁴ However, it depends on the circumstances in which piercing is to take place in order to do justice to the parties.

2.2.9 When is it Necessary to Pierce the Corporate Veil?

A number of these contract cases involve shareholder misrepresentation and therefore may warrant disregard of the parties' risk allocation agreement, but most do not.³⁵⁵ Even if the misrepresentation cases are set to one side, courts still pierce more often in contract than in tort cases.³⁵⁶ In sum, the actual incidence of veil piercing has little to do with the logic of efficiency.³⁵⁷ The standard for piercing the corporate veil may depend upon whether the underlying cause of action against the corporation sounds in contract or in tort.³⁵⁸ The close corporation cases that do entertain piercing claims generally do not take seriously the distinction between contract and tort claims.³⁵⁹ Typically, in contract claims, a party knows the other party to the contract.³⁶⁰

Many authorities, therefore, assert that the plaintiff must prove a higher degree of culpability in a contract case than in a tort case for the court to pierce the corporate veil because the plaintiff has sufficient information to make an informed choice as to

³⁵⁴ Surguy, M. Piercing the Corporate Veil, 2015, p.1-3

³⁵⁵ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006; 56:1305.

³⁵⁶ Ibid 1305

³⁵⁷ Ibid 1305

³⁵⁸ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa LJ. 1992;28:869.

³⁵⁹ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006; 56:1305.

³⁶⁰ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa LJ. 1992;28:869.

whether to deal with the corporation before entering the transaction.³⁶¹ The plaintiff must prove that there is no real separation between the company and its owners; the company's actions were wrongful or fraudulent; the company's creditors suffered an unjust cost.³⁶² The justification for piercing is weaker in the contract setting because of the opportunity for ex ante bargaining over risk allocation.³⁶³ In fact, however, courts disregard the corporate shield more often in contract cases than in tort cases.³⁶⁴ On the other hand, in tort cases courts sometimes relax the requirements to pierce the veil.³⁶⁵ The plaintiff typically has not ascertained the financial condition of a corporation before, for example, buying a defective product and thus has no reason to believe the corporation is undercapitalized or insolvent.³⁶⁶

Therefore, when the plaintiff has been tortiously injured, out of fairness and equity the courts will consider piercing the corporate veil to allow a recovery when the corporation cannot satisfy the plaintiff's claim.³⁶⁷ If the legal objective can be achieved without needing to cast aside the separate corporate personality, no piercing is involved.³⁶⁸ The most common factors that courts consider in determining whether to pierce the corporate veil are: whether the corporation engaged in fraudulent behavior; whether the corporation failed to follow corporate formalities;

³⁶¹ Ibid 869.

³⁶² NOLO, Piercing the Corporate Veil: When LLCs and Corporations May be at Risk, <https://www.nolo.com/legal-encyclopedia/personal-liability-piercing-corporate-veil-33006.html>, 2020, p.1

³⁶³ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006; 56:1305.

³⁶⁴ Ibid 1305

³⁶⁵ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa LJ.* 1992;28:869.

³⁶⁶ Ibid 869

³⁶⁷ Ibid 869

³⁶⁸ Vandekerckhove, K. Piercing the Corporate Veil. *Eur. Company L.*, 2007, 4, 191

whether the corporation was inadequately capitalized (if the corporation never had enough funds to operate, it was not really a separate entity that could stand on its own), and whether one person or a small group of closely related people were in complete control of the corporation.³⁶⁹ When courts pierce the corporate veil, they make exception to two fundamental rules of company law: the rule that corporation is a legal person independent from its shareholders and the rule that principle shareholders and directors are not liable for corporation debts.³⁷⁰ True piercing of the veil occurs where a person who owns and controls a company is identified in law with the company.³⁷¹

It is well known that fraud unravels all³⁷² as it occurs when the court disregard the separateness endowed in the corporations by holding the shareholders responsible for corporations actions as if it their own.³⁷³ Does this mean that in any case where a company is used for fraudulent purposes or commits an act that may amount to the criminal offence of fraud or even some lesser form of wrongdoing under the civil law, the shareholders are liable?³⁷⁴ By properly forming a corporation and taking the steps required of corporate formalities, a corporate veil is raised that may protect shareholders, officers and directors from personal liability and provide tax

³⁶⁹ NOLO, Piercing the Corporate Veil: When LLCs and Corporations May be at Risk, <https://www.nolo.com/legal-encyclopedia/personal-liability-piercing-corporate-veil-33006.html>, 2020, p.1

³⁷⁰ Vandekerckhove, K. Piercing the Corporate Veil. *Eur. Company L.*, 2007, 4, 191

³⁷¹ *Ibid* 191

³⁷² Surguy, M. Piercing the corporate veil, 2015, p.1-3

³⁷³ Thompson, R. B. (1990). Piercing the Corporate Veil: An Empirical Study. *Cornell L. Rev.*, 76, 1036.

³⁷⁴ Surguy, M. Piercing the Corporate Veil, 2015, p.1-3

benefits³⁷⁵. It is well established that a company is artificial person but it cannot act in itself. It has agents who activate the artificiality within the company.

The veil of a corporate entity may be pierced only to prevent fraud or to enforce a paramount equity.³⁷⁶ This test was formulated to balance the policy of limited shareholder liability with the interest of serving justice while producing disparate results.³⁷⁷ Hence, there are two circumstances in which true piercing may be necessary and therefore appropriate, for example, where a company is being used as a means of evading the law and in this case, the company is commonly referred to as a sham³⁷⁸. This occurs where a company is being used to conceal the true facts, where it acts as a façade whereby they trigger operation of the true rule, namely piercing the veil to prevent the abuse of corporate legal personality³⁷⁹.

However, to ensure that the corporate veil remains intact and business meets its potential; all persons involved in the corporation must follow certain corporate formalities³⁸⁰. If they fail to follow the requirements of corporate formalities, they could be vulnerable to court decisions which pierce the corporate veil³⁸¹. Nowadays most of piercing of corporate veil court cases succeeds because owners are failing to

³⁷⁵ Sutton, G. The Corporate Veil-How to Avoid it. Retrieved from <https://www.corporatedirect.com/running-a-business/piercing-the-corporate-veil-how-to-avoid-it/2015>, p.1-2

³⁷⁶ Speer, Denise L. "Piercing the Corporate Veil in Maryland: An Analysis and Suggested Approach." U. Balt. L. Rev. 14 (1984): 311.

³⁷⁷ Ibid 311

³⁷⁸ Surguy, M. Piercing the Corporate Veil, 2015, p.1-3

³⁷⁹ Ibid 1-3

³⁸⁰ Sutton, G. The Corporate Veil-How to Avoid it. Retrieved from <https://www.corporatedirect.com/running-a-business/piercing-the-corporate-veil-how-to-avoid-it/2015>, p.1-2

³⁸¹ Ibid1-2

properly follow corporate formality requirements³⁸². A situation in which courts put aside limited liability and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts³⁸³. The veil of incorporation limits the personal liability of corporate directors, officers and employees for actions taken by the business³⁸⁴. However, business owners can still be liable for business activities if they fail to follow corporate guidelines, commingled assets or acted recklessly³⁸⁵.

Piercing of corporate veil is most common in close corporations³⁸⁶. While the law varies in different countries, generally courts have a strong presumption against piercing the corporate veil, and will only do so if there has been misconduct like abuse of the corporate form, for example, intermingling of personal and corporate assets) or undercapitalization at the time of incorporation³⁸⁷. If corporate formalities such as annual corporate filings and meeting minutes are not maintained in a timely and proper manner, courts can hold the entity's owner, personally responsible for claims filed against the company³⁸⁸.

Notwithstanding much endeavor no conclusive answer has yet been given to the question of when the courts will lift the veil³⁸⁹ though it is most commonly used as a justification for imposing personal liability on corporate shareholders

³⁸² Ibid1-2

³⁸³ Ibid1-2

³⁸⁴ Garcia, M. What is the Veil of Incorporation? 2017, p.1

³⁸⁵ Ibid 1

³⁸⁶ Sutton, G. The Corporate Veil-How to Avoid it. Retrieved from <https://www.corporatedirect.com/running-a-business/piercing-the-corporate-veil-how-to-avoid-it/2015>, p.1-2

³⁸⁷ Ibid1-2

³⁸⁸ Ibid1-2

³⁸⁹ Ottolenghi, S. *From Peeping behind the Corporate Veil to Ignoring it Completely*. The Modern law review, ,1990, 53(3), 338-353.

for corporate debts³⁹⁰. The concept of the corporation from legal perspective is actually a separate entity³⁹¹. If there is not a clear distinction between the individuals versus what the corporation is doing, a court of law may pierce the corporate veil, in other words, hold the individuals liable for actions taken by the business³⁹². A corollary principle is that the shareholders of the corporation are only liable for corporate obligations to the extent of their investment.³⁹³ Specifics vary by states/countries, but some of the common events that may convince a court to pierce the corporate veil include³⁹⁴-mingling business and personal assets: for example, paying for individuals personal expenses out of the corporate checking account; not capitalizing the corporation: in other words, not investing sufficient funds for the corporation to do business; not following the corporate formalities, such as hosting board of directors meetings, keeping meeting minutes and ensuring company representatives abide by corporate bylaws; and acting recklessly or fraudulently: for example, making business deals on behalf of the corporation that you know the business cannot pay for. There are other situations³⁹⁵ in which limited liability would not protect someone. For example: If someone personally guarantee a loan or debt; if someone directly injure someone; if someone fails to pay the payroll taxes withheld from employee wages.

³⁹⁰ Morris, G.G. "Piercing the Corporate Veil in Louisiana." *La. L. Rev.* 52 (1991): 271

³⁹¹ Garcia, M. *What is the Veil of Incorporation?* 2017, p.1

³⁹² *Ibid* 1

³⁹³ Bakst, D.S. "Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive." *BC Int'l & Comp. L. Rev.* 19 (1996): 323.

³⁹⁴ Garcia, M. *What is the Veil of Incorporation?* 2017, p.1

³⁹⁵ *Ibid*1

Additionally, lawyers, judges, law students have a love-hate relationship with the doctrine of piercing the corporate law-the idea that shareholders might sometimes be personally liable for the debts of corporation.³⁹⁶ It is a subject that is covered more than all others in corporate law and it is widely litigated being the subject of thousand of opinion.³⁹⁷ Nonetheless, courts are more likely to pierce the corporate veil if the corporation is a close corporation-meaning, it has fewer than thirty five shareholders and if it is not publicly traded but if the corporate veil is pierced, a court may find the owner personally liable for business debts or actions taken by the business³⁹⁸.

2.2.10 Scholarly legal Perceptive on Veil Piercing

Veil piercings doctrine has been the subject of much scholarly attention in recent years.³⁹⁹ They have generated diametrically opposing views, with some legal commentators advocating the complete abolition of the doctrines and others advocating a significant contribution.⁴⁰⁰ Piercing the veil law exists as a check on the principle that, in general, investor shareholders should not be held liable for the debts of their corporation beyond the value of their investment⁴⁰¹. This principle gives courage to investors because they know from the outset that that if the company becomes insolvent they will not be charged beyond what they invested in the corporation. Because of the questions they ask, scholars tend to ascribe to veil-piercing a kind of procedural homogeneity. In the typical depiction, veil-piercing is

³⁹⁶ Michael DC. To Know a Veil. J. Corp. L.. 2000;26:41.

³⁹⁷ Ibid 26:41

³⁹⁸ Garcia, M. What is the Veil of Incorporation? 2017, p.2-4

³⁹⁹ Smith, D.G. "Piercing the Corporate Veil in Regulated Industries." BYU L. Rev. (2008): 1165.

⁴⁰⁰ Ibid 1165.

⁴⁰¹ Saxena, H. Lifting of Corporate Veil.dspace.jgu.in:8080, 2013, p.1-7

an “equitable remedy” exercised by a judge at the end of litigation when a judgment for a corporate creditor remains unsatisfied and the relative involvement of one or more shareholders in the underlying contract breach or tort is assessed under a presumably uniform although unstated burden of proof.⁴⁰²

The rationale behind reaching the owners of the corporation is probably that the law will not allow the corporate form to be misused or abused and in those circumstances in which the court feels that the corporate form is being misused in order to rip through the corporate veil to expose its true character and nature disregarding the Salomon principal as laid down by the House of Lords⁴⁰³. Basically, scholarly perceptive shows indicate that there are two types of provisions for the lifting of the corporate veil- judicial provisions and statutory provisions⁴⁰⁴. Judicial provisions include issues like fraud, character of company, protection of revenue, single economic entity etc. while statutory provisions include reduction in membership, misdescription of name, fraudulent conduct of business, failure to refund application money, etc.⁴⁰⁵ They are universal in most of the jurisdictions. It is unsurprising, then, that when it is studied with these legal priors implicitly or explicitly informing the inquiry, it appears unpredictable and incoherent.⁴⁰⁶ The reality is that veil-piercing claims run the gamut from free-standing causes of action (which under the law of waiver in some jurisdictions must be pleaded early in litigation) to affirmative

⁴⁰² Halabi, S.F. Veil Piercing Procedure, 2015.

⁴⁰³The Law Teacher, [Lifting of The Corporate Veil, Accessed from https://www.lawteacher.net/free-law-essays/.../article-on-lifting-of-the-law-essays.ph](https://www.lawteacher.net/free-law-essays/.../article-on-lifting-of-the-law-essays.ph), 2018, p. 1-17.

⁴⁰⁴ Ibid 1-17

⁴⁰⁵ Ibid 1-17

⁴⁰⁶ Halabi, S.F. Veil Piercing Procedure, 2015.

defenses to, indeed, equitable remedies enforced at the end of litigation.⁴⁰⁷ Those claims or the claims to which they are tied are subject to burdens of proof ranging from preponderance of the evidence to clear-and-convincing evidence, which may or may not, in turn, be a proper subject for accepting expert testimony.⁴⁰⁸

2.2.11 Corporate Veil Maintenance

Piercing the veil is corporate law's most widely used doctrine to decide when a shareholder or shareholders will be held liable for obligations of the corporation.⁴⁰⁹ It continues to be one of the most litigated and most discussed doctrines in all of corporate law.⁴¹⁰ This implies that corporate veil is a crucial issue, as it needs to be protected from illicit behaviours. The following ways⁴¹¹ may provide guidance for maintaining the corporate veil while conducting business through a corporation: perform all annual filings; maintain internal formalities; maintain a written record of corporate decisions; provide the world with corporate notice; ensure the corporation is sufficiently capitalized; maintain the distinction between corporate assets and personal assets; use caution when distributing corporate profits; and Separate bank accounts; and separate tax returns.

However, the reality on the ground shows that it is very difficult for most corporate owners to maintain the corporate veil. This is due to the fact that most people prefer to establish companies as a means of perpetuating their illegal dealings, which is

⁴⁰⁷ Halabi, S.F. Veil Piercing Procedure, 2015.

⁴⁰⁸ Ibid

⁴⁰⁹ Strasser, K.A. "Piercing the veil in corporate groups." Conn. L. Rev. 37 (2004): 637.

⁴¹⁰ Ibid 637

⁴¹¹ Sutton, G. The Corporate Veil-How to Avoid it. Retrieved from <https://www.corporatedirect.com/running-a-business/piercing-the-corporate-veil-how-to-avoid-it/2015>, p.1-2

intolerable in the corporate law. Failure to adhere to the formalities of the establishment of the company implies that the corporate law will apply by disregarding the veil for the purpose of finding the directing mind of the company especially in criminal cases.

Piercing of the corporate veil has created considerable comment and confusion among courts' and scholars⁴¹² for instance, in the case of reverse piercing which is a derivation of the doctrine of piercing of the corporate veil.⁴¹³ The veil piercing doctrine provides only one of many potential remedies for a plaintiff in an action against a corporation.⁴¹⁴ Once it is decided that a corporation is the right entity for business or asset holding purpose and one has to think of incorporating the business and corporate formalities begin.⁴¹⁵ Events occurring immediately after formation must be performed properly to maintain the corporate veil and ensure the corporation's longevity and flexibility⁴¹⁶.

When courts pierce the corporate veil, they make an exception to the two fundamental roles of the company: the rule that corporation is a legal person who is independent from the shareholders and the rule that in principle shareholder and directors are not liable for corporation debts. For example, in the United States can be considered as a place where corporate veil piercing jurisprudence found its origin

⁴¹²Youabian, E., "Reverse Piercing of the Corporate Veil: The Implications of Bypassing Ownership Interest." Sw. UL Rev. 33 (2003): 573.

⁴¹³ Ibid 573.

⁴¹⁴ Figueroa, D., "Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America." Duq. L. Rev. 50 (2012): 683.

⁴¹⁵ Sutton, G. The Corporate Veil-How to Avoid it. Retrieved from <https://www.corporatedirect.com/running-a-business/piercing-the-corporate-veil-how-to-avoid-it/2015>, p.1-2

⁴¹⁶ Ibid 1-2.

or at least has most developed⁴¹⁷. Currently, piercing the corporate veil is the most litigated issue in corporate law and it is not surprising considering plaintiffs' inevitable temptation to look to shareholders for relief when a corporation is unable to provide the desired remedy.⁴¹⁸

2.2.11 Corporate Veil-Piercing in Group Context

Piercing corporate veil may also occur in the group of companies. A group means a parent or holding company and its subsidiaries.⁴¹⁹ As regards to piercing the corporate veil of group companies, the veil may be removed to the extent that individual corporate entities (subsidiary companies) are treated as but division of another corporate entity (the holding company) will be merged with subsidiaries and in the group of companies will for practical purpose be treated as one economic entity as opposed to collection of different corporate entities.⁴²⁰

Indeed in order to establish that a group of companies is in reality one economic activity, it must be shown at the very least that holding company exerts a substantial if not absolute degree of control over the affairs of the subsidiaries of the company to the extent that the holding company must be in a position whereby it controls the subsidiary.⁴²¹ The holding company degree of control must extend beyond control based upon its control of majority of the subsidiary share.⁴²² Courts pierce the

⁴¹⁷ Vandekerckhove, Karen. "Piercing the Corporate Veil." *Eur. Company L.* 4 (2007): 191.

⁴¹⁸ Swain, John A., and Edwin E. Aguilar. "Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine." *BUL Rev.* 84 (2004): 445.

⁴¹⁹ Companies Act, s 2

⁴²⁰ Griffin, S. *Company law: Fundamental Principles*, (3rd Ed.), Edinburgh: Pearson Education Ltd, 2000, p.10

⁴²¹ *Ibid* 10-20

⁴²² *Ibid* 10-20

corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or more individual shareholders.⁴²³ For example, in the case⁴²⁴ of *Holds Worth & Co v Caddies* [1995] 1 WLR 352 where a dispute arose over managing director service of contract, a contract which he alleged had been breached as a result of holding company decision to exclusively restrict his managerial duties to subsidiary company. The managing director contended that he could not as a result of employment contract with the holding company be employed by its subsidiary in so far as in accordance with the application of the Salomon principle [supra] the subsidiary was distinct and quite separate legal entity from holding company. The High Lord (Lord Keith dissenting) ruled against the managing director on the premise that in terms economic reality of the subsidiary was not but a division of the holding company. The holding company appointed the entire subsidiary, directors and further it was in a position whereby it was able to dictate the subsidiary corporate entity. Accordingly, the High Lord lifting the corporate veil of the subsidiary company merged the legal entities of the holding company and its subsidiary constitutes one economic entity. Conversely, some commentators believe that parent-subsidary arrangements should be more closely scrutinized.⁴²⁵ Many times, a subsidiary will be set up to operate merely as a shell to allow the parent corporation to escape potential tort or contract liability, including the avoidance of debts and other obligations.⁴²⁶

⁴²³ Ramsay I, Noakes DB. Piercing the Corporate Veil in Australia. Available at SSRN 299488. 2001.

⁴²⁴ Griffin, S. Company Law: Fundamental Principles. Edinburgh: Pearson Professional Ltd, 2000, p.10-20

⁴²⁵ Cheng-Han T, Wang J, Hofmann C. Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives. Berkeley Bus. LJ. 2019;16:140.

⁴²⁶ Ibid 16:140.

Similarly, in the case⁴²⁷ of *Scottish Coop Whole Society v Meyer [1959] AC 324*, the High Lord found that the corporate veil of the holding company subsidiary should be lifted to create one economic activity. Another leading case often quoted to support the argument that a single economic entity can be established in circumstances where a holding company dominates the corporate policy of the subsidiary company is the decision of the court of appeal in *DHN Food Distributors Ltd v Tower Hamlets LBC[1976]1 WLR 852*.⁴²⁸ However, in the *Bank of Tokyo Ltd v Karoon [1987] AC 45*-the court of appeal denied that a strong economic link between the group of companies could justify a finding of one economic entity for the purpose of merging the group of companies into one legal entity.⁴²⁹

2.3 The Origins of Corporate Veil Piercing Analysis

From its inception veil piercing has been a scourge in corporate law.⁴³⁰ The doctrine of corporate veil originated in 1897 with the Solomon case. Generally, the doctrine of veil piercing has been the subject of numerous statutory, judicial decisions and scholarly commentary.⁴³¹ Since then it is being followed till the present date⁴³². But during the years, the way the doctrine of corporate veil has taken different approaches⁴³³. Up to now, corporate veil piercing is the most heavily litigated issue

⁴²⁷Griffin, S. *Company Law: Fundamental principles*. Edinburgh: Pearson Professional Ltd, 2000, p.10-20

⁴²⁸Ibid.p.10-20.

⁴²⁹Ibid.p.10-20.

⁴³⁰Oh, P.B. *Veil-Piercing*. *Tex. L. Rev.*2010; 89:81.

⁴³¹Bendremer, F.J. *Delaware LLCs and Veil Piercing: Limited Liability has its Limitations*. *Fordham J. Corp. & Fin. L.*2004; 10:385.

⁴³²Trisha & Devanshi, B., *The Doctrine Of Lifting The Corporate Veil And The Judicial Trend In Determining The Criminal Liability Of Corporations*, *Journal On Contemporary Issues Of Law* Volume 3 Issue 5. P. 1-16, http://jcil.lsyndicate.com/wp_content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf

⁴³³Ibid 1-16

in corporate law, yet legal doctrine in this area is notoriously incoherent.⁴³⁴ The courts typically base their decisions on conclusory references to criteria of doubtful relevance for corporate veil piercing.⁴³⁵

Unlike other forms of creditor protection, the origins of veil piercing are uncertain; and the criteria used to apply this protection are not uniform.⁴³⁶ Presser explains that by the end of the 19th century some legal scholars questioned the justification of limited liability.⁴³⁷ During the early part of the 20th century, corporations functioned as partnerships. During the Great Depression, however, U.S. lawmakers tried to codify the equitable doctrine of piercing the corporate veil as a legal way to protect creditors.⁴³⁸ The foundations of modern veil piercing were established in three⁴³⁹ seminal legal texts: Judge Benjamin Cardozo's opinion in *Berkey v Third Avenue Railway Co.*, Maurice Wormser's article *Piercing the Veil of Corporate Entity* and Frederick J. Powell's book *Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of Its Subsidiary*.

From 1897 to 1966, it was called the period of early experimentation where the courts experimented with different approaches of the doctrine.⁴⁴⁰ The different

⁴³⁴ Milton, D. *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*. Emory LJ. 2006; 56:1305.

⁴³⁵ Ibid 1305

⁴³⁶ Dávalos Torres MS. *Corporate Veil Piercing: A Proposal for Mexico*. Mexican Law Review. 2012 Dec;5(1):81-123

⁴³⁷ Ibid 81-123

⁴³⁸ Ibid 81-123

⁴³⁹ Ibid 81-123

⁴⁴⁰ Trisha & Devanshi, B., *The Doctrine of Lifting The Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jci.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

approaches were tried keeping in view the decision of House of Lord in Salomon's Case⁴⁴¹. Hence, the term piercing the corporate veil was first mentioned by Wormser in 1912⁴⁴² who analyzed various situations where the concept of the corporate fiction should be ignored. Despite that it is not known exactly who originated this colorful phrase that is now often used to describe having a corporation's separate existence disregarded and particular corporate shareholder held liable to the offences.⁴⁴³

Wormser generalized that when the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons⁴⁴⁴. Later, he concluded that the doctrine could not be precisely formulated since it could take on many different forms.⁴⁴⁵ Nonetheless, this distinction between permanent and temporary disregard of the corporate form is not self-evident.⁴⁴⁶ This is because the term veil-piercing seems more suggestive of the result, implying from the outset that the corporation or other limited-liability vehicle is a sham, as a veil hides reality whereby in this light, the term disregard of the corporate entity appears more neutral, and some scholars prefer it.⁴⁴⁷ Nonetheless, shareholders are afforded this risk shifting protection under the law as a way, from a public policy standpoint, to

⁴⁴¹ Ibid 1-16

⁴⁴² Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁴³ Crespi GS. Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles. *NYU Ann. Surv. Am. L.*. 2008;64:85.

⁴⁴⁴ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁴⁵ Ibid 1-27

⁴⁴⁶ Michael, D.C , To Know a Veil, University of Kentucky, College of Law, Fall 2000, p.43-46

⁴⁴⁷ Ibid 43-46

encourage corporate investment and growth of businesses and, in theory, the economy.⁴⁴⁸ The idea is to minimize shareholders' personal liability risk to increase capitalistic venture.⁴⁴⁹

From time to time the corporate veil or shield allowed shareholders, who may be individuals or corporations or other types of entities themselves, to invest in a corporation without fearing that their personal or individual assets, beyond what they are investing into the corporation, might be exposed to the risks, debts, obligations and liabilities undertaken or incurred by the corporation.⁴⁵⁰ According to Stephen Presser's history of the subject, corporate veil-piercing as a doctrine dates from three events in the first third of the century: Maurice Wormser's works on the subject from 1912 to 1927, Judge Benjamin Cardozo's 1926 opinion in *Berkey v Third Avenue Railway Co.*, and Frederick Powell's 1931 book on parent and subsidiary corporations.⁴⁵¹

There was even some debate, in the beginning, of whether veil-piercing or disregard of the corporation is the most appropriate name for the analysis.⁴⁵² Wormser shifted between the two terms in his writing, attributing the origin of the veil analogy to one court's analysis of an early U.S. Supreme Court case.⁴⁵³ The general principles for disregarding the corporate entity are applicable to all types of corporations.' The situations which arise most frequently involve two general categories: close

⁴⁴⁸ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil. 2014, p. 2

⁴⁴⁹ Ibid 2

⁴⁵⁰ Ibid 2

⁴⁵¹ Michael, D.C , To Know a Veil, University of Kentucky, College of Law, Fall 2000,p 43-46

⁴⁵² Ibid 43-46

⁴⁵³ Ibid 43-46

corporations, including solely-owned and family-owned, and parent-subsidary arrangements.⁴⁵⁴ There is generally no personal liability on the part of a shareholder, whether it is an individual, small group of individuals, or another corporation.⁴⁵⁵ If a shareholder, however, exploits the corporation by placing his own interests above the corporation's, then the shareholder may be held liable under the general principles relating to piercing the corporate veil.⁴⁵⁶ Some commentators have suggested that policy should favor a different standard when considering the liability of an individual shareholder in contrast to that of a corporate shareholder.⁴⁵⁷

Powell suggests that veil piercing is a better caption than disregard, because it shows that shareholder liability for corporate obligations is imposed on a one-time-only basis.⁴⁵⁸ Traditionally, courts have consistently emphasized the importance of recognizing and maintaining the separate identities of the entities and their individual (or other corporate) owners.⁴⁵⁹ Therefore, veil piercing can be a useful tool when a creditor wants to reach the assets of an individual, or, in some cases, the assets of an affiliate or owner company, to satisfy a debtor's obligation.⁴⁶⁰ It is important to remember that a company's agent may be held liable for his own tortious or fraudulent actions, so it is not always necessary to pierce the veil to hold an individual liable.⁴⁶¹

⁴⁵⁴ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa LJ*. 1992;28:869.

⁴⁵⁵ *Ibid* 869

⁴⁵⁶ *Ibid* 869

⁴⁵⁷ *Ibid* 869

⁴⁵⁸ Michael, D.C , *To Know a Veil*, University of Kentucky, College of Law, Fall 2000,p 43-46

⁴⁵⁹ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil*. 2014, p. 2

⁴⁶⁰ *Ibid* 2

⁴⁶¹ *Ibid* 2

The early piercing cases usually required some kind of fraud.⁴⁶² With *Simmons Creek Coal Co. v Doran* and *J.J. McCaskill Co. v U.S [1898]*⁴⁶³, the piercing doctrine was expanded to cases not involving actual fraud. In *United States v Milwaukee Refrigerator Transit Co*, the court formulated the kind of wrongdoing that would trigger piercing the corporate veil.⁴⁶⁴ When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.⁴⁶⁵ In other words, when recognizing corporations as distinct entities from their owners would be inconsistent with public policy, courts will consider disregarding the corporate entity.⁴⁶⁶ Courts consistently agree that, in some situations, the corporate entity may be removed as a technical barrier between its owner(s) and the parties with whom it deals.⁴⁶⁷ Although jurisdictions have differing standards, it is generally agreed that upon a showing of some improper purpose, the veil may be pierced.⁴⁶⁸

This early attempt concentrated mainly on the harm done but the relationship between the corporation and the plaintiff was neglected⁴⁶⁹. Since this articulation was very broad and severe, scholars and courts were dissatisfied with this approach⁴⁷⁰. Nevertheless this eminent attempt marked the intensification of the corporate veil piercing. What followed was a period of considerable enthusiasm for the corporate

⁴⁶² Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁶³ Ibid 1-27

⁴⁶⁴ Ibid 1-27

⁴⁶⁵ Ibid 1-27

⁴⁶⁶ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa L.J.* 1992;28:869.

⁴⁶⁷ Ibid 869

⁴⁶⁸ Ibid 869

⁴⁶⁹ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁷⁰ Ibid 1-27

veil doctrine whereby successful veil piercing cases in the first half of the twentieth century included *Gilford Motor v Horne*, *In re Darby*, *Brougham*, *Trebanog Working Men's Club and Institute, Ltd v MacDonald*, and *Rainham Chemical Works, Ltd. v Belvedere Fish Guano Co*⁴⁷¹. The lack of a well-defined approach to the doctrine meant that English courts had to experiment with existing common law concepts such as agency, trusteeship, and tort liability principles to resolve corporate personality issues⁴⁷². These experiments failed to yield a generally applicable framework but this lack of a general framework did not prevent the courts from piercing the veil when the circumstances so warranted⁴⁷³. Courts continued to adjudicate corporate veil piercing cases despite the weaknesses, which were inherently in the approaches adopted from common law jurisdiction.

Later in *Berkey v Third Avenue Railway Co. [1927]*⁴⁷⁴, Cardozo demurred at the broad metaphors used in this area of law.⁴⁷⁵ At the same time, he admitted that an accurate definition could not and should not be made due to fairness reasons.⁴⁷⁶ In this light, the term disregard of the corporate entity appeared to be more neutral, and some scholars preferred it.⁴⁷⁷ However, of the three scholars (namely, Cardozo's, Presser & Wormser), Powell, in his 1931 book, is probably most frequently credited with creating and neatly packaging the veil-piercing doctrine.⁴⁷⁸ Although technically his work deals only with parent and subsidiary corporations, he freely

⁴⁷¹ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." *BC Int'l & Comp. L. Rev.* 34 (2011): 329.

⁴⁷² *Ibid* 329

⁴⁷³ *Ibid* 329

⁴⁷⁴ Michala, R., *Piercing Corporate Veil*. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁷⁵ Michael, D.C , *To Know a Veil*, University of Kentucky, College of Law, Fall 2000, p.43-46

⁴⁷⁶ Michala, R., *Piercing Corporate Veil*. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁷⁷ Michael, D.C , *To Know a Veil*, University of Kentucky, College of Law, Fall 2000, p.43-46

⁴⁷⁸ *Ibid* 43-46

extended his analysis to one-man corporations, indicating the rules applied to those entities with equal force.⁴⁷⁹ He stated it would be an abuse of the privilege or, using Cardozo's phrase, a fraud upon the law to allow the separate existence of a corporation to be recognized if the following were true: (1) there was control of the corporation, (2) used to commit fraud or wrong, causing (3) unjust loss or injury to the complainant.⁴⁸⁰ Powell's three part test is the one now most frequently used as the touchstone for veil-piercing analysis.⁴⁸¹

Despite the significant progress corporate veil piercing remains to unprincipled due to lack of one to one standardizing approach in adjudicating cases. If the corporate veil is pierced, the plaintiff will be able to obtain a judgment against both the corporation and its owner(s), and the judgment will be enforceable against each separately.⁴⁸² Courts pierce the corporate veil in order to protect third party plaintiffs from unjust injury by the corporation, and most jurisdictions recognize the doctrine as an equitable concept.⁴⁸³ In order to pierce the corporate veil, it is necessary to show that some injustice will occur if the veil is not pierced and this is usually the case when a shareholder of a corporation is aware of a plaintiff's valid claim against the corporation's property, and the corporation intentionally acts in disregard of that claim.⁴⁸⁴ To put it another way, the corporate veil is pierced when the corporation has, in some way, abused its privilege of doing business in the corporate form.⁴⁸⁵

⁴⁷⁹ Ibid 43-46

⁴⁸⁰ Ibid 43-46

⁴⁸¹ Ibid 43-46

⁴⁸² Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa L.J.* 1992;28:869.

⁴⁸³ Ibid 869

⁴⁸⁴ Ibid 869

⁴⁸⁵ Ibid 869

At first piercing the corporate veil was limited to corporations, however, with the advent of new entity forms the principles of corporate veil piercing have also been applied other entities.⁴⁸⁶ Generally, the test for piercing the veil does not vary greatly between entities, corporate law that an individual can incorporate a business and thereby shield himself from personal liability for the corporation's contractual obligations.⁴⁸⁷ As a result of this dissatisfaction, new doctrines were articulated but in 1931, Powell made one of the biggest attempts to formulate a clear rule of piercing by using the instrumentality doctrine.⁴⁸⁸ His approach originally dealt only with piercing within corporate groups but was over time extended to all corporations⁴⁸⁹; simultaneously, the alter ego doctrine emerged.

With the development of different approaches in corporate veil piercing, the focus shifted slowly from the harm done to the plaintiff towards the triangle relationship between the corporation, its shareholders and the plaintiff.⁴⁹⁰ In theory, the emerged doctrines of piercing applied to publicly-held and closely-held corporations⁴⁹¹ whereby in order to be pierced, shareholders have to dominate the corporation. Some legal scholars have even asserted that the advent of the corporate form stems from democracy itself, giving small business owners the opportunity and foundation, through sole shareholder or closely held corporations, to fairly compete in the world

⁴⁸⁶ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil. 2014, p2

⁴⁸⁷ Ibid, p.2

⁴⁸⁸ Michala, R., Piercing corporate veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁸⁹ Ibid 1-27

⁴⁹⁰ Ibid 1-27

⁴⁹¹ Ibid 1-27

of cutthroat capitalism.⁴⁹² Since publicly-held corporations have a large number of different shareholders, it is hard to show the required domination and establish a piercing case against them.⁴⁹³ Consequently, no case exists where the veil is pierced against shareholders of publicly-held corporations.⁴⁹⁴

With development of corporate veil piercing it could only occur against shareholders of closely-held corporations because the required separation of ownership and control is most likely not given in this kind of corporation.⁴⁹⁵ However, the corporate veil is not absolute and may be pierced under certain factual and legal circumstances when courts disregard the corporate fiction and hold individual shareholders or members personally liable for the debts, obligations, actions, and liabilities of the corporation.⁴⁹⁶ Moreover, most jurisdictions consider piercing the corporate veil as an extraordinary remedy to be applied only in limited circumstances.⁴⁹⁷ Courts are therefore often reluctant to pierce the corporate veil in the absence of compelling reasons.⁴⁹⁸ Today, the rulings of lifting the veil are discretionary and are determined on a case-by-case basis as a result of a missing bright-line rule⁴⁹⁹.

To accomplish this objective, courts have fashioned the so-called “piercing the corporate veil” doctrine whereby under certain circumstances, courts will disregard

⁴⁹² Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil*. 2014, p2

⁴⁹³ Michala, R., *Piercing Corporate Veil*. <https://www.grin.com/document/125582>, 2006, p.1-27

⁴⁹⁴ *Ibid* 1-27

⁴⁹⁵ *Ibid* 1-27

⁴⁹⁶ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil*. 2014, p.2

⁴⁹⁷ *Ibid* 2

⁴⁹⁸ *Ibid* 2

⁴⁹⁹ Michala, R., *Piercing Corporate Veil*. <https://www.grin.com/document/125582>, 2006, p.1-27

or puncture the limited liability shield to hold shareholders personally responsible for obligations the corporation itself lacks the capacity to discharge.⁵⁰⁰ If there is one overriding principle in all piercing cases, it is that each one must be decided upon its own facts.⁵⁰¹ Thus, the application is highly fact specific and courts enjoy great latitude of judgment⁵⁰², but the application of the doctrine differs depending on jurisdiction and of court, the whole area of law is unclear and confusing however, the whole problem is still evolved in mist and metaphors and this is still true today. That's why scholars and courts are continuously trying to formulate new frameworks and guidelines for a perspicuous application of the doctrine⁵⁰³. The criticisms are not directed towards the achieved result but rather towards the emergence of endless labels and metaphors used to describe the decisions⁵⁰⁴.

While the legal parameters of piercing the veil vary from state to state, generally courts continue to allow veil piercing when there is some abuse of the corporate form that results in the entity's creditors being treated unfairly.⁵⁰⁵ In many cases, determined plaintiffs, feeling that they have been harmed by the corporation or by employees or agents of the corporation, often seek to recover damages personally from the shareholders, directors and officers of the corporation by asking a court to pierce the corporate veil.⁵⁰⁶ Hence, piercing the corporate veil, also known as

⁵⁰⁰ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006; 56:1305.

⁵⁰¹ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁵⁰² *Ibid* 1-27

⁵⁰³ *Ibid* 1-27

⁵⁰⁴ *Ibid* 1-27

⁵⁰⁵ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil.* 2014, p2

⁵⁰⁶ *The Law in Texas, Regarding Piercing the Corporate Veil*, 2018, p.5

disregarding of the corporate veil is a method used by plaintiffs and courts to impose liability on officers, directors, and shareholders of a corporation.⁵⁰⁷

Importantly, the corporate veil doctrine and the related rules of separate corporate personality and limited liability has been a much-studied subject in corporation law since the early part of the twentieth century⁵⁰⁸. For example, creditors of insolvent corporations often ask courts to pierce the corporate veil and hold shareholders personally liable for a corporate obligation.⁵⁰⁹ Nonetheless, a perennial challenge facing the corporate veil doctrine has been the attempt to increase its predictability⁵¹⁰. The doctrine being an exception to the general rule of limited liability was created to prevent injustice⁵¹¹. As such, the application of the doctrine has always been fact specific and open-ended while justice requires a flexible legal standard that allows room for the weighing of equity and policy considerations⁵¹². The same impulses that have led courts to disregard corporate existence to prevent perceived injustice are already resulting in the deployment of corporate law veil-piercing analysis to claims brought by creditors against the owners of the newly created forms of unincorporated limited liability entity.⁵¹³ Here, too, the decisions are a product of judicial initiative rather than statutory text.⁵¹⁴ Nonetheless, veil piercing

⁵⁰⁷ Ibid 5

⁵⁰⁸ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." *BC Int'l & Comp. L. Rev.* 34 (2011): 329.

⁵⁰⁹ Milton, D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006;56:1305.

⁵¹⁰ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." *BC Int'l & Comp. L. Rev.* 34 (2011): 329.

⁵¹¹ Ibid 329

⁵¹² Ibid 329

⁵¹³ Milton, D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory LJ.* 2006;56:1305.

⁵¹⁴ Ibid 1305

can perform a useful function. Once the appropriate limits of limited liability are understood, veil piercing can police those limits.⁵¹⁵

Some degree of open-endedness is thus probably inherent in the doctrine and it is perhaps because of this open-endedness that the corporate veil doctrine has remained fertile ground for academic research⁵¹⁶. For example, the corporate veil doctrine under English company has attracted considerable academic attention while in the United States has focused on making sense of the voluminous, and often contradictory but the case law the importance of the doctrine having been firmly accepted in the United States—the debate in the United Kingdom has taken on a different tone⁵¹⁷. The general rule of corporate law in the United States is that a corporation, being a separate legal entity, limits the creditor's rights to the assets of the corporation.⁵¹⁸ However, as the 1854 case *York & Maryland Line Railroad v Winans* stated, when the Supreme Court of the United States pierced the corporate veil between parent company and its subsidiary, it concluded that the subsidiary should be liable to the same extent as its parent company.⁵¹⁹ Despite the fact that in this case the Supreme Court applied reversed piercing, when holding the subsidiary liable for the actions of its parent company. The main implication of this case is that the Supreme Court was willing to set aside the corporate structure and look at what

⁵¹⁵ Ibid 1305.

⁵¹⁶ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." *BC Int'l & Comp. L. Rev.* 34 (2011): 329.

⁵¹⁷ Ibid 329

⁵¹⁸ Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia.* *Chicago-Kent Journal of International and Comparative Law.* 2016;17(1):7.

⁵¹⁹ Ibid 7

was inside it and decide based on the economic reality, for example, how the assets were divided and what was the decision-mechanism within the corporate group.⁵²⁰

Although some commentators have argued in favor of the doctrine, the general perception is that English courts are loathed to apply the doctrine and only under exceptional circumstances is veil piercing permitted⁵²¹. Judicial attitude toward the doctrine, however, has not always been unaccommodating as until the late 1970s, where English courts demonstrated considerable willingness to pierce the veil when justice so required.⁵²² Most notably, Lord Denning propounded the single economic unit theory, which allows a court to treat corporate parent and its wholly owned subsidiaries as a single entity, a theory that would be considered expensive even under U.S. law⁵²³.

Unlike its U.S. counterpart, which has enjoyed steady judicial acceptance throughout the years, the English corporate veil doctrine has had a topsy-turvy career⁵²⁴. Unfortunately, as most of the law in the United States, it is still regulated on the state level, including corporate and enterprise law.⁵²⁵ Thus, there is no federally accepted doctrine of veil piercing. Therefore, it is the decision of state courts to what extent they apply and use this doctrine.⁵²⁶ Moreover, even if the case comes before a federal

⁵²⁰ Ibid 7

⁵²¹ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." *BC Int'l & Comp. L. Rev.* 34 (2011): 329.

⁵²² Ibid 329

⁵²³ Ibid 329

⁵²⁴ Ibid 329

⁵²⁵ Horvathova A, Stanescu CG. Piercing the Corporate Veil US Lessons from Romania and Slovakia. *Chicago-Kent Journal of International and Comparative Law.* 2016; 17(1):7.

⁵²⁶ Ibid 7

court, it will apply state law standards.⁵²⁷ For example, Texas courts are generally willing to disregard the corporate form in this situation only when corporations are not operating as separate entities, but rather integrate their resources to achieve a common business purpose.”⁵²⁸ In group companies plaintiffs, therefore, often attempt to pierce the corporate veil in order to treat the two corporations as one entity.⁵²⁹ As far as piercing of the corporate veil of the group company is concerned, plaintiffs often attempt to pierce the corporate veil in order to impose liability upon a parent corporation for the obligations of a subsidiary.⁵³⁰ For the purposes of legal proceedings, subsidiary corporations and parent corporations are separate and distinct persons as a matter of law and the separate entity of corporations will be observed by the courts even where one company may dominate or control, or even treat another company as a mere department, instrumentality, or agency.⁵³¹

To this respect, piercing of the corporate veil had become very chaotic in the United States, as many courts failed to explain the legal grounds of their decision, and hence, form confusion and unforeseeability.⁵³² However, this situation could be resolved by establishing a federal doctrine, or by continuously applying one specific state veil piercing doctrine properly, and with full justification.⁵³³ Unlike United States, the attitude of English courts toward the doctrine has oscillated from enthusiasm to outright hostility as the history of the English doctrine can be roughly

⁵²⁷ Ibid 7

⁵²⁸ The Law in Texas, Regarding Piercing the Corporate Veil, 2018, p.5

⁵²⁹ Ibid 5

⁵³⁰ Ibid 5

⁵³¹ Ibid 5

⁵³² Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. *Chicago-Kent Journal of International and Comparative Law*. 2016;17(1):7.

⁵³³ Ibid 7

divided into the following periods.⁵³⁴ The first period which lasted from 1897, when *Salomon v Salomon [supra]* was decided, to around the Second World War⁵³⁵. This period can be called the early experimentation period, during which English courts experimented with different approaches to the doctrine⁵³⁶. The second period began after the War and continued until 1978, the year when *Woolfson v Strathclyde Regional Council [1978]* was decided⁵³⁷.

The early decisions relied on equitable principles, and typically involved allegations of fraud as per *Booth v. Bunce*, 33 N.Y. 139 (1865)⁵³⁸ that is, when a plaintiff has a valid cause of action against an insolvent corporation, the Court must weigh two competing values. The first is society's desire to uphold the principle of limited liability, and the second is the desire to achieve an equitable outcome. The first use of "veil" may have been *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173, 179 (1839). First use of "piercing the veil" may have been in a 1912 law review article. *I.M. Wormser, Piercing the Veil of Corporate Entity*, 12 Colum. L.Rev. 496 (1912).⁵³⁹ This period can be regarded as the heyday of the doctrine but much of the vitality of the doctrine during this period can be attributed to Lord Denning, who was an enthusiastic advocate and practitioner of veil piercing and one of the most influential English jurists of the second half of the twentieth century⁵⁴⁰.

⁵³⁴ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." BC Int'l & Comp. L. Rev. 34 (2011): 329.

⁵³⁵ Ibid 329

⁵³⁶ Ibid 329

⁵³⁷ Ibid 329

⁵³⁸ Cohen, M. A Brief History of Piercing the Corporate Veil, 2010.p.3

⁵³⁹ Ibid 4

⁵⁴⁰ Cheng, T. K. "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines." BC Int'l & Comp. L. Rev. 34 (2011): 329.

Veil piercing can perform a useful function, once the appropriate limits of limited liability are understood, veil piercing can police those limits.⁵⁴¹ For various reasons, a corporation's limited liability shield for its shareholders is one of the corporation's most valuable assets.⁵⁴² In other words, the court will pierce the corporation's veil of limited liability; however, piercing the corporate veil is easier said than done.⁵⁴³ For instance, this was observed from 1966 to 1989 where the rules of the House of Lords in Solomon's case were changed and the lifting of veil was encouraged⁵⁴⁴. Hence, courts will occasionally disregard a corporation's limited liability protection by holding the individual shareholders liable to the corporation's creditors.⁵⁴⁵ Lord Denning in *Littlewoods Mailstores v IRC* stated that "the doctrine laid down in Salomon's case [supra] has to be watched very carefully⁵⁴⁶. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see⁵⁴⁷. This is because some individuals may abuse the corporate form's limited liability status by using it to mislead or defraud creditors demanding the courts to pull off the mask.⁵⁴⁸

⁵⁴¹ Milton, D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006; 56:1305.

⁵⁴² Jimerson,C.B. , Daniel, L. & Buchholz, J.D. Candidate Piercing the Corporate Veil in Florida: Essential Elements and Common Factors, October 3, 2017, p. 1

⁵⁴³ Ibid, p.1

⁵⁴⁴ Trisha & Devanshi, B., *The Doctrine of Lifting The Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jcil.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

⁵⁴⁵ Jimerson,C.B. , Daniel, L. & Buchholz, J.D. Piercing the Corporate Veil in Florida: Essential Elements and Common Factors, October 3, 2017, p. 1

⁵⁴⁶ Trisha & Devanshi, B., *The Doctrine of Lifting The Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jcil.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

⁵⁴⁸ Jimerson,C.B. , Daniel, L. & Buchholz, J.D. Candidate Piercing The Corporate Veil In Florida: Essential Elements and Common Factors, October 3, 2017, p. 1

Despite the vitality of corporate veil piercing, from 1989 to the present date, the doctrine began to be disfavoured by the courts⁵⁴⁹. Veil piercing has been the subject of extensive criticism, and, like limited liability itself, there have been calls for its abolition.⁵⁵⁰ Critics have emphasized the apparently unprincipled, ad hoc, and therefore unpredictable manner in which courts have deployed this device.⁵⁵¹

Nevertheless, it remains a prominent feature of corporate law.⁵⁵² The classic case which started the trend of disapproving the doctrine is *Woolfsan v Stratheclye Regional Council [1978] UKHL 5* in which Lord Keith stated that the only situation where a corporate veil could be lifted was where there are special circumstances indicating that the company is a 'mere facade concealing the true facts.'⁵⁵³ Thus, the English court started to take a very narrow view of the doctrine and the judgement of the court of appeal in *Adams v Cape Industries Plc.*⁵⁵⁴ The reason for the doctrinal confusion and unpredictability of results in the veil-piercing cases is the courts' persistent failure to articulate and then base their analysis on a sound understanding of the policy basis for limited liability.⁵⁵⁵ Only with a coherent view of the

⁵⁴⁹ Trisha & Devanshi, B., *The Doctrine of Lifting The Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jCIL.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

⁵⁵⁰ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006;56:1305.

⁵⁵¹ Ibid 1305

⁵⁵² Ibid 1305

⁵⁵³ Trisha & Devanshi, B., *The Doctrine of Lifting the Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jCIL.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

⁵⁵⁴ Ibid 1-16

⁵⁵⁵ Milton D. Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. Emory LJ. 2006;56:1305.

appropriate reasons for limited liability can courts hope to think rationally about the limits that ought to be imposed on its scope.⁵⁵⁶

There were only three circumstances in which the corporate veil could be pierced. They were⁵⁵⁷: First if the court is interpreting a statute or document and the statute itself is ambiguous, it would allow the court to treat a group as a single entity; second if special circumstance indicates that it is a mere facade concealing the true facts, the court may lift the veil; third it is an application of the agency principle. Parent companies and subsidiaries are unlikely have express agency agreements and it is even difficult to prove an implied agency and evidence is required that day to day control was being exercised by the parent company over its subsidiaries⁵⁵⁸

2.4 Corporate Veil Piercing Theories

There are numerous theories for lifting the corporate veil. They include single economic theory, the instrumentality theory, the alter ego theory, and totality principles doctrine and façade theory. It is up to the court to decide on which theory to apply but courts are generally reluctant to pierce the corporate veil, and this is only done when liability is imposed to reach an equitable result.⁵⁵⁹

Realizing the inadequacy of this standard, courts formulated supplementary theories which focus upon the relationship between the shareholder/owner and the

⁵⁵⁶ Ibid1305

⁵⁵⁷ Trisha & Devanshi, B., *The Doctrine of Lifting The Corporate Veil and The Judicial Trend in Determining the Criminal Liability of Corporations*, Journal on Contemporary Issues of Law Volume 3 Issue 5. P. 1-16, <http://jci.lsyndicate.com/wp-content/uploads/2017/06/Trisha-Devanshi-corporate-veil.pdf>

⁵⁵⁸ Ibid, p.1-16

⁵⁵⁹ Forji, A.G., *The Veil Doctrine in Company Law* 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

corporation and offer a more concrete method of analysis than vague equitable considerations.⁵⁶⁰ Courts generally have been less reluctant to pierce the veil where they have found a high degree of unity between the shareholder and the corporation.⁵⁶¹ Confusion, however, has also occurred since courts have employed different terms to describe the same relationship between the corporation and its shareholders.⁵⁶² *The Milwaukee Refrigerator rule* focused on the harm to the plaintiff. Some courts did not like this because they felt it too vague. They began to focus on the relationship between the owners of the corporation and the corporation itself. Various tests and theories emerged, Alter ego, Instrumentality, Sham, totality of circumstances and public policy.⁵⁶³

2.4.1 The Alter Ego Theory

The earliest mention of the alter *ego* concept was in 1898 by Justice Taft in *Harris v Youngstown Bridge Co.* [1898] which is a metaphor for an unacceptably close relationship between a parent and a subsidiary corporation, resulting in a disregard of the subsidiary's separate corporate identity⁵⁶⁴. The alter ego doctrine stipulates that the corporate veil should be pierced if there is such a unity of ownership and interest that two allied corporations no longer can be considered separate, and the subsidiary thus is viewed as the alter ego of the parent.⁵⁶⁵ Furthermore, recognition of the corporations' separate entities must either sanction fraud or lead to an inequitable

⁵⁶⁰ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa LJ. 1992;28:869.

⁵⁶¹ Ibid

⁵⁶² Ibid

⁵⁶³ Cohen, M. A Brief History of Piercing the Corporate Veil, 2010.p.7

⁵⁶⁴ Orn, P. "Piercing the Corporate Veil-a Law and Economics Analysis." (2009).37

⁵⁶⁵ Ibid 37

result that is why, the alter ego is said to exist when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist as per *Dietel v Day* [1972]⁵⁶⁶. Under the alter ego theory, the plaintiff must establish that the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation as per *Gasparini v Pordomingo* [2008]⁵⁶⁷ Stated differently, individual liability under the alter ego theory is imposed where "the personal affairs of the shareholder become confused with the business affairs of the corporation."⁵⁶⁸

The alter-ego theory considers if there is in distinctive nature of the boundaries between the corporation and its shareholders.⁵⁶⁹ The Alter Ego Theory proposes that a court can treat a group of companies as a single entity in law because they are/it is a single economic entity is false⁵⁷⁰. The apparent acceptance of the single economic theory by Lord Denning in *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] can no longer be regarded as good law⁵⁷¹. The correctness of the reasoning in the case has been doubted by the House of Lords in *Woolfson v Strathclyde Regional Council* [1978] in which referencing the DHN decision, Lord Keith of Kinkell said: "I have some doubt whether in this respect the Court of Appeal properly applied in principle that it is appropriate to pierce the corporate veil only

⁵⁶⁶ Mitchell, RD. Alter Ego Doctrine and Piercing the Corporate Veil, 2018, p.1

⁵⁶⁷ Jimerson, C.B., Daniel, L. & Buchholz, J.D. Candidate Piercing The Corporate Veil in Florida: Essential Elements and Common Factors, October 3, 2017, p. 1

⁵⁶⁸ Ibid 1

⁵⁶⁹ Chaitanya, S. & Kaushalya, T. M., Lifting The Corporate Veil, On January 7, 2015 p.1

⁵⁷⁰ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁵⁷¹ Ibid 117-138

where special circumstances exist indicating that it is a mere façade concealing the true facts” DHN involved compensation under the Land compensation Act 1961 of United Kingdom⁵⁷²whereby in this case, a group of companies was treated as one single economic unit⁵⁷³.

The alter ego theory also called another self theory permits a court to impose liability upon an individual shareholder, officer, director, or affiliate for the acts of a corporation it may also be used to impose liability upon a parent corporation for the acts of a subsidiary corporation when the subsidiary is organized or operated as a mere tool or business conduit.⁵⁷⁴ A court will look at many factors to determine whether an alter ego relationship exists. When dealing with an individual and a corporation, the court will look at the total dealings of the corporation and the individual, including evidence of the degree to which corporate and individual property have been kept separate; the amount of financial interest, ownership, and control the individual has maintained over the corporation; whether the corporation has been used for personal purposes⁵⁷⁵. In these cases the court will disregard their separate personality and consider them as a single entity working in different form or shape⁵⁷⁶.

The most popular identity theory is known as the "alter ego" rule.' The elements of the alter ego rule are: (1) unity of interest to the degree that the separateness of the

⁵⁷² Ibid 117-138

⁵⁷³ Ibid 117-138

⁵⁷⁴ Mitchell, RD. Alter Ego Doctrine and Piercing the Corporate Veil,2018, p.1

⁵⁷⁵ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁵⁷⁶ Ibid 117-138

corporation from the shareholder ceases, and (2) allowing separateness to continue would promote fraud or injustice.⁵⁷⁷ To find an alter ego, courts examine various factors, including the shareholder transacting business for himself in the name of the corporation, participation on the board of directors, right to corporate property, claiming personal ownership of corporate property donated by the shareholder, and unfettered control of corporate property.⁵⁷⁸ Critics have argued that some factors used in the alter ego rule have no relevance to the injury of the plaintiff.⁵⁷⁹ For example, failure to issue stock, use of the same business office and same attorney, and disregard of legal formalities tend to show a lack of corporate individuality; nevertheless, they usually do not have an impact upon the injury sustained by the plaintiff. These factors are not an exact science, and they tend to overlap with the control theories.⁵⁸⁰

The alter ego theory boils down to looking at how the owners managed internal matters, how the financial interests were kept separated from personal interests and the degree of control the individual had over the company.⁵⁸¹ Basically, was the corporate put in place as a shield to liability or were business formalities observed? The courts will look at everything from the existence of a corporate book to the payment of taxes in order to determine the degree the alter ego was employed.⁵⁸² The Alter ego category has similar characteristics to the single economic entity

⁵⁷⁷ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa LJ. 1992;28:869.

⁵⁷⁸ Ibid 869

⁵⁷⁹ Ibid 869

⁵⁸⁰ Ibid 869

⁵⁸¹ Tressie E. M., Piercing The Corporate Veil in Texas Posted in Business Litigation, Court Procedure and Demeanor, General Business Law News and Updates On July 27, 2017, p.3

⁵⁸² Ibid 3

category.⁵⁸³ The Alter ego category is where the company does not carry on its own business or affairs, but rather acts in the furtherance of the affairs of the controlling members, resulting in the situation where the controlling members do not treat the company as a separate entity.⁵⁸⁴

If there is such unity between the corporation and the individual so that the company was merely a hollow shell used to perpetrate a fraud, courts are more likely to pierce the veil.⁵⁸⁵ The ultimate goal of using the theory of alter ego to reach the assets of the individuals involved is to avoid an inequitable result.⁵⁸⁶ Alter Ego Theory is one of the most common ways to pierce the corporate veil⁵⁸⁷ but courts, however, apply the single business enterprise theory to pierce the corporate veil in situations where two or more corporations are not operated as wholly separate entities, but instead combine their resources to achieve a common business purpose.⁵⁸⁸ While the exact standard varies by jurisdiction, generally the courts look to see whether the shareholders maintained an identity separate than that of the company.⁵⁸⁹ As regards to Alter Ego originally focused on the relationship between the corporation and its shareholders⁵⁹⁰.

⁵⁸³ Cohen, J., "Veil Piercing-A Necessary evil? A Critical Study on the Doctrines of Limited Liability and Piercing the Corporate Veil." PhD diss., University of Cape Town, 2014 p.13

⁵⁸⁴ Ibid 13

⁵⁸⁵ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil. 2014, p.2.

⁵⁸⁶ Ibid 2

⁵⁸⁷ Ibid 2

⁵⁸⁸ The Law in Texas, Regarding Piercing the Corporate Veil, 2018, p.5.

⁵⁸⁹ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil. 2014, p.2

⁵⁹⁰ Cohen, M. A Brief History of Piercing the Corporate Veil, 2010.p.7

The specific requirements for asserting alter ego varies from state to state and is a factual inquiry that will depend on the circumstances of each case.⁵⁹¹ However, courts have established some general characteristics of situations in which veil piercing may be appropriate.⁵⁹² For example, in Florida, the Supreme Court imposes a strict standard, which requires a showing of improper conduct and under this standard, it must be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them.⁵⁹³ Another example may be observed in California courts established the “alter ego” doctrine, which is also commonly used.

According to this doctrine, two conditions must be met before the corporate veil might be pierced.⁵⁹⁴ First, there has to be such “a unity of ownership and interest” that the two affiliated companies or a director and the company itself do not represent separate personalities and the company represents an “alter ego” of the party.⁵⁹⁵ Secondly, there has to be an “inequitable result” if the acts in question are treated as those of the party alone.⁵⁹⁶

2.4.2 Single Business Enterprise Theory

The single business enterprise theory is a common law doctrine based in equity that is used to impose partnership-like liability principles when businesses integrate their resources.⁵⁹⁷ It is sometimes known as single economic theory. Some courts have

⁵⁹¹ Karen, L. H., Cronje, A., Nunnally, B., & Martin, LLP., *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil*. 2014, p.2

⁵⁹² *Ibid* 2

⁵⁹³ *Ibid* 2

⁵⁹⁴ Horvathova A, Stanescu CG. *Piercing The Corporate Veil US Lessons from Romania and Slovakia*. *Chicago-Kent Journal of International and Comparative Law*. 2016;17(1):7.

⁵⁹⁵ *Ibid* 7

⁵⁹⁶ *Ibid* 7

⁵⁹⁷ *The Law in Texas, Regarding Piercing the Corporate Veil*, 2018, p. 5

responded by turning to enterprise analysis, which treats the corporate components of a company as one unit rather than as separate legal entities.⁵⁹⁸ Single business enterprise theory examines whether the various corporate affiliates comprising the enterprise have such a unity of purpose and conduct interrelated operations as part of an integrated enterprise under common direction directed at the maximization of return for the group as a whole.⁵⁹⁹ In order to take advantage of the corporate form of limited liability, parties will often incorporate several different business concerns under the belief that each incorporated entity will protect them from any and all personal liability of each business concern.⁶⁰⁰

The single business enterprise theory does not normally allow a successful plaintiff to reach the pockets of an officer, director, or shareholder, but rather allows a successful plaintiff to reach the pockets of an affiliated corporation.⁶⁰¹ The assumption of this theory is that each company within a group of companies constitutes a separate legal entity and each entity possesses separate rights and obligations.⁶⁰² The single business enterprise theory⁶⁰³ used to impute liability to companies that share resources and operate as if they were one entity. This is rarely used, but when it is used it can considerably open up the pool of damages available to the plaintiff.⁶⁰⁴ A single economic theory of piercing the corporate veil is another

⁵⁹⁸ Aronofsky, D. Piercing The Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis. *NCJ Int'l L. & Com. Reg.* 1985; 10:31.

⁵⁹⁹ *Ibid* 31.

⁶⁰⁰ *The Law in Texas, Regarding Piercing the Corporate Veil*, 2018, p.5

⁶⁰¹ *Ibid* 5

⁶⁰² Cohen, J., "Veil Piercing-A Necessary Evil? A Critical Study on the Doctrines of Limited Liability and Piercing the Corporate Veil." PhD diss., University of Cape Town, 2014, p.13

⁶⁰³ Tressie E. M., Piercing the Corporate Veil in Texas Posted in Business Litigation, Court Procedure And Demeanor, *General Business Law News And Updates* On July 27, 2017 p.3

⁶⁰⁴ *Ibid* 3

interconnected theory to the theory of alter ego, which is used to impose liability when businesses integrate their resources⁶⁰⁵.

Courts, however, apply the single business economic theory to pierce the corporate veil in situations where two or more corporations are not operated as wholly separate entities, but instead combine their resources to achieve a common business purpose⁶⁰⁶. When courts find that a single business enterprise exists, they will hold each corporation liable for the obligations of the other relating to the common business purpose to avoid an inequitable outcome.⁶⁰⁷ The degree of centralized control and economic integration, organization, market, and public identification as a unitary company are factors to be considered in using this theory.⁶⁰⁸ Apart from that the basis for an intra-enterprise conspiracy is judicial acceptance of the theory that because business entities have opted to incorporate themselves separately, they warrant recognition as separate legal entities with regard to the burdens as well as the benefits of their actions.⁶⁰⁹ Basically, when attempting to utilize the single business enterprise theory, the plaintiff desires to pierce the corporate veil in order to reach the assets of a subsidiary's parent corporation or to reach the assets of any other entity involved in the single business enterprise.⁶¹⁰

⁶⁰⁵ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." *Review of Contemporary Business Research* (2014): 117-138.

⁶⁰⁶ *Ibid* 117-138.

⁶⁰⁷ *Ibid* 117-138.

⁶⁰⁸ Aronofsky, D. "Piercing The Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis." *NCJ Int'l L. & Com. Reg.* 1985; 10:31

⁶⁰⁹ *Ibid* 31

⁶¹⁰ *Ibid* 5

In certain circumstances, the court will ignore the distinction between the various companies in a single group and treat it as though it is a single economic unit.⁶¹¹ This results in the companies, although they are all independent, being regarded as part of the constituent group of companies, effectively piercing the corporate veil.⁶¹² The courts use a single economic theory to pierce the corporate veil in order to reach the assets of a subsidiary's parent corporation or to reach the assets of any other entity involved in the single business enterprise⁶¹³. Courts have listed several factors that are to be considered when determining whether a single business enterprise exists⁶¹⁴. These factors, though not cumulative, include having common employees; common shareholders; common officers; centralized accounting; payment of wages by one corporation to another corporation's employees; services rendered by the employees of one corporation on behalf of another corporation; unclear allocations of profits and losses between corporations; undocumented transfers of funds between corporations etc⁶¹⁵.

The question of fact is that courts most commonly pierce the corporate veil where the holding company has such control over the subsidiary that the subsidiary is in fact carrying on the business of the parent company, resulting in the subsidiary being a façade.⁶¹⁶ Where there is little or no control, this will assist the courts in finding that

⁶¹¹ Cohen, J., "Veil Piercing-A Necessary Evil? A Critical Study on the Doctrines of Limited Liability and Piercing the Corporate Veil." PhD diss., University of Cape Town, 2014, p.13

⁶¹² Ibid 13

⁶¹³ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶¹⁴ Ibid 117-138

⁶¹⁵ Ibid 117-138.

⁶¹⁶ Cohen, J., "Veil Piercing-A Necessary Evil? A Critical Study on the Doctrines of Limited Liability and Piercing the Corporate Veil." PhD diss., University of Cape Town, 2014, p.13

agency is not present.⁶¹⁷ However, the existence of overriding share control in the subsidiary is per se not sufficient to justify an agency relationship.⁶¹⁸ In nutshell, both the alter ego and single economic theories are interrelated as the purpose and effect of the two theories is identical: to allow a plaintiff to recover from another party when a corporation does not have adequate assets⁶¹⁹.

2.4.3 The Instrumentality Theory

The instrumentality theory, one of the most widely recognized theories, centers around the element of shareholder control.⁶²⁰ Instrumentality focused on relationship between a parent and subsidiary on top of that Frederick J. Powell described an “instrumentality” test in his study, parent and subsidiary corporations (1931).⁶²¹ In the famous New York case of 1931, *Lowendahl v Baltimore & Ohio*, Justice Frederick Powell established his test for veil piercing where the factual circumstances indicate that a company is a mere “instrumentality” since then, this test has been widely applied throughout the United States⁶²². In Powell’s test, there exist three conditions for liability: a) Excessive exercise of control; b) Some wrongful or inequitable conduct; and c) Causal relationship between the plaintiff’s loss and the parent’s conduct.⁶²³ Evaluating the control, which needs to be ‘excessive’ in a case of veil piercing, depends not on a stock ownership, but on a de

⁶¹⁷ Ibid 13

⁶¹⁸ Ibid 13

⁶¹⁹ Bello, S.A., and Ogwezy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." *Review of Contemporary Business Research* (2014): 117-138.

⁶²⁰ Watt KB. *Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach*. *Tulsa L.J.* 1992;28:869.

⁶²¹ Cohen, M. *A Brief History of Piercing the Corporate Veil*, 2010.p.7

⁶²² Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. *Chicago-Kent Journal of International and Comparative Law*. 2016;17(1):7.

⁶²³ Ibid 7

facto extreme intrusion in to the company's everyday decision making.⁶²⁴ Under the instrumentality theory, courts look for control, not merely in the sense of stock ownership, but in complete domination over the corporation.⁶²⁵

As with the alter ego rule, courts use several factors to determine evidence of this requisite control needed to find an instrumentality.⁶²⁶ These factors, while often stated in terms of a parent subsidiary relationship, also apply to the other types of corporations such as close corporations.⁶²⁷ - Typical factors courts employ when applying the instrumentality theory, either in their totality or in some mystical combination, include⁶²⁸ whether: first the parent owns most or all of the stock of the subsidiary; second the parent and subsidiary have common directors; third the parent finances the subsidiary; fourth the parent subscribes to the stock of the subsidiary or otherwise causes its incorporation; fifth the subsidiary is severely undercapitalized; sixth the parent pays the salaries and other expenses of the subsidiary; seventh the subsidiary conducts business with no one other than its parent, and its only assets were conveyed to it by its parent; eight the parent describes the subsidiary as a department or division; nine the parent uses the property of the subsidiary as its own; ten the directors and officers of the subsidiary take their orders directly from the parent with only the parent's interest in mind; and eleven legal formalities are not observed.

⁶²⁴ Ibid 7

⁶²⁵ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. Tulsa L.J. 1992;28:869.

⁶²⁶ Ibid 869

⁶²⁷ Ibid 869

⁶²⁸ Ibid 869

The instrumentality theory on the other hand examines the use of a corporation by its owners in ways that benefit the owner rather than the corporation.⁶²⁹ For example, when the corporate veil is pierced by courts in the United States this is done by applying the instrumentality, sometimes also called the instrumentality rule.⁶³⁰ It is up to the court to decide on which theory to apply when piercing the corporate veil.⁶³¹ When courts apply the instrumentality theory they are not concerned with the fictional façade which the corporation creates.⁶³² Instead they are concerned with reality, how the corporation actually was directed, and what the shareholder's role in the operation consisted of.⁶³³ These factors and the process through which they are applied by courts in order to evaluate whether it is appropriate to employ the doctrine of instrumentality owe much of their composition to Fredrick Powell's instrumentality test of 1931, also known as the Powell Rule.⁶³⁴

The instrumentality rule⁶³⁵ requires, in any case but an express agency, proof of three elements: (1) control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of

⁶²⁹ Chaitanya, S. & Kaushalya, T. M., Lifting The Corporate Veil, On January 7, 2015 p.1

⁶³⁰ Orn, P. "Piercing the Corporate Veil-a Law and Economics Analysis." (2009).12

⁶³¹ Chaitanya, S. & Kaushalya, T. M., Lifting The Corporate Veil, On January 7, 2015 p.1

⁶³² Orn, P. "Piercing the Corporate Veil-a Law and Economics Analysis." (2009).12

⁶³³ Ibid 12

⁶³⁴ Ibid, p.12.

⁶³⁵ Gelb H. Limited Liability Policy and Veil Piercing. Wyo. L. Rev.. 2009; 9:551.

plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. Based on Powell's elaboration in 1931, this doctrine comprehends the following three factors:⁶³⁶(1) "The corporation is a mere instrumentality of the shareholder; . . . (2) the shareholder exercised control over the corporation in such a way as to defraud or harm the plaintiff; . . . (3) a refusal to disregard the corporate entity would subject the plaintiff to unjust loss. Note that a mere majority or complete stock ownership is not sufficient for the first prong rather complete domination has to be observed.⁶³⁷ Powell named this prong instrumentality rule as the corporation has to be a mere dummy of the shareholder.⁶³⁸

In the parent/subsidiary context, which is the primary application area of this doctrine, decisive factors are common directors and officers of parent and subsidiary corporations, lack of business of the subsidiary with parties other than the parent corporation or complete financing of the subsidiary through the parental enterprise.⁶³⁹ Nevertheless, in corporate law, the doctrine of limited liability holds that shareholders of a corporation generally are not liable for debts incurred or torts committed by the firm.⁶⁴⁰ However, this is always not the case as most of corporate owners may use corporations to fulfill their personal interests. When corporation are misused the owners then piercing of the corporate veil is invoked for justice to be done.

⁶³⁶ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁶³⁷ Ibid 1-27.

⁶³⁸ Ibid 1-27.

⁶³⁹ Ibid 1-27.

⁶⁴⁰ Bainbridge SM. Abolishing Veil Piercing. *J. Corp. L.* 2000; 26:479.

2.4.4 The Totality of Circumstances Theory

The totality of circumstances theory was developed by the opponents of the alter ego and the instrumentality theories⁶⁴¹. A totality of the circumstances⁶⁴² theory suggests that there is no single deciding factor that one must consider all the facts, the context, and conclude from the whole picture whether there is probable cause, or whether an alleged detention is really a detention. The primary guide for this kind of substantive rule is the fact patterns from cases in which the courts have found that the criteria were met. In essence, the totality of circumstances theory states that courts should analyze all relevant facts of the case and then balance them against the presumption of limited liability⁶⁴³. Constantly, so-called laundry lists, which cover potential facts, are compiled in order to provide a guideline for piercing decisions⁶⁴⁴. For instance, commingling of assets, lack of meetings and elections, undercapitalization and excessive withdrawals of funds on the part of the shareholders are frequently contemplated on such lists⁶⁴⁵. This means that the court ought to conclude from the bits and pieces that forms the unity identity whole of the causal factors.

In contrast to the classic piercing approach, this approach is broad and not clouded in any labels or metaphors⁶⁴⁶. When dealing with a situation in which a plaintiff seeks to pierce the corporate veil in order to impose liability upon a parent corporation for the obligations of a subsidiary, the factors that courts will consider include:⁶⁴⁷

⁶⁴¹ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁶⁴² Dominguez, H. From the Incident through the System Legally: Knowledge Base of Legal Concepts California State University, Dominguez Hills, University of Wisconsin, Parkside 1999, p.1

⁶⁴³ Michala, R., Piercing Corporate Veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁶⁴⁴ Ibid 1-27

⁶⁴⁵ Ibid 1-27

⁶⁴⁶ Ibid 1-27

⁶⁴⁷ The Law in Texas, Regarding Piercing the Corporate Veil, 2018, p.5

common stock ownership between parent and subsidiary; common directors and officers between parent and subsidiary; common business departments between parent and subsidiary; consolidated financial statements and tax returns filed by parent and subsidiary; parent's financing of the subsidiary; parent's incorporation of the subsidiary; undercapitalization of the subsidiary; parent's payment of salaries and other expenses of subsidiary; whether parent is subsidiary's sole source of business; parent's use of subsidiary's property; combination of corporations' daily operations; lack of corporate formalities by the subsidiary; whether directors and officers of subsidiary are acting independently or in the best interests of the parent; and whether parent's employee, officer or director was connected to the subsidiary's action that was the basis of the suit.

Indeed, it is too broad, since every case depends eventually upon its own facts, no universally applicable rule can be derived⁶⁴⁸. Therefore, it seems disproportionate to speak from the totality of the circumstances as a doctrine⁶⁴⁹ and it is mere restatements of what courts usually do, namely subsuming the facts. When the corporation is used to perpetuate a fraud, the veil will most likely be pierced where some courts regard this circumstance as describing a separate form, the "sham to perpetuate a fraud" doctrine⁴⁸ while The plaintiff is in fact not required to show actual fraud; a demonstration of constructive fraud is deemed to be sufficient. In *Archer v Griffith* [1964]⁶⁵⁰ the court distinguished both kinds of fraud: "Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas con-

⁶⁴⁸ Michala, R., Piercing corporate veil. <https://www.grin.com/document/125582>, 2006, p.1-27

⁶⁴⁹ Ibid 1-27

⁶⁵⁰ Ibid 1-27

structive fraud is breach of some legal or equitable duty which, irrespective of moral guilt, law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interest.⁶⁵¹

2.4.5 The Façade Theory

This theory stated that if a company is a mere façade concealing the true facts, the corporate veil will be pierced⁶⁵². At times it may happen that the corporate personality of the company is used to commit frauds and improper or illegal acts.⁶⁵³ Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty.⁶⁵⁴ This is known as ‘lifting of corporate veil’ that is, the situation where a shareholder is held liable for its corporation’s debts despite the rule of limited liability and/of separate personality.⁶⁵⁵

The façade theory is invoked when shareholders blur the distinction between the corporation and the shareholders however a company or corporation can only act through human agents that compose it. As a result, there are two main ways through which a company becomes liable in company or corporate law: firstly through direct liability (for direct infringement) and secondly through secondary liability (for acts of its human agents acting in the course of their employment).⁶⁵⁶ The authority for

⁶⁵¹ Ibid 1-27

⁶⁵² Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶⁵³ Chaitanya, S. & Kaushalya, T. M., Lifting The Corporate Veil, On January 7, 2015, p.1

⁶⁵⁴ Ibid 1

⁶⁵⁵ Ibid 1

⁶⁵⁶ Ibid 1

this proposition is the House of Lords decision in *Woolfson v Strathclyde Regional Council*, [1978] though Lord Kinkel cited no authority for this proposition and gave no indication of the meaning of façade⁶⁵⁷.

If the courts are to lift the corporate veil, whether to protect the creditors or others, there must in the absence of statutory grounds be such impropriety in the use of the company to justify the court disregarding an action which otherwise legally effective.⁶⁵⁸ In *Adams v Cape Industries Plc* [1990], it was argued that “from the authorities cited to us we are left with rather sparse guidance as to the principle which should guide the court in determining whether or not the arrangements of a corporate group involved a façade within the meaning of that word as used by the House of Lords in *Woolfson*”⁶⁵⁹. For further illustration of this theory, in cases in which the courts have treated the company and the shareholders as one, the terms used to describe the company, apart from ‘façade’, are ‘device’, ‘stratagem’, ‘mask’, ‘cloak’ and ‘sham’, all of which were used in *Gilford Motors Company Ltd v Horne* [1933]⁶⁶⁰. Finally where a company is formed with the intention of using it to avoid an existing legal liability, the court will pierce the veil based on a finding of sham⁶⁶¹. Again the consequences of finding that the acts or documents are a sham was illustrated by the words of LJ Lindley in *Yorkshire Railway Wagen Co. v Maclure*, [1933] speaking in the context of a transaction entered into by a company, he state

⁶⁵⁷ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶⁵⁸ Ottley, m. Company Law: Questions and Answers, New York: Routledge Cavendish, 2007, p.11

⁶⁵⁹ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶⁶⁰ Ibid 117-138

⁶⁶¹ Ibid 117-138

that “if it were a mere cloak or screen for another transaction one could see through it”⁶⁶².

The English court in *Prest v Petrodel Resources Ltd*, [2013] differentiated between a ‘mere façade’ and ‘sham’ in terms of common law with regards to piercing of the corporate veil.⁶⁶³ It was stated that while the word ‘façade’ connotes concealment, ‘sham’ connotes evasion. The court held that concealment is when a company is incorporated with the intention to hide the identity of the person who is actually conducting business.⁶⁶⁴ On the other hand, evasion was held to be a circumstance where a company is incorporated with the intention to prevent the enforcement of a legal right against the controller of the company.⁶⁶⁵

If a company is a sham, it is ignored, and this act is referred to as piercing of the corporate veil⁶⁶⁶. The courts have seen fit to pierce the corporate veil when a company is used by a defendant as a means of evading his obligations⁶⁶⁷. Some of the early cases involved corporations with little or no existence at all and these corporations lacked assets, business, and even employees whereby they were only officially registered, and had an official seat, but did not exercise any activity.⁶⁶⁸ They represented only a “sham” or “shell,” as they were only a “mere instrument”

⁶⁶² Ibid 117-138

⁶⁶³ Mashiri, P.T., A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law, With Special Reference to the Position in Groups of Companies. Diss. 2016.19

⁶⁶⁴ Ibid 19

⁶⁶⁵ Ibid 19

⁶⁶⁶ Bello, S.A., and Ogwezzy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶⁶⁷ Ibid 117-138

⁶⁶⁸ Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. Chicago-Kent Journal of International and Comparative Law. 2016; 17(1):7.

for the parent company or its director.⁶⁶⁹ For example: In *Gilford Motor Co Ltd v. Horne*, [1933] a company through which Mr Horne conducted business which, if he had conducted it himself, would have been a breach of restrictive covenants which he had entered into with the plaintiff company of which he was the former managing director was held to be “a device, a stratagem”⁶⁷⁰. In *Jones and Ano v Lipman*, [1962] the defendant agreed to sell land to the plaintiff, then transferred it to a company, to defeat the plaintiff’s right to specific performance⁶⁷¹. The company was held to be “the creature of the first defendant, a mask to avoid recognition by the eye of equity”⁶⁷². Other cases involved transfers of individual assets without consideration to acquainted subsidiaries and companies in order to avoid creditors.⁶⁷³ In cases where the company was a part of fraudulent conveyances, courts generally granted recoveries to such transfers, disregarded the formal existence of the company as a separate entity, and invoked equitable principles.⁶⁷⁴ In analysis, the case of *Adams & Others v Cape Industries plc* is probably the most important case establishing that the corporate veil should not be pierced just because a group of companies operated as a single economic entity⁶⁷⁵.

Although these terms are interchangeable and the underlying theories contain fine shades of distinction among them, the theories have the same basic aim: to expand

⁶⁶⁹ Ibid 7

⁶⁷⁰ Bello, S.A., and Ogwezy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

⁶⁷¹ Ibid 117-138

⁶⁷² Ibid 117-138

⁶⁷³ Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. Chicago-Kent Journal of International and Comparative Law. 2016; 17(1):7.

⁶⁷⁴ Ibid 7

⁶⁷⁵ Bello, S.A., and Ogwezy C. M., "Piercing the Veil of Business Incorporation: An Overview of what Warrants It." Review of Contemporary Business Research (2014): 117-138.

the inquiry to include the relationship between the corporation and its shareholder. Two main concepts underlie these theories: identity and control.⁶⁷⁶ The identity theories are premised upon a unity of interest between the corporation and its shareholder.⁶⁷⁷ To summarize, regardless of the approach (the "instrumentality or alter ego" approach or the "agency" approach), there are some elements that courts constantly look at to determine whether or not to pierce the corporate veil. These factors include: *a*) control; *b*) undercapitalization; *c*) failure to observe corporate formalities; and *d*) fraud, wrongful or unjust act.⁶⁷⁸ The adoption of different theories in each jurisdiction has resulted in a doctrine, which combines equitable considerations with a set of additional factors derived from one of the enumerated theories.⁶⁷⁹

In other words, courts examine the plaintiff's relationship with the shareholder as well as the shareholder's relationship with the corporation.⁶⁸⁰ For example, a jurisdiction might examine the requisite elements of (1) instrumentality, through control or complete domination; (2) use of control for fraud or other improper purposes; and 3) proximate cause, in considering whether or not to pierce the corporate veil.⁶⁸¹

⁶⁷⁶ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa LJ.* 1992;28:869.

⁶⁷⁷ *Ibid* 869

⁶⁷⁸ Dávalos Torres MS. Corporate Veil Piercing: A Proposal for Mexico. *Mexican law review.* 2012 Dec;5(1):81-123.

⁶⁷⁹ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa LJ.* 1992;28:869.

⁶⁸⁰ *Ibid* 869.

⁶⁸¹ Watt KB. Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach. *Tulsa LJ.* 1992;28:869.

2.5 Conclusion

This chapter presented the concepts, origins and theories of corporate veil piercing. It provided the meaning of incorporation and legal basis of separate personality doctrine. The chapter disclosed that *Solomon's principle* as the foundation of legal personality of the company can sometimes be disregarded to pave the way of blurring the wall that exist between the company and members. It was revealed that under corporate personality shareholders and the company are two different persons.

It was further shown that the shareholders are natural persons while the company is the artificial person. This distinction was affirmed in the Salomon principle, which views the company as a legal person distinct from the shareholders. The chapter has shown that in case there are malpractices in the corporation then piercing has a direct effect towards the corporate personality of the respective company. This shows that the corporate personality has close relationship with corporate veil doctrine. Hence, piercing the piercing the corporate veil implies direct effect towards corporate personality due to the symbiotic relationship existing between the two concepts.

This chapter further analyzed the concept of veil piercing from various legal perceptive. The analysis showed that concept corporate veil is the most litigated doctrine in the corporate law yet it lacks standard approach when the need arises. The concept was widened by unraveling various circumstances under which corporate veil could be lifted. This review has shown that sometimes Solomon's principle which laid down the legal personality doctrine can bring undesired results perpetuated by unfair prejudices and fraudulent behaviours as well failure to follow

corporate formalities. When such malpractice occurs in the corporation, the plaintiff may resort to piercing of the corporate veil.

More importantly, it has been shown that the concept of limited liability, which flows from separate legal personality, is fundamental in the corporate law. This is due to the fact the shareholders can lose only what they have invested in the corporation. The chapter has shown that in case there are malpractices in the corporation then piercing has a direct effect towards the corporate personality and limited liability offered to the respective company. This shows that the corporate veil and corporate personality and limited liability have close relationship with corporate veil doctrine. Hence, piercing the piercing the corporate veil implies direct effect towards corporate personality due to the symbiotic relationship existing between the two concepts.

The chapter also presented the origin and theories of piercing the corporate veil. It shows a great contribution made by Powell when compared to other jurists in the history of corporate law, for instance, he is credited for formulating the doctrine of instrumentality. The overall analysis disclosed that the concept of piercing the corporate veil has been fundamental since time immemorial. However, despite being a long litigated doctrine in the in corporate law, there has not been the best theory to be applied when piercing the corporate veil. Such situation made the courts to rely on several factors when adjudication for corporate veil cases. The analyses of its origin and the theories piercing the corporate veil therein have been applied depending in the context and the causal factors contained in the malpractices,

omission and acts of the respective corporation and shareholders. The findings have disclosed that in order to pierce the corporate veil of the group companies several factors are essential. However, there should be prior initiatives of establishing that parent and its subsidiary as a single economic entity. The next chapter presents international perspective on piercing of the corporate veil.

CHAPTER THREE

INTERNATIONAL PERCEPTIVE ON CORPORATE VEIL PIERCING

3.1 Introduction

This chapter provides international perceptive on the corporate veil piercing. It begins by an overview on corporate veil piercing at the international level in order to show how multinational corporations operate their businesses in parent-subsiary context. Thereafter, the chapter provides a clue on corporate veil piercing at the international arbitration. This is in concomitant with how the enforcements of the awards are done. Additionally, the chapter provides how different jurisdictions in the world have dealt with piercing of the corporate veil as established from landmark case of *Solomon v Solomon [1897]* in order to show how different jurisdictions disregarded corporate veil. Moreover, the chapter provides grounds of piercing the corporate veil as well as veil piercing cases from different jurisdictions in a group context. Lastly, the chapter provides conclusion in order to indicate the main insights obtained under the chapter.

3.2 Overview on Corporate Veil Piercing at the International Level

Since the Industrial Revolution, large multinational corporations have come to dominate the national and global economic scene.⁶⁸² Some of them are as economically powerful as some states in terms of corporate wealth—and would acknowledge the possible threat of these corporate monsters—it is indisputable that the role of business, trade, and industry is to form prosperity for shareholders,

⁶⁸² Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. Chicago-Kent Journal of International and Comparative Law. 2016;17(1):7.

employees, customers, and society at large.⁶⁸³ In addition, companies do not only contribute towards the world's wealth, but also towards novel technology, new environmental solutions, and discovery of medical cures.⁶⁸⁴ Today, massive corporations-both national and international dominate financial and commercial activities by exercising enormous economic power in a group context.⁶⁸⁵ This is due to the fact that multinational corporations play a significant role with worldwide subsidiaries in the global economy and they generally dominate agreements with their offshore subsidiaries in promoting their global operations⁶⁸⁶. In other words, most of multinational corporations prefer to conduct their business in parent-sub subsidiary context. This means that the standard organizational structure for these businesses has a parent corporation as the sole shareholder of multiple, separately incorporated operating subsidiaries (or layers of subsidiaries) in a corporate group.⁶⁸⁷

Given the massive financial assets of many multinational parent corporations, actions to ignore the legal separateness of a corporate subsidiary of a parent company offer some of the biggest potential payoffs for claimants.⁶⁸⁸ This growth has spurred an increasing awareness that the traditional principles of national jurisdiction to prescribe often provide insufficient legal and political tools for the protection of legitimate national interests⁶⁸⁹. Moreover, transnational business is frequently

⁶⁸³ Ibid 7

⁶⁸⁴ Ibid 7

⁶⁸⁵ Matheson JH. The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context. *NCL Rev...* 2008; 87:1091.

⁶⁸⁶ Ji M. Multinational Enterprises' Liability for the Acts of their Offshore Subsidiaries: The Aftermath of Kiobel and Daimler. *Mich. St. Int'l L. Rev...* 2014; 23: 397.

⁶⁸⁷ Matheson JH. The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context. *NCL Rev..* 2008;87:1091

⁶⁸⁸ Ibid 1091

⁶⁸⁹ Schenck DW. Jurisdiction Over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory. *U. Pa. J. Int'l Bus. L..* 1989;11:495.

conducted through a corporate structure of subsidiary companies located and operating in host states.⁶⁹⁰ Transitional corporations have moved to the forefront of regulatory governance both within states and in the international arena but more often than not the parent company use layers of intermediaries to distance itself legally from the host state subsidiary and/or to benefit from a favourable regulatory framework.⁶⁹¹ Such behaviours depict the tradeoffs of the multinational corporations conducting business in corporate group.

Some of these multinational companies go further to the extent of building illicit behaviours, which are detrimental to Host States, as well as ineffective functioning of the corporate law. In order to provide a well-balanced legal environment for both natural and legal persons, it is necessary to impose adequate controls over the conduct of legal persons in order to avoid and prevent deceitful and fraudulent demeanour, such as money laundering, corruption, hiding and shielding assets from creditors and other claimants, illicit tax practices, self-dealing, or market fraud and circumvention of disclosure requirements.⁶⁹² One such control is, in our perspective, the piercing of the corporate veil.⁶⁹³ Yet, this type of control has not been fully introduced in all jurisdictions.⁶⁹⁴ That is why, in the current global economic world, the primary impact of piercing theory and application comes in the context of these

⁶⁹⁰Vastardis AY, Chambers R. Overcoming The Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business And Human Rights Treaty? *International & Comparative Law Quarterly*. 2018 Apr; 67(2):389-423.

⁶⁹¹ De Jonge A, Tomasic R, editors. *Research Handbook on Transnational Corporations*. Edward Elgar Publishing; 2017 Jan 27.

⁶⁹² Horvathova A, Stanescu CG. Piercing The Corporate Veil US Lessons From Romania And Slovakia. *Chicago-Kent Journal of International and Comparative Law*. 2016;17(1):7.

⁶⁹³ *Ibid* 7

⁶⁹⁴ *Ibid* 7

corporate groups-that is parent-subsidary context.⁶⁹⁵ For example, in the United States of America railroad industry, an operating subsidiary is a company, that is, a subsidiary but operates with its own identity, locomotives and rolling stock but a non-operating subsidiary would exist on paper only (i.e., stocks, bonds, articles of incorporation) and would use the identity of the parent company.⁶⁹⁶ Subsidiaries are a common feature of business life, and all multinational corporations organize their operations in this way.⁶⁹⁷ Nonetheless, the problem comes in when they are conducting their business in a shrewd manner that threatens the economy as well as corporate development in the Host State through parent-subsidary relationship

Nowadays, corporate veil piercing is considered to be a cross border issue as it transcends purely the national framework. When corporate veil piercing is viewed from international perspective, it makes a shift from traditionally being considered as problem of national company law.⁶⁹⁸ This is due to the fact that multinational corporations have been operating from the headquarters as the parent corporation through many subsidiaries established in various countries.⁶⁹⁹ In fact creation of business through multinational companies operating in parent-subsidary context has a global in the corporate law. The operations of multinational corporations have sometimes depicted illicit behaviours, which are dangerous to the host states. Some of behaviours perpetuates corporate law problems which conflicts with domestic

⁶⁹⁵Matheson JH. The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context. NCL Rev.. 2008;87:1091

⁶⁹⁶ French P. *Parent Corporation Liability: An Evaluation of the Corporate Veil Piercing Doctrine and Its Application to the Toxic Tort Arena*. Tulane Environmental Law Journal. 1992 May 1;5(2):605-34.

⁶⁹⁷ Ibid 605-34

⁶⁹⁸Vandekerckhove, K. Piercing of the Corporate Veil. 4 Eur. Company L. 191 (2007) accessed from <https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/eurcompl0004&div=42&id=&page=>

⁶⁹⁹ Ibid

laws triggering the corporate veil piercing. Apart from that the question of the law which should govern an international veil piercing raises many issues both of technical natures related to the conflict of laws rules and to the policy option to be followed have been issues of great concern.⁷⁰⁰ Despite such lacuna in law, the internationalization of business is subtly changing the legal landscape.⁷⁰¹ This may be observed in the private company laws as well as public company laws of other countries are relevant to a growing number of small and midsize business enterprises.⁷⁰²

As cross-border private enterprise grows, the need for harmonization of private as well as public business law increases.⁷⁰³ Such drastic changes in cross border business through corporation create conflict of laws between domestic and international laws. However, the whole problem of in the relationship between the parent and subsidiary corporations is the one still enveloped in the mists of metaphor.⁷⁰⁴ This is because corporations which conduct their business through a variety of business structures including among others whole owned subsidiaries, partially owned subsidiaries and affiliate corporations.⁷⁰⁵

⁷⁰⁰ Ibid

⁷⁰¹ Miller S.K. *Piercing the Corporate Veil among Affiliated Companies in the European Community and in the US. A Comparative Analysis of US, Germany, and UK Veil-Piercing Approaches.* American Business Law Journal. 1998 Sep; 36(1):73-149.

⁷⁰² Ibid 73-149.

⁷⁰³ Ibid 73-149.

⁷⁰⁴ Tsang KF. *Applicable Law in Piercing the Corporate Veil in the United States: A Choice with no Choice.* Journal of Private International Law. 2014 Aug 1; 10(2):227-64.

⁷⁰⁵ Mwaura K. Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil. J. Int'l Bus. & L.. 2012;11:85.

Sometimes in the event that a parent corporation controls the subsidiary or affiliate corporation it may easily pursue profits through the activities that violate rights.⁷⁰⁶ For example, the illegal plundering of fishing stocks worldwide is masked behind a maze of corporate structures that makes discovery of the beneficiaries of such activity, difficult, if not impossible to identify.⁷⁰⁷ Such problem of illegal fishing and then develops a multi-layered response to avert the veil of corporate entity being used as a means of preventing domestic States from answering the principal thematic question—who is the true beneficiary of this illegal behaviour, and who should be held responsible.⁷⁰⁸ Such events, which transcend beyond the national framework perpetuate the so-called international corporate veil piercing.

The international corporate veil piercing being referred is the separation of legal identity between parent firms and their subsidiaries, which gives the parent protection against the liabilities of its subsidiaries.⁷⁰⁹ Fearing that such liability protection would facilitate illicit activity as those in the early twentieth century courts, especially in America, which would sometimes pierce the corporate veil for preventing illicit behaviours of the subsidiary companies⁷¹⁰. For example, in the case of *Adams v Cape [1990]*, in which American plaintiffs attempted to persuade the English courts to lift the corporate veil and impose liability for industrial disease on Cape Industries, a leading U.K. asbestos manufacturer.⁷¹¹ This landmark case shows

⁷⁰⁶ Ibid 11:85

⁷⁰⁷ Griggs L, Lugten G. Veil over the Nets (Unraveling Corporate Liability for IUU Fishing Offences). *Marine Policy*. 2007 Mar 1;31(2):159-68.

⁷⁰⁸ Ibid.

⁷⁰⁹ Tweedale G, Flynn L. Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004. *Enterprise & Society*. 2007 Jun; 8(2):268-96.

⁷¹⁰ Ibid 268-96

⁷¹¹ Ibid 268-96

how corporate strategy can be closely intertwined with international corporate law.⁷¹² The case [supra] shows that corporate veil piercing can be extended beyond the national framework forming international corporate veil piercing.

3.3 Corporate Veil Piercing in the International Arbitration

In the context of international arbitration, piercing the corporate veil involves bringing in the parties that have signed an arbitration agreement, which could be parent companies, subsidiaries, private individuals, governmental and quasigovernmental entities, and states⁷¹³. Arbitration agreements are subject to general principles of contract law and among these is the doctrine of privity of contract, which dictates that contractual rights and duties only affect the parties to the agreement.⁷¹⁴ Civil law jurisdictions recognize this doctrine via the application of the Roman law principle *res inter alios acta* whereby this doctrine mandates that arbitration agreements extend only to the agreement's parties, and not to others.⁷¹⁵

Piercing the corporate veil at the international level can occur in various contexts, such as human rights, environment, and tax, and the principles on which the adjudicators rely are even more diverse.⁷¹⁶ In their determination of the merits of a particular dispute, arbitration tribunals are usually bound by domestic law.⁷¹⁷ Article II (1) of the New York Convention also implicitly recognizes privity in providing

⁷¹² Ibid 268-96

⁷¹³ Kryvoi Y. Piercing the Corporate Veil in International Arbitration. *Global Bus. L. Rev.* 2010;1:169.

⁷¹⁴ Otazu J.M. The Law Applicable to Veil Piercing in International Arbitration. *McGill J. Disp. Resol.* 2018, p.33

⁷¹⁵ Ibid.

⁷¹⁶ Kryvoi Y. Piercing the Corporate Veil in International Arbitration. *Global Bus. L. Rev.* 2010; 1:169.

⁷¹⁷ Ibid33

that contracting states recognize written agreements under which “the parties undertake to submit to arbitration all or any differences.”⁷¹⁸ However, there is no consistency across national legal systems on the issue of piercing the corporate veil.⁷¹⁹ Not surprisingly, the approaches of international tribunals also vary.⁷²⁰ That is why adjudication of corporate veil cases both at national and international level remains to be one the biggest challenge in the corporate law.

International tribunals often struggle with the question of whether to determine corporate nationality according to a corporation's state of incorporation or by the nationality of a corporation's predominant shareholders and managers on the issue of piercing the corporate veil of parent –subsidiary relationship.⁷²¹ This question affects whether certain cases involving foreign investors may be heard by an international tribunal, as opposed to a domestic courts.⁷²² Because at least one party to an international foreign investment dispute usually prefers to try the case in a neutral forum, this jurisdictional issue is often litigated in cases before international tribunals.⁷²³ However the jurisdictional of international tribunal has been undefined since the modern era of international tribunals begun in 1794 with signing of Jay treaty between US and Great Britain.⁷²⁴

⁷¹⁸ Otazu J.M. The Law Applicable to Veil Piercing in International Arbitration. *McGill J. Disp. Resol.* 2018;5:30.

⁷¹⁹ Kryvoi Y. Piercing the Corporate Veil in International Arbitration. *Global Bus. L. Rev.* 2010;1:169.

⁷²⁰ *Ibid* 169

⁷²¹ Lyons KE. Piercing the corporate veil in the international arena. *Syracuse J. Int'l L. & Com.* 2005;33:523.

⁷²² *Ibid* 523

⁷²³ *Ibid* 523

⁷²⁴ *Ibid* 523

Nevertheless, numerous attempts have been made to hold parent companies liable for illegality committed overseas ostensibly by their subsidiaries.⁷²⁵ Victims have attempted to hold parent companies liable, sometimes jointly with their host State subsidiaries, before home State courts due to the lack of sufficient legal protections, including ineffective enforcement, in the host State and/or due to the subsidiary not having sufficient assets to satisfy a judgment⁷²⁶ This is contrary to the turn of 20th Century whereby international tribunals have been undefined reaching new levels of judicial procedure while gaining better understanding of international disputes.⁷²⁷

Jurisdiction issue with respect to corporate nationality came under scrutiny of certain tribunals as more corporate transactions are international in scope.⁷²⁸ The most crucial issue being whether to include non-signatories to the international arbitration. One of the most well-known examples of piercing the corporate veil for the benefit of consenting non-signatories is the *Dow Chemical International Chamber Of Commerce Arbitration* whereby in that case, the tribunal allowed parent companies to be claimants despite the fact that the arbitration clauses were between the defendant and subsidiary companies of the same parent group.⁷²⁹

However, litigating in a parent company's home State is also sometimes seen as advantageous as it may open the door to favourable civil procedural arrangements

⁷²⁵ Vastardis AY, Chambers R. Overcoming *The Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business and Human Rights Treaty?*. International & Comparative Law Quarterly. 2018 Apr;67(2):389-423.

⁷²⁶ Ibid 389-423

⁷²⁷ Lyons KE. Piercing the Corporate Veil in the International Arena. Syracuse J. Int'l L. & Com.. 2005;33:523

⁷²⁸ Ibid 523

⁷²⁹ Kryvoi Y. Piercing the Corporate Veil in International Arbitration. Global Bus. L. Rev.. 2010;1:169.

such as class actions, public interest litigation, wide disclosure rules and sophisticated case funding arrangements, which make mounting this type of litigation feasible⁷³⁰ Thus in *Dow Chemical International Chamber Of Commerce Arbitration* the tribunal relied on “the common intent of the parties . . . such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of contracts.”⁷³¹The tribunal also followed “usages conforming to the needs of international commerce, in particular in the presence of group of companies.” According to the single entity theory applied by the tribunal, “a group of companies, despite the legal status of each of the companies, represents a single economic reality which the arbitral tribunal must take into account when ruling on its jurisdiction.”⁷³²

3.4 The Law Applicable to Corporate Veil Piercing in the International

Arbitration

International law provides little aid to courts adjudicating legal actions brought against affiliate members of the multinational corporations.⁷³³ *Barcelona Traction case*⁷³⁴ the leading contemporary international law case on corporations, held in a sharply divided International Court of Justice opinion that corporate nationality is determined by the place of incorporation.⁷³⁵ While most jurisdictions today

⁷³⁰ Vastardis AY, Chambers R. Overcoming The Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business And Human Rights Treaty?. *International & Comparative Law Quarterly*. 2018 Apr;67(2):389-423.

⁷³¹ Kryvoi Y. Piercing the corporate veil in international arbitration. *Global Bus. L. Rev.*. 2010;1:169.

⁷³² *Ibid* 169

⁷³³ Aronofsky D. Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis. *NCJ Int'l L. & Com. Reg.*. 1985;10:31.

⁷³⁴ This case provides a clear example of corporate veil piercing case at the international arbitration

⁷³⁵ Aronofsky D. Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis. *NCJ Int'l L. & Com. Reg.*. 1985;10:31.

recognize that the separate legal personality of a corporation can be disregarded to submit the parent company or the controlling shareholder to a choice-of-forum agreement and/or to hold them contractually liable, the rules and applicable test for veil piercing vary across state lines.⁷³⁶ This discrepancy proves to be particularly complex in international arbitration, which often incorporates bodies of law from various jurisdictions.⁷³⁷

For example, it is not uncommon for parties to be incorporated and/ or have their principal place of business in different states, which might also be distinct from the place chosen as the seat of the arbitration.⁷³⁸ That is why; the corporate veil is more readily disregarded in international investment law decisions in order to protect the parent company's access to benefits under an investment treaty, when seeking to hold parent companies liable for harm caused by their subsidiaries.⁷³⁹

While the practice of veil piercing has been accepted in numerous jurisdictions, its application in international arbitration creates unique difficulties because arbitration is not a default dispute resolution mechanism and can only be adopted via party consent.⁷⁴⁰ However, a pressing issue arising from the victims' inability to obtain justice locally is whether they can pursue the parent company in the home State's courts for the harm inflicted by its subsidiary's activities that materialized in the host

⁷³⁶ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018;5:30.

⁷³⁷ Ibid 30

⁷³⁸ Ibid 30

⁷³⁹ Vastardis AY, Chambers R. *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business and Human Rights Treaty?*. International & Comparative Law Quarterly. 2018 Apr;67(2):389-423.

⁷⁴⁰ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018;5:30.

State.⁷⁴¹ This further raises questions regarding how and when a non-signatory can be included in an arbitral proceeding, as is the case when a corporate veil is pierced to include a third party and because international arbitration often implicates parties across jurisdictions, choice-of-law issues often arise in the veil-piercing context, i.e., to determine which law provides the applicable test⁷⁴². Indeed, the choice of law in the international arbitration for veil piercing cases is considered as the most delicate and complex issues in international commercial arbitration.⁷⁴³ This is due to the fact that cases are brought to the international arbitration by the parties. The law to be used will also depend on company laws of the parties States.

As regards to the enforcement of awards, the application of corporate veil piercing in international arbitration is dependent upon domestic courts' recognition and enforcement of arbitration awards.⁷⁴⁴ The special procedure is established by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, better known as the New York Convention.⁷⁴⁵ Article V of the New York Convention provides five procedural defects, on which national courts can rely to refuse recognition and enforcement of arbitration awards. These are (1) lack of valid arbitration agreement; (2) denial of opportunity to be heard; (3) an excess of jurisdiction by an arbitrator in deciding matters beyond the scope of the arbitration submission; (4) procedure contrary to the parties' agreement; and (5) annulment of

⁷⁴¹ Vastardis AY, Chambers R. *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business and Human Rights Treaty?*. International & Comparative Law Quarterly. 2018 Apr;67(2):389-423.

⁷⁴² Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018;5:30.

⁷⁴³ Ibid 30

⁷⁴⁴ Kryvoi Y. Piercing the Corporate Veil in International Arbitration. Global Bus. L. Rev.. 2010;1:169.

⁷⁴⁵ Ibid 169

the award in the country where rendered.⁷⁴⁶ Thus, piercing the corporate veil at the international arbitration becomes the phrase that conjures up in the tantalizing pursuit of an exotic being whose identity is shrouded in mystery; unfortunately, the guiding principles for judicial veil piercing are almost as elusive as the creature behind the veil itself.⁷⁴⁷

In addition, domestic courts are likely not to recognize and enforce an arbitration award piercing the corporate veil in the absence of a written arbitration agreement.⁷⁴⁸ To determine who is bound by an arbitration agreement, it is common to look to the contract for “the entities [or natural persons] that formally executed and expressly assumed the status of parties.”⁷⁴⁹ In other words, the signatories of the contract and, more specifically, the signatories to the arbitration agreement will, as a general rule, constitute the parties to the arbitration agreement.⁷⁵⁰ Piercing the corporate veil may help to give a concrete practical meaning to the purpose of an arbitration agreement or a bilateral investment treaty.⁷⁵¹

However, there are downsides of such piercing because it negates many of the benefits, which the corporate form offers but the jurisprudence under the International Centre for Settlement of Investment Disputes (“ICSID”) Convention allows one to avoid the enforcement problem though the approaches of ICSID

⁷⁴⁶ Ibid.

⁷⁴⁷ Levenberg PN. *The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions*. *Penn St. JL & Int'l Aff.*. 2019;7:115.

⁷⁴⁸ Kryvoi Y. *Piercing the Corporate Veil In International Arbitration*. *Global Bus. L. Rev.*. 2010;1:169.

⁷⁴⁹ Otazu JM. *The Law Applicable to Veil Piercing in International Arbitration*. *McGill J. Disp. Resol.*. 2018,p.34

⁷⁵⁰ Ibid 34

⁷⁵¹ Kryvoi Y. *Piercing the corporate veil in international arbitration*. *Global Bus. L. Rev.*. 2010;1:169

tribunals are inconsistent.⁷⁵² There is a great variation when it comes to adjudication of corporate veil issues based on parent-subsidary context. Some tribunals declined jurisdiction in the absence of an explicit arbitration agreement but other tribunals pierced the corporate veil by looking into the issue of foreign control while ICSID tribunals also pierced the veil on the basis of interpretation of the concept of investment in accordance with the intent of parties to the arbitration agreement or purpose of an international treaty.⁷⁵³ Such variation shows that it is important to have a written arbitration between the parties to avoid unnecessary problems in the course of the implementing the agreement between the parties.

As far as agreement is concerned in the international arbitration it adheres to the general principle of privity to the contract. It means that only parties who signed the contract are the parties to agreement in the international arbitration. Thus, based on the general principle non-signatory are not party to contract in the international arbitration. However, exceptional case can be in the circumstances where third party or non signatory are included in the international arbitration but it does not mean that they are bound by agreement of the parties to the contract. The agreements made by the parties' remains to be valid to those who have signed it not otherwise. Concomitantly, the choice of the law should also take into account the place of incorporation of the respective company. The laws to be used are companies' acts of the parties to the contract.

⁷⁵² Ibid 169

⁷⁵³ Ibid 169

3.5 Corporate Veil Piercing under Different Jurisdictions

The concept of the corporate veil dates back to the landmark decision of the House of Lords in *Salomon v Salomon and Co Ltd [1897] AC 22*, where the legal separation between a company and its shareholders was established⁷⁵⁴. Hence, piercing the corporate veil means that a court disregards the existence of the corporation because the owners failed to keep one or more corporate requirements and formalities.⁷⁵⁵ It is sometimes caused by failure to follow corporate formalities and malpractices like fraudulent or single economic enterprises. Although most jurisdictions recognize the veil piercing doctrine, substantive requirements differ from one country to country, for instance, they may even differ from state to state⁷⁵⁶.

That is why United States is among multiple jurisdictions that apply the doctrine and it might be considered the cradle of the veil piercing doctrine.⁷⁵⁷ Throughout the decades that this doctrine has been applied in the United States, it has been greatly developed and US courts have shown a great amount of innovation and creativity when applying and delineating the character and circumstances for the application of the veil piercing doctrine.⁷⁵⁸ For example, in United States of America⁷⁵⁹ piercing of the corporate veil differ from one state to the other as demonstrated below:

⁷⁵⁴ Wibberley, J. Lifting, piercing and side stepping: The corporate veil, Guildhall Chambers & Michelle Di Gioia, Gardner
<http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf>

⁷⁵⁵ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

⁷⁵⁶ Otazu J.M. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol. 2018;5:30.

⁷⁵⁷ Horvathova A, Stanescu CG. Piercing The Corporate Veil US Lessons From Romania And Slovakia. *Chicago-Kent Journal of International and Comparative Law*. 2016;17(1):7.

⁷⁵⁸ Ibid 17(1):7.

⁷⁵⁹ Legal Information Institute, Accessed from https://www.law.cornell.edu/wex/piercing_the_corporate_veil

In *Florida*⁷⁶⁰ one must typically show two things in order to pierce the corporate veil: (1) That the relevant corporation is only the alter ego or mere instrumentality of the parent corporation or its shareholder(s) (2) That the alleged parent company or shareholder(s) also engaged in improper conduct. In *Alaska*,⁷⁶¹ courts use two tests to determine whether a court may pierce the veil: (1) disjunctive test-either excessive control or corporate misconduct must be shown for the court to pierce the veil; (2) conjunctive test-both excessive control and corporate misconduct must be shown for the court to pierce the veil.

In *Nevada*⁷⁶² uses a three-part test to determine whether a court may pierce the corporate veil: (1) the corporation must be influenced and governed by the person asserted to be its alter ego (2) there must be such unity of interest and ownership that one is inseparable from the other (3) the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

In *New York*⁷⁶³, *Walkovsky v Carlton* is a leading case on piercing the corporate veil. The court in that case held that a plaintiff needs to prove that a shareholder used the corporation as his agent to conduct business in an individual capacity. A court will pierce the corporate veil when it finds that the corporation is an agent of its shareholder, and will hold the principal vicariously liable, due to the respondent

⁷⁶⁰Otazu J.M. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018;5:30.

⁷⁶¹ Ibid 30

⁷⁶² Ibid 30

⁷⁶³ Ibid 30

superior doctrine. In *Texas*⁷⁶⁴, *In re JNS Aviation, LLC* [2007] is a leading case where the court found that the corporate veil could be pierced when any of the asserted veil-piercing strands are met. Further, courts will pierce the corporate veil when the member(s) intended to use the company to perpetrate an actual fraud, and the company did perpetrate an actual fraud primarily for the direct personal benefit of the considered defendant.

Thus the question of what it takes to pierce the corporate veil is one that should be of interest to all multinational corporations that engage in international trade through local subsidiaries incorporated in other countries.⁷⁶⁵ Thus, in international setting with various extraterritorial elements for example contracting parties from different states, a substantive law from a third state, or an arbitral seat in a state separate from that of the contracting parties and the substantive law chosen) brings about choice of law problem arises⁷⁶⁶.

This is at least the case where at least two alternatively applicable laws differ in terms of their requirements for veil piercing for example in the US, the *Van Dorn* test⁷⁶⁷ dictates that: “corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and, second, circumstances must be

⁷⁶⁴ Ibid 30

⁷⁶⁵ Levenberg PN. The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions. *Penn St. JL & Int'l Aff.*. 2019;7:115.

⁷⁶⁶ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. *McGill J. Disp. Resol.*. 2018;5:30.

⁷⁶⁷ Ibid 30

such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”⁷⁶⁸

Veil piercing is one of the most litigated areas of corporate law in the United States and that the plaintiff has been successful on average in approximately forty percent of reported cases.⁷⁶⁹ Veil piercing claims also tend to be more successful in specific states.⁷⁷⁰ Other US courts have adopted a three-prong test, adding a third element by requiring that the fraud or injustice “be proximately caused by the excessive control.”⁷⁷¹ Most US courts follow the *Van Dorn* test or the three-prong test, and the difference between them is ultimately slim because “[i]f both excessive control and fraud are found, they are usually proximately related...it is extremely rare for a court to reject piercing simply based on the lack of proximity.”⁷⁷²

However, there are also US courts that follow different tests requiring only control, only fraud, either control or fraud, a laundry list including a fraud factor, a laundry list without a fraud factor, and some jurisdictions do not permit veil piercing at all.⁷⁷³ After all, one of the reasons that large listed companies incorporate subsidiaries in other countries is to shield the holding company from claims arising in the jurisdiction in which the subsidiary is situated.⁷⁷⁴ The risk of the holding company

⁷⁶⁸ Ibid 30

⁷⁶⁹ Levenberg P.N. The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions. Penn St. JL & Int'l Aff.. 2019;7:115.

⁷⁷⁰ Ibid 115

⁷⁷¹ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018,p. 42

⁷⁷² Ibid 42

⁷⁷³ Ibid 42

⁷⁷⁴ Levenberg PN. The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions. Penn St. JL & Int'l Aff.. 2019;7:115

incurring personal liability for the debts of its foreign subsidiaries is therefore an important one for parent companies to consider before commencing business through a subsidiary in another country.⁷⁷⁵

Unlike the case within the US, different jurisdictions around the world have different requirements for veil piercing. In *England*, courts maintain that lifting the veil “is done only in extreme cases of misconduct” and most judges refuse to lift the corporate veil without clear evidence of fraud.⁷⁷⁶ The English law principles in relation to corporate veil piercing are of international significance because the corporate laws of many countries in the British Commonwealth are influenced by English law.⁷⁷⁷ Courts have laid down general principles as to when this drastic remedy will be allowed.⁷⁷⁸ The application of the law to the facts has however led to inconsistent results.⁷⁷⁹ These inconsistencies have more to do with the public morals of the time when, and the place where, piercing is sought. Nevertheless, many of the outcomes are reasonably predictable.⁷⁸⁰

In *France*, the corporate veil is lifted only in cases of mismanagement leading to bankruptcy or fraud, and via two court-developed doctrines: the fictitious company doctrine (‘société fictive’) and the commingling of assets doctrine (‘confusion des

⁷⁷⁵ Ibid 115

⁷⁷⁶ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018,p. 42

⁷⁷⁷ Levenberg PN. The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions. Penn St. JL & Int'l Aff.. 2019;7:115.

⁷⁷⁸ Ibid 115

⁷⁷⁹ Ibid 115

⁷⁸⁰ Ibid 115

patrimoine⁷⁸¹). On the other hand, *Swiss law* adopts an exceptionally restrictive approach that disregards the separate personality of corporations only in ‘abuse of right’ or fraud cases.⁷⁸² However, *German courts* require a series of cumulative factors to pierce the corporate veil, such as the commingling of assets, failure to follow formalities, undercapitalization, or total domination of a company by another.⁷⁸³

In the case of Young J, in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd, [1986]* it was stated whenever each individual company is formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers.⁷⁸⁴ The simplest way to summarize the veil principle is that it is the direct opposite of the limited liability concept.⁷⁸⁵ When the veil is lifted, the owners’ personal assets are exposed to the litigation, just as if the business had been a sole proprietorship or general partnership.⁷⁸⁶

The corporate veil metaphorically symbolizes the distinction between the company as a separate legal entity and the shareholders who own the shares in the company.⁷⁸⁷ The effect of lifting or piercing the corporate veil is that the shareholders, rather than the company, are regarded as the relevant actors on whom liability of the

⁷⁸¹ Otazu JM. The Law Applicable to Veil Piercing in International Arbitration. McGill J. Disp. Resol.. 2018,p. 42

⁷⁸² Ibid 42

⁷⁸³ Ibid 42

⁷⁸⁴ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/7>

⁷⁸⁵ Ibid 7

⁷⁸⁶ Ibid 7

⁷⁸⁷ Mehlin, A.J. & Lawton, J. Lifting the Corporate Veil. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

obligations of the company are placed⁷⁸⁸. Lifting the veil can be used to impose liability upon the shareholders or for other purposes, such as ascertaining appropriate jurisdiction⁷⁸⁹. Whilst there is a general reluctance to lift the corporate veil, there is a body of case law where the courts have considered doing so⁷⁹⁰.

Piercing the veil of the corporate veil is an equitable doctrine that is not, by itself, a cause of action as per *Turner Murphy Co. v Specialty Constructors, Inc.*, [1995].⁷⁹¹ Accordingly, a plaintiff cannot attempt to pierce a corporation's veil unless the corporation itself is found liable and the judgment against the corporation is unsatisfied. Notwithstanding the procedural aspects of the doctrine, for instance in Florida courts require the plaintiff to establish three elements to pierce a corporation's veil.⁷⁹² These are (1) a lack of separateness between the corporation and its shareholder(s); (2) improper conduct in the use of the corporation by the shareholder(s); and (3) that the improper conduct was the proximate cause of the alleged loss.

In the case of *Solomon v Betras Plastics, Inc.*, [1989] the court observed that where a free market economy relies upon the role of limited liability companies (they allow individuals to take economic risks that they otherwise might not), it must also relies on a degree of fairness in the dealings.⁷⁹³ This was also recognized in the dicta of Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, where he said at page

⁷⁸⁸ Ibid 3-4

⁷⁸⁹ Ibid 3-4

⁷⁹⁰ Ibid 3-4

⁷⁹¹ Jimerson, C.B., Daniel, L. & Buchholz, J.D. Piercing The Corporate Veil in Florida: Essential Elements and Common Factors, October 3, 2017, p. 1

⁷⁹² Ibid 1

⁷⁹³ The Law Teacher. Cases, 2018, p.1-5

712 that:⁷⁹⁴ “No court in this land will allow a person to keep an advantage which he had obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...” It is this statement of principle that underpinned all of the early attempts to pierce the corporate veil; the court would not allow a corporate personality to be used to protect individuals from wrongdoing⁷⁹⁵. Fraudulent actions would not be protected, nor would those where the limited company was simply being used as a facade or a sham⁷⁹⁶.

The human ingenuity started using the veil of corporate personality blatantly as a cloak for fraud or improper conduct⁷⁹⁷. Thus, it became necessary for the courts to break through or lift the corporate veil and look at the persons behind the company who are the real beneficiaries of the corporate fiction⁷⁹⁸. The lifting or piercing of the corporate veil is more or less a judicial act, hence its most concise meaning has been given by various judges, for instance, Staughton LJ, in the case of *Atlas Maritime Co SA v Avalon Maritime Ltd [1991]* defined the term thus:⁷⁹⁹ “To pierce the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To

⁷⁹⁴ Ibid 1-5

⁷⁹⁵ Ibid 1-5

⁷⁹⁶ Ibid 1-5

⁷⁹⁷ The Law Teacher, Lifting of The Corporate Veil Accessed from <https://www.lawteacher.net/free-law-essays/.../Article-On-Lifting-Of-The-Law-Essays.Ph>, 2018, p. 1-17.

⁷⁹⁸ Ibid 1-17

⁷⁹⁹ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>

lift the corporate veil or look behind it, therefore should mean to have regard to the shareholding in a company for some legal purpose.” It is important to emphasize that burden of proving fraud is a heavy one, and that allow the court to interfere with the corporate veil simply to prevent unjust results⁸⁰⁰. This was acknowledged by Lord Keith of Kinkel in *Woolfson v Strathclyde Regional Council* [1978] S.C. (HL) 90, where he commented that “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts”.⁸⁰¹ A similar comment was made by Slade LJ in *Adams v Cape Industrial Plc* [1990] CH 433, commonly regarded as one of the leading cases on the principle of piercing the corporate veil.

The strictness of this approach led to a principle of piercing the corporate veil that existed more as a matter of legal theory than it did a feature of legal practice while the judges were clear when the veil could not be pierced, but, absent a clear case of fraud, less clear about when they could.⁸⁰² Cardozo's opinion is relevant as it was one of the first writings to criticize the unprincipled nature of this legal mechanism and proposed a standard to determine the circumstances under which the parent entity should be held liable for the debts of its subsidiaries.⁸⁰³ According to his approach, veil piercing should be applied not only when there is an agency relationship between the parent and its subsidiary, but when "the attempted separation between

⁸⁰⁰ The Law Teacher. Cases, 2018, p.1-5

⁸⁰¹ Ibid 1-5

⁸⁰² Ibid 1-5

⁸⁰³ Horvathova A, Stanescu CG. *Piercing the Corporate Veil US Lessons from Romania and Slovakia*. *Chicago-Kent, Journal of International and Comparative Law*. 2016;17(1):7.

parent and subsidiary will work a fraud upon the law.⁸⁰⁴ The leading cases, such as the decision in Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 11, seemed to pose more questions than they answered in terms of when the principle could be applied.⁸⁰⁵ This confusion is perhaps best illustrated by the decision of Sir Andrew Morritt V-C in *AB v Smallbone (No 2)* [2011] 1 WLR 1177,⁸⁰⁶ where he sought to classify the circumstances in which the veil could be pierced as those where (i) the company was a sham or (ii) it was involved in some form of impropriety. However, limited liability can also facilitate opportunistic behavior by shareholders that the law should not endorse⁸⁰⁷ leading to the piercing of corporate veil.

In *Lee v Lee's Air Farming Ltd.*, [1961]⁸⁰⁸ it was held that there was a valid contract of service between Lee and the Company, and Lee was a therefore a worker within the meaning of the Act. It was a logical consequence of the decision in Salomon's case that one person may function in the dual capacity both as director and employee of the same company". In *The King v Portus; ex parte Federated Clerks Union of Australia* [1949]⁸⁰⁹, "where Latham CJ while deciding whether or not employees of a company owned by the Federal Government were not employed by the Federal Government ruled that the company is a distinct person from its shareholders; the shareholders are not liable to creditors for the debts of the company. The shareholders do not own the property of the company". In course of time, the

⁸⁰⁴ Ibid 7

⁸⁰⁵ The Law teacher. Cases, 2018, p.1-5

⁸⁰⁶ Ibid 1-5

⁸⁰⁷ Milton, D. Piercing the corporate veil, financial responsibility, and the limits of limited liability. Emory LJ. 2006; 56:1305.

⁸⁰⁸ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School Of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

⁸⁰⁹ Ibid 1

doctrine that a company has a separate and legal entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of corporation can be lifted and its face examined in substance⁸¹⁰. “Thus when “Tata Company” or “German Company” or “Government Company” is referred to, we look behind the smoke-screen of the company and find the individual who can be identified with the company. This phenomenon which is applied by the courts and which is also provided now in many statutes is called lifting of the corporate veil;⁸¹¹ as a consequence of the lifting of the corporate veil, the company as a separate legal entity is disregarded and the people behind the act are identified irrespective of the personality of the company. Therefore, piercing the veil is the corporate law mostly widely used doctrine to decide when shareholder or shareholders will be held liable for the obligation of the corporation.⁸¹² It remains to be one of the most litigated and most discussed doctrines in the corporate law.⁸¹³ Piercing the corporate law exist as check on the principle that in general investor shareholders should not be held liable for the debts of corporation beyond the value of their investment.⁸¹⁴

3.5 Grounds of Piercing the Corporate Veil in Group Context

Lifting the corporate veil refers to the possibility of looking behind the company’s framework (or behind the company’s separate personality) to make the members liable, as an exception to the rule that they are normally shielded by the corporate shell (i.e. they are normally not liable to outsiders at all either as principles or as

⁸¹⁰ Ibid 1

⁸¹¹ Ibid 1

⁸¹² Strasser, K.A. Piercing the Veil in Corporate Groups. *Conn. L. Rev.*.. 2004;37:637.

⁸¹³ Ibid 637

⁸¹⁴ Ibid 637

agents or in any other guise, and are already normally liable to pay the company what they agreed to pay by way of share purchase price or guarantee, nothing more).⁸¹⁵ The doctrine is also known as disregarding the corporate entity⁸¹⁶ though it is incoherent and unprincipled⁸¹⁷ This shows that despite the existence of the doctrine it lacks consistence, which is probably attributed to lack of standard approach in matters relating to lifting of the corporate veil.

When the true legal position of a company and the circumstances under which its entity as a corporate body will be ignored and the corporate veil is lifted, the individual shareholder may be treated as liable for its acts.⁸¹⁸ The corporate veil may be lifted where the statute itself contemplates lifting the veil or fraud or improper conduct is intended to be prevented.⁸¹⁹ It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of public interest, the effect on parties who may be affected, etc. This was iterated by the Supreme Court in the case of *Life Insurance Corporation of India v Escorts Ltd.*⁸²⁰

⁸¹⁵ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School Of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

⁸¹⁶ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/5>

⁸¹⁷ In his 1990 article, Fraud, Fairness and Piercing the Corporate Veil, Professor Farrar remarked that the Commonwealth authority on piercing the corporate veil as “incoherent and unprincipled”.

⁸¹⁸ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School Of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

⁸¹⁹ Ibid 1

⁸²⁰ Ibid 1

Common law courts have the lassitude or exclusive jurisdiction to lift or look beyond the corporate veil at any time they want to examine the operating mechanism behind a company.⁸²¹

This wide margin of interference given common law judges has led to the piercing of the corporate veil becoming one of the most litigated issues in corporate law.⁸²² But it should be worthy of note that a rigid application of the piercing doctrine in common law jurisdictions has been widely criticized as sacrificing substance for form.⁸²³ Hence, Windeyer J, in the case of *Gorton v Federal Commissioner of Taxation*, [1965] remarked that this approach had led the law into “unreality and formalism.”⁸²⁴ As aforementioned, when the judges pierce the veil of incorporation, they accordingly proceed to treat the company’s members as if they were the owners of the company’s assets and as if they were conducting the companies business in their personal capacities, or the court may attribute rights and/or obligations of the members on to the company.⁸²⁵ There are several arguments providing the basis for piercing the corporate veil and among them are the following:

3.5.1 The Single Economic Entity Argument

Sometimes is it described as failure to maintain the separate identities of the companies whereby a familiar scene that may cause some scrutiny is where there are several related affiliates or multiple companies acting under the umbrella of one

⁸²¹ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/6>

⁸²² Ibid 6

⁸²³ Ibid 6

⁸²⁴ Ibid 6

⁸²⁵ Ibid 6

company and the failure to maintain separate identities of the companies.⁸²⁶ To narrow this down more, it is good to use the example of when there is a parent company and a subsidiary company and the parent company operates and controls the subsidiary, provides all of the financing for the subsidiary, indicates the same officers, address, and corporate information, and files consolidated taxes with the subsidiary.⁸²⁷ This argument for lifting the veil is targeted at companies within a corporate group.⁸²⁸ It exists where there is a holding company, which has absolute control of the subsidiaries. The plaintiff must prove beyond reasonable doubt that there are total dealings between the parent and its subsidiary.

The basis of this argument is that despite the separate legal personalities of the companies within the group, they in fact constitute a single unit for economic purposes and should therefore be seen as one legal unit⁸²⁹. The factual circumstances where this may arise are where the owners create a corporation but continue to operate out of individual checking accounts, fail to recognize corporate formalities, and use the company's assets as if they were individual assets.⁸³⁰ Again, the business tip is to ensure distinctness in the company and the owners at the same time owners, shareholders, and officers should avoid commingling funds and must treat assets of the business separate from personal assets⁸³¹ The existence of such misbehaviors

⁸²⁶ Jimerson & Cobb P.A, *The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts*, 2016, p.3

⁸²⁷ *Ibid* 3

⁸²⁸ Mehlin, A.J. & Lawton, J. *Lifting the Corporate Veil*. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

⁸²⁹ *Ibid* 3-4

⁸³⁰ Jimerson & Cobb P.A, *The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts*, 2016, p.3

⁸³¹ *Ibid* 3

drive the courts towards treating the corporations as single economic entities when piercing the corporate veil.

Liabilities should therefore, be attached to the whole group as companies aim to reach a single economic goal⁸³². This argument was advanced successfully in the 1976 in the case of *DHN Food Distributors v Tower Hamlets [1976]* where the veil was lifted for the benefit of the parent company in a group situation⁸³³. DHN were treated as owning the land of its subsidiary and entitled to compensation for the corporate torts committed by Tower Hamlets⁸³⁴. This case appears to have been the exception, rather than the rule in terms of advancing this argument as subsequent case law has rejected this ground on the basis that the argument is based on economics, and not the law⁸³⁵.

This factual example is similar to *Ocala Breeders' Sales Co. v Hialeah, Inc [1999]*, where the court pierced the corporate veil to pursue the personal liability of corporate officers.⁸³⁶ Amongst the factors⁸³⁷ identified by the court, the court found that the following were indicia of a showing that the subsidiary was merely an instrumentality of the parent corporation: The same person controlled both the parent and subsidiary; they operated out of the same facilities as the parent; the subsidiary's contracts were performed by employees of the parent; the subsidiary was never

⁸³²Mehlin, A.J. & Lawton, J. Lifting the corporate veil. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

⁸³³ Ibid 3-4

⁸³⁴ Ibid 3-4

⁸³⁵ Ibid 3-4

⁸³⁶ Jimerson & Cobb P.A, The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts, 2016, p.3

⁸³⁷ Ibid 3

capitalized; and the subsidiary shared bank accounts and financial obligations with the parent.

The argument of group enterprises⁸³⁸ is to the effect that in certain cases, some companies that act as a corporate group, may operate to hide behind the advantages of limited liability to the disadvantage of their creditors. They may operate in a way that the parent entity is not clearly distinguishable from the subsidiaries.⁸³⁹ The argument in favor of piercing the corporate veil in these circumstances is to ensure that a corporate group which seeks the advantages of limited liability must also be ready to accept the corresponding responsibilities as per Doyle CJ in the 1998 case of *Taylor v Santos Ltd [1999]*⁸⁴⁰.

The court also required a showing of improper conduct because “to pierce the corporate veil for instance under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them.”⁸⁴¹ Thus, the court held that a parent corporation defrauded the plaintiff when its subsidiary entered into a contract requiring it to make certain capital improvements and the subsidiary did not have the ability to fulfill the contract since it was never capitalized⁸⁴². Such circumstances attract disregarding the corporate veil under corporate law.

⁸³⁸ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007, <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/7>

⁸³⁹ Ibid 7

⁸⁴⁰ Ibid 7

⁸⁴¹ Jimerson & Cobb P.A., The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts, 2016, p.3

⁸⁴² Ibid 3

The most outstanding instance however where Anglo-Saxon courts would most probably pierce the corporate veil on the ground of group enterprises is where there exists a sufficient degree of common ownership and common enterprise as per the case of *Bluecorp Pty Ltd v ANZ Executors and Trustee Co Ltd*⁸⁴³, the following Lord Justices identified the main grounds under which Anglo-Saxon courts would be prompt to pierce the corporate veil as a result of group enterprises. The court stated thus: “The inter-relationship of the corporate entities here, the obvious influence of the control extending from the top of the corporate structure and the extent to which the companies were thought to be participating in a common enterprise with mutual advantages perceived in the various steps taken and plans implemented, all influence the overall picture.”⁸⁴⁴ Sometimes in the case of group of enterprises the Salomon principle [supra] may not be adhered to and the court may lift the veil in order to look at the economic realities of the group itself⁸⁴⁵ for instance in the case of *D.H.N. food products Ltd. v Tower Hamlets*, [supra] it has been said that the courts may disregard *Salomon's case* [supra] whenever it is just and equitable to do so.

3.5.2 The Existence of Fraud or Façade Cases

The ability to disturb the corporate veil may be justified where the formation of subsequent existence of the company constitutes fraudulent abuse of incorporation process.⁸⁴⁶ The fraud or façade exception occurs where the underlying motive of

⁸⁴³ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007, <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/5>

⁸⁴⁴ Ibid 5

⁸⁴⁵ The Law Teacher, Lifting of the corporate veil accessed from <https://www.lawteacher.net/free-law-essays/.../article-on-lifting-of-the-law-essays.ph>, 2018, p. 1-17.

⁸⁴⁶ Griffin, S. *Company Law: Fundamental principles*. Edinburgh: Pearson Professional Ltd, 2000, p.14

incorporation of a company is to enable its membership to impugn an existing binding obligation with a third party or to instigate other forms of fraud.⁸⁴⁷ Of all of the factors that courts look at, the existence of fraud, wrongdoing, or injustice is the biggest red flag when determining whether or not to pierce the corporate veil.⁸⁴⁸ In a majority of cases, the claimant is seeking to pierce the corporate veil because of the wrongdoing of the company or its owners.⁸⁴⁹ The basis of this argument is that the company that was incorporated is a façade/sham to escape pre-existing legal obligations and therefore the veil of incorporation should be lifted to reveal the true identity of the persons who must be responsible; this has proven to be a more successful line of argument in past case law⁸⁵⁰.

In Woolfson v Strathclyde Regional Council [1978] it was held that the veil could be pierced where special circumstances exist indicating that the company is a façade concealing the true facts.⁸⁵¹ In such the court may recognize the existence of corporate entity but may nevertheless pierce the corporate veil to prove those involved in the façade or fraudulent act from escaping the liability which would otherwise been enforceable had the company not been incorporated.⁸⁵²

*In Re Darby, ex Brougham [1911]KB 95*⁸⁵³ which dates back to 1911, the veil was lifted where career-fraudsters had incorporated companies to disguise their true

⁸⁴⁷ Ibid 14.

⁸⁴⁸ Jimerson & Cobb P.A., *The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts*, 2016, p.3

⁸⁴⁹ Ibid 3-4

⁸⁵⁰ Mehlin, A.J. & Lawton, J. *Lifting the corporate veil*. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

⁸⁵¹ Ibid 3-4

⁸⁵² Griffin, S. *Company Law: Fundamental Principles*. Edinburgh: Pearson Professional Ltd, 2000, p 10-20.

⁸⁵³ *Re Darby, ex Brougham* case

involvement as sole beneficiaries of the scheme. In the case⁸⁵⁴ of *Gilford Motor Company v Horne*, [1933] Ch.935 “where Mr Horne (H) entered into a contract with Gilford Motor Co by which he agreed to abide by a restrictive covenant which provided should he leave Gilford employment he would not solicit their customers.

On leaving Gilford employment H, through nominees formed a company through which he sought to escape the terms of restrictive covenant. The court held that the company was sham an alias of H and as such an injunction was granted to enforce the covenant. The restrictive company was enforced against both H and the company corporate existence was not denied although the company corporate veil was pierced to recognize H’s personal culpability for the breach of restrictive covenant”.

In *Trustor v Smallbone [2001]* a director of the claimant stole money from Trustor and paid it to his own company Intercom and the veil was lifted in order to make Smallbone jointly and severally liable for the sums received by Intercom.”⁸⁵⁵ A further illustration of fraud of façade is provided in the case⁸⁵⁶ of *Jones v Lipman [1902]*, WLR.832, in which “Mr Lipman sought to escape specific performance of the contract entered for the sale of land by transferring the said land to a company which he recently incorporated. *Held*: It was held that incorporation of the company was a façade, a devise to evade Ls contractual responsibility and such specific performance of the sale of land was granted against both L and the company. Once

⁸⁵⁴ Ibid

⁸⁵⁵ Mehlin, A.J. & Lawton, J. Lifting the Corporate Veil. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

⁸⁵⁶ Griffin, S. Company Law: Fundamental Principles. Edinburgh: Pearson Professional Ltd, 2000, p.10-20.

again the company corporate existence was judicially recognized in so far as the order was granted against the company although its corporate veil was pierced to the extent that the court recognized Ls personal culpability.”

As regards to *Fraud*⁸⁵⁷ in a majority of cases, the claimant is seeking to pierce the corporate veil because of the wrongdoing of the company or its owners.⁸⁵⁸ Consider the following:⁸⁵⁹ (1) Creditor of ABC Corp. receives a final judgment for money damages; (2) ABC Corp. cannot pay the judgment so it shuts down; (3) ABC Corp. transfers all of its assets to XYZ Corp. and XYZ Corp. operates a substantially similar business with the same assets and same employees. In this example, it is likely that ABC Corp. engaged in wrongful, potentially fraudulent actions, by shutting down its business and essentially reopening a new corporation of the same ilk where this is a classic example of a debtor attempting to defraud its creditor.⁸⁶⁰

In the Australian case of *Re Neo*[1997]⁸⁶¹ where the Immigration Review Tribunal took fraudulent in a case where a decision to refuse an application for a visa by an employee, where sponsorship had been arranged by a company formed on the same day that the application was lodged, and interestingly, the company never carried out any business. *The Australian Immigration Review Tribunal* ruled thus: “The company was merely a vehicle used to circumvent Australian migration law that

⁸⁵⁷ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/3>

⁸⁵⁸ Jimerson & Cobb P.A., The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts, 2016, p.3

⁸⁵⁹ Ibid 3

⁸⁶⁰ Ibid 3

⁸⁶¹ Ibid 3

means it was only a façade, its true purpose being to allow the applicants to remain in the country.”⁸⁶²

An argument that the company under scrutiny is a sham or a façade is one of the strongest points that would prompt a common law court to lift the veil of incorporation.⁸⁶³ The argument is quite close to the argument of fraud, but usually stands on its own and to say a company was merely a façade or a sham means the corporate form was incorporated or merely used as a mask to hide the real purpose of the corporate controller.⁸⁶⁴ In the English case of *Sharrment Pty Ltd v Official Trustee in Bankruptcy [1988]* Lockhart J, stated that: “A ‘sham’ is...something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something, which it is not. It is something which is false or deceptive.”⁸⁶⁵

The ability to hide behind the corporate veil could be a powerful weapon in the hands of those fraudulent tendencies.⁸⁶⁶ The courts have therefore always reserved the right to ignore a company, which is formed or used merely to perpetrate a dishonest scheme.⁸⁶⁷ The courts have been more that prepared to pierce the corporate

⁸⁶² Ibid 3

⁸⁶³ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/9>

⁸⁶⁴ Ibid 9

⁸⁶⁵ Ibid 9

⁸⁶⁶ Dine, J. Company Law, 4th Ed. Company Law, New York: Palgrave, 2001, p.30

⁸⁶⁷ Ibid 30

veil when it feels that fraud is or could be perpetrated behind the veil⁸⁶⁸. The courts will not allow the Salomon principle to be used as an engine of fraud⁸⁶⁹. Nonetheless, in respect of holding company, subsidiary relationship and it should be noted in the case⁸⁷⁰ of *Adams v Cape Industries [1990]*, ch.433 “the Court of Appeal could not find legal obligation where the corporate structure of a group companies had been used to ensure that any future legal liabilities which might be attached to the group of enterprise would fall in the subsidiary of the holding company rather than holding company itself”

3.5.3 Agency Relationship

This approach was adopted in *Berkey v Third Avenue Railway Co.* and is based on the concept of agency relationship whereby one person —the principal— uses another person —the agent— to act on his behalf; the principal is bound by the acts of the agent, who is not entitled to the gains of the enterprise —nor is he expected to carry the risks.⁸⁷¹ The idea of this approach is that the subsidiary has acted on behalf of the parent and therefore the parent is liable for the debts of the subsidiary.⁸⁷² This argument asserts that the company is an agent for its controllers, that is, the shareholders.⁸⁷³ In a corporate group it would be argued that the subsidiary is an

⁸⁶⁸ The Law Teacher, Lifting of The Corporate Veil Accessed from <https://www.lawteacher.net/free-law-essays/.../Article-On-Lifting-Of-The-Law-Essays>. Ph, 2018, p. 1-17.

⁸⁶⁹ Ibid 1-17

⁸⁷⁰ Griffin, S. *Company Law: Fundamental Principles*. Edinburgh: Pearson Professional Ltd, 2000, p.10-20.

⁸⁷¹ Dávalos Torres MS. *Corporate Veil Piercing: A Proposal for Mexico*. *Mexican law review*. 2012 Dec;5(1):81-123

⁸⁷² Ibid 81-123

⁸⁷³ Mehlin, A.J. & Lawton, J. *Lifting the Corporate Veil*. Accessed from <https://www.cwj.co.uk/site>, 2018, p.3-4

agent of the parent company.⁸⁷⁴ It is generally presumed that there is no such agency relationship and that in principle, a company is not an agent of its shareholders.⁸⁷⁵ Agency relations would have to be proved on the evidence in each case and cannot be inferred from the control exercised by the shareholders. As far as agency⁸⁷⁶ is concerned, the doctrine of separate legal entity that the company is a legal entity with a different identity from that of its members means that a company does not exist to become an agent for its shareholders but where this is the case, Anglo-Saxon courts would not hesitate to pierce the corporate veil.

In Rowland J, in *Barrow v CSR Ltd [1988]*⁸⁷⁷, where the court found out that a parent company was responsible for the actions of a subsidiary in relation to an employee, it did not hesitate to lift the veil. The court stated: “Now, whether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between CSR and the employees of ABA, or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same.” But Anglo-Saxon courts do not have any unique judicial approach to determining whether the company acted as an agent.⁸⁷⁸ The approach differs from the common law jurisdiction.

The agency approach proposes a two-prong test, namely: a) First prong-this refers to the parent-subsidiary agency relationship.⁸⁷⁹ In order for this requirement to be

⁸⁷⁴ Ibid 3-4

⁸⁷⁵ Ibid 3-4

⁸⁷⁶ Forji, A.G., The Veil Doctrine in Company Law 29 Sep 2007 <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/11>

⁸⁷⁷ Ibid 11

⁸⁷⁸ Ibid 11

⁸⁷⁹ Dávalos Torres MS. Corporate Veil Piercing: A Proposal for Mexico. Mexican law review. 2012 Dec;5(1):81-123

satisfied, the parent must be shown to have exercised complete control over the subsidiary.⁸⁸⁰ In case the control exercised by the parent does not qualify as "domination," the relationship can be evaluated under the test of honesty and justice.

b) Second prong-this requires showing that the "separation between parent and subsidiary will work a fraud upon the law."⁸⁸¹ Where a company is acting as agent for its shareholder, the shareholders will be liable for the acts of the company⁸⁸². It is a question of fact in each case whether the company is acting as an agent for its shareholders⁸⁸³. There may be an express agreement to this effect or an agreement may be implied from the circumstances of each particular case⁸⁸⁴. In the case of *F.G. Films Ltd*,⁸⁸⁵ An American Company financed the production of a film in India in the name of a British company. The president of the American company held 90 per cent of the capital of the British company and the board of trade of Great Britain refused to register the film as a British film. *Held*, the decision was valid in view of the fact that British company acted merely as the nominee of the American Company⁸⁸⁶.

The use of the agency theory⁸⁸⁷ when piercing the corporate veil has also been heavily criticized. When the subsidiary acts as the parent's agent by doing all the business the parent could do with its own unincorporated representatives, or vice versa, the agency theory requires the principal corporation to answer for the conduct

⁸⁸⁰ Ibid 81-123

⁸⁸¹ Ibid 81-123

⁸⁸² The Law Teacher, Lifting of the corporate veil accessed from <https://www.lawteacher.net/free-law-essays/.../article-on-lifting-of-the-law-essays.ph>, 2018, p. 1-17.

⁸⁸³ Ibid 1-17

⁸⁸⁴ Ibid 1-17

⁸⁸⁵ Ibid 1-17

⁸⁸⁶ Ibid 1-17

⁸⁸⁷ Aronofsky, D. Piercing the transnational corporate veil: trends, developments, and the need for widespread adoption of enterprise analysis. *NCJ Int'l L. & Com. Reg.* 1985;10:31.

of the agent.⁸⁸⁸ Defining an agency relationship within a large enterprise, however, is not simple.⁸⁸⁹ Blumberg mentions that this approach is often confused with the "instrumentality" or "alter ego" approach; given the difficulty to show that consent was given by both parties, the agency theory has been used in few cases.⁸⁹⁰ A literal application of the theory subsumes the doctrine of limited liability, and courts often confuse traditional agency law, which requires a formal agency agreement, with the multifactor instrumentality and control analysis discussed above.⁸⁹¹ While use of a separate corporation to prevent legal liability is sufficient to support the finding of an agency relationship under this analysis, stock ownership and control by the parent through common directors may not be enough, although courts often have difficulty making a practical distinction.⁸⁹²

Apart from that an ability to establish *an agency relationship*⁸⁹³ between holding company and its subsidiary will facilitate a finding that that holding company (the principal) is responsible for the actions of its subsidiary (the agent) although it must be observed that there will be no disturbance subsidiary corporate veil in so far as the principal and the agent will be regarded as distinct legal entities. In the context of the agency relationship between the corporate entities agency may be tentatively defined as a relationship which is based upon the express or implied consent of both the

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

⁸⁹⁰ Dávalos Torres MS. Corporate Veil Piercing: A Proposal for Mexico. Mexican law review. 2012 Dec;5(1):81-123

⁸⁹¹ Aronofsky, D. Piercing the transnational corporate veil: trends, developments, and the need for widespread adoption of enterprise analysis. NCJ Int'l L. & Com. Reg.. 1985;

⁸⁹² Aronofsky, D. Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis. NCJ Int'l L. & Com. Reg.. 1985;10:31

⁸⁹³ Griffin, S. Company Law: Fundamental principles. Edinburgh: Pearson Professional Ltd, 2000, p.10-20.

subsidiary company and its holding company the former will act on the latter on behalf and the subsidiary so acting it will be made subject to the holding company control as per the judgment of Lord Pearson in *Garnac Grain Co. Inc v HMF Fane and Fair Clough Ltd [1968] AC 1130*.⁸⁹⁴

It should be noted that companies under the control of dominant person or persons can be opposed to dominant holding company and may be viewed as constituting a single economic entity per *Creasey v Breachwood Motors [1993]*⁸⁹⁵ Where two or more companies operate together in group relationship and do so under dominant control in one of their number (holding company) the corporate veils of other company/companies or subsidiary company may in specific circumstances be lifted with the result that group of companies is viewed as single economic entity.⁸⁹⁶ However, it must be stressed that group relationship does not in itself imply that the group can be regarded as one economic entity.⁸⁹⁷ Further, it does not necessarily follow that a company which is whole owned subsidiary of its holding company is to be classed as but a division of holding company therefore part of the one economic activity.⁸⁹⁸

Hence, the relationship in *Adams v Cape Industries*-the relationship has been that of agency and for the purpose of establishing an agency relationship it is therefore crucial to establish that one dominant company had absolute control over the actions

⁸⁹⁴ Ibid 10-20.

⁸⁹⁵ Ibid 10-20

⁸⁹⁶ Ibid 10-20

⁸⁹⁷ Ibid 10-20

⁸⁹⁸ Ibid 10-20

and actions of another company.⁸⁹⁹ For example, in *Smith Stone & Knight Ltd v Birmingham Corp [1939] 4 All ER 116*- where the fact which were almost identical to *DHN Food Distributors Ltd v London Borough of Tower Hamlets* an agency relationship was established in the group relationship on the basis that the subsidiary company was a mere tool working for ultimate benefit of its holding company.⁹⁰⁰ By contrast in *Kodak v Clarke [1902] 2 KB 450*-the court denied the existence of agency relationship between English holding company and overseas subsidiary because the English company which held 98% of the subsidiary share had never attempted to interfere with management of the subsidiary.⁹⁰¹

3.5.4 Enemy Character

When the nation is at war or finds itself in some other serious form of political or economic conflict it may be expedient for the court to dislodge the corporate veil to prevent, for example, the payment of money from companies regulated to a particular state to the enemy state.⁹⁰² This means that a company may assume an enemy character when persons in de facto control of its affairs are residents in an enemy country⁹⁰³. In such a case, the court may examine the character of persons in real control of the company, and declare the company to be an enemy company⁹⁰⁴. This may be illustrated by the case of *Daimler v Continental Tyre and Rubber Co.[1916]2 AC 307* whereby in this case⁹⁰⁵ “ The Continental Tyre sought to

⁸⁹⁹ Ibid 10-20

⁹⁰⁰ Ibid 10-20

⁹⁰¹ Ibid 10-20

⁹⁰² Ibid 10-20

⁹⁰³ The Law Teacher, Lifting of the corporate veil accessed from <https://www.lawteacher.net/free-law-essays/.../article-on-lifting-of-the-law-essays.ph>, 2018, p. 1-17.

⁹⁰⁴ Ibid 1-17.

⁹⁰⁵ Griffin, S. *Company Law: Fundamental Principles*. Edinburgh: Pearson Professional Ltd, 2000, p.10-20.

enforce a debt owed to it by Daimler. The membership of the Continental Tyre was comprised of Germany nationals. As UK was at war with Germany the High Lord (reversing the decision of the court of Appeal) refused to sanction enforcement of the debt. In doing so despite the fact that the continental was registered in UK the High Lords refused to recognize that Continental was an entity which was independent from its membership”

3.6 Corporate Veil Piercing Cases on Group Context

Occasionally, the courts have pierced the veil between companies in a group on the basis that while legally distinct economically they exist as one, single independent unit.⁹⁰⁶ Thus in *DHN food distributors v Tower Hamlets LBC*⁹⁰⁷ –the veil between three companies was pierced in order to achieve what judges considered to be equitable result. In this case the court of appeal held that the veil would be pierced stating that “the group was virtually the same as a partnership in which all three companies are partners. According to Goff LJ the veil could be pierced between the companies in a group of companies were whole owned, subsidiaries which had no separate business operations and where the owners of all business in question had been disturbed in their possession and enjoyment of it”.

A review of judgment in respect to groups was proffered in the case of *Adams v Cape Industries Ltd*⁹⁰⁸. Here the plaintiffs were the personal representatives of persons to whom an award was made in Texan Court in respect of the claims for

⁹⁰⁶ Kathleen, O. An Anatomy of the Grounds of Lifting the Corporate Veil: Steps to Codification. *International Journal of Family and Business Management*, 2019, 3(2):1-11

⁹⁰⁷ *Ibid* 1-11

⁹⁰⁸ *Ibid* 1-11

damages for personal injury and consequential loss suffered as a result of exposure to asbestos fibers. The fibres were omitted from asbestos insulation factory of subsidiaries. The courts pierced the veil of incorporation to hold the parent company liable.

In *Smith, Stone, and Knight v Birmingham Corporation*⁹⁰⁹, a company acquired a business and registered it as a parent company and a subsidiary. The parent company held all but five shares in the subsidiary ownership and controls were effectively by the parent company. The defendants Birmingham Corporate compulsory acquired the premises owned by the subsidiary upon which the parent company business was carried on. The parent company claimed compensation. The corporation claimed that the proper recipient was the subsidiary as it owned the land and the parent company was a separate entity. Piercing the veil was allowed and it was held that “to obtain an advantage for the parent company to claim compensation it must show that the subsidiary was not a separate entity but in fact an agent of the parent company.

In *Daimler Co. Ltd. v Continental Tyre and Rubber Co. (Great Britain) Ltd [1916]*⁹¹⁰ – This is an instance of determination of enemy character of a company. In this case, there was a German company. It set up a subsidiary company in Britain and entered into a contract with Continental Tyre and Rubber Co. (Great Britain) Ltd. for supply of tyres. During the time of war the British company refused to pay as trading with an alien company is prohibited during that time. To find out whether

⁹⁰⁹ Ibid 1-11

⁹¹⁰ Chaitanya S., Kaushalya T.M, Lifting the Corporate Veil by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

the company was a German or a British company, the court lifted the veil and found out that since the decision making bodies, the board of directors and the general body of share holders were controlled by Germans, the company was a German company and not a British company and hence it was an enemy company.

In *Friday Alfred Akpan and others v SPDC*⁹¹¹, a Dutch court at the global headquarters of the parent company ruled that Royal Dutch Shell Nigeria subsidiary was responsible in negligence for case of oil pollution of farmlands in Niger Delta and ordered it to pay damages. However, implying further principles of tort the parent company avoided liability because the environmental degradation caused by subsidiary was too remote as a causative factor.

*Re, FG (Films) Ltd*⁹¹²- In this case the court refused to compel the board of film censors to register a film as an English film, which was in fact produced by a powerful American film company in the name of a company registered in England in order to avoid certain technical difficulties. The English company was created with a nominal capital of 100 pounds only, consisting of 100 shares of which 90 were held by the American president of the company. The Court held that the real producer was the American company and that it would be a sham to hold that the American company and American president were merely agents of the English company for producing the film.

⁹¹¹ Kathleen, O. *An Anatomy of the Grounds of Lifting the Corporate Veil: Steps to Codification*. International Journal of Family and Business Management, 2019, 3(2):1-11

⁹¹² Chaitanya S., Kaushalya T.M, *Lifting the Corporate Veil* by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

In *Cape v Chandler*⁹¹³ - a parent company was made liable for the acts of its foreign subsidiary company. The facts of the case were that the claimants, Mr Chandler had been employed by a subsidiary of Cape plc for eighteen months which exposed him to asbestos (over fifty years) by which time Cape products had been wound up. The court awarded damages against the parent company for the act of the subsidiary.

Furthermore, the case of *Singer India v Chander Mohan Chadha*⁹¹⁴ The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud the people. Where therefore the corporate charter is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.

3.7 Conclusion

The chapter presented the international perspective on corporate veil piercing. The review disclosed that most of the multinational corporations prefer to do business in a parent-subsidary relationship. However, most of these multinational corporations have not been honest in the course of engaging into contract with host states resulting into detrimental loss of revenue as most of the host states end up in conducting shoddy business with shrewd Multinational Corporations. The problem occurs when it comes to corporate veil piercing of such companies which demand the use of

⁹¹³ Kathleen, O. An Anatomy of the Grounds of Lifting the Corporate Veil: Steps to Codification. *International Journal of Family and Business Management*, 2019, 3(2):1-11

⁹¹⁴ Chaitanya S., Kaushalya T.M, *Lifting the Corporate Veil* by KIIT School of Law, KIIT University <https://www.lawctopus.com/academike/corporate-veil/> On January 7, 2015, p.1

international arbitration. The chapter explicitly indicated that when the matters are sent to the international arbitration only the parties to contract are supposed to be involved.

However, this is in accordance to the general principle of contract which excludes non signatories to the contract. It was further indicated that there can be some exceptional to the general principle of contract whereby third parties may be included in the international arbitration if it is found beyond reasonable doubt that they have interest to the matter. The choice of law at the international arbitration depends on the parties of the contract implying that domestic laws of their respective countries is ought to be given much prominence.

The results further revealed that there is a great variation from one jurisdiction to the other when it comes to the matter of corporate veil piercing at the international level. The confusing case was observed in the USA whereby the variation existed between the states making corporate veil piercing to be a complex endeavor at in the domestic states as well as in the international arbitration. Generally, there are uncertainties and inconsistencies in piercing of corporate veil between nations.

This situation is caused by lack of universal approach in disregarding corporate veil as a result it remains to be vague concept in the corporate law. Despite that the concept of piercing the corporate veil remained to be essential while different States using factors like single economic argument, the existence of fraud or façade cases, agency and enemy character as the grounds for piercing the corporate veil. The next chapter presents piercing of corporate veil in Tanzania.

The chapter has also disclosed that there are the best methods and experiences that Tanzania can learn from the international arena in piercing the corporate veil of the group companies. They include taking the parties to the international arbitration as well as establishing single economic argument in adjudicating matters relating to multinational corporations operating in a parent subsidiary relationship.

CHAPTER FOUR
THE LEGAL FRAMEWORK OF CORPORATE VEIL PIERCING IN
TANZANIA

4.1 Introduction

This chapter presents the legal framework of corporate veil-piercing framework in Tanzania. It presents the corporate veil piercing laws-namely the Constitution of the United Republic of Tanzania and the Companies Act. It further provides the concept of group companies as provided in the CA of Tanzania. Thereafter, the chapter focuses on statutory and judicial piercing of corporate veil in Tanzania.

Finally, the chapter provides conclusion. The legal framework for piercing the corporate veil in Tanzania is governed by the Constitution of the United Republic of Tanzania and the Companies Act. Nonetheless, in adjudication corporate veil cases judges may invoke the inherent power of the court as per section 95 of the civil procedure code.

4.2 The Constitution of the United Republic of Tanzania (CURT) 1977

Piercing of the corporate veil aims at dispensation of justice between the parties. However, dispensation of justice is a constitutional right, which is to be inferred judicially. Therefore, courts pierce the corporate veil as per article 107A.-(1) of the CURT which provides that the judiciary shall be authority with final decision in dispensation of justice in the United Republic of Tanzania. Therefore, in order to achieve justice in piercing of corporate veil must adhere to the constitution. Otherwise the judgment will be rendered null and void.

4.3 The Companies Act of Tanzania

In Tanzania all companies are governed and regulated under the CA No.12 of 2002. The Act provides for different types of the companies or entities that are formed for various purpose-commercial and non-commercial. The CA was enacted by the parliament of United Republic of Tanzania on 2002 and assented by the president on 27th Jun 2002⁹¹⁵ and its regulations came in to force on 11th February 2005.⁹¹⁶ The CA was enacted to replace a law relating to companies and other associations, to provide comprehensive provisions for regulations and control of companies, associations and related matters⁹¹⁷.

The CA of Tanzania provides the meaning of as consisting of parent or holding company and its subsidiary.⁹¹⁸ Moreover, the Companies Act⁹¹⁹ of Tanzania provides that for the purposes of this Act, a company shall be subjected to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if, (a) that other either- is a member of it and controls the composition of its board of directors; or holds more than half in nominal value of its equity share capital; or (b) The first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Furthermore the CA⁹²⁰ provides that for the purposes of subsection (1), the composition of a company's board of directors shall be deemed to be controlled by

⁹¹⁵ Companies Act, Opening Sentence, Revised Ed.[2002]

⁹¹⁶ Subsidiary Legislation to the Gazette of the United Republic of Tanzania No. 6 Vol.86 dated 11th February 2005, Printed by the Government Printer, Dar es Salaam by order of government

⁹¹⁷ Companies Act, Opening Sentence, Revised Ed.[2002]

⁹¹⁸ Companies Act, s 2

⁹¹⁹ Companies Act, s 487-(1)

⁹²⁰ Companies Act, s 487-(2)

another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holdings of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say- (a) That a person cannot be appointed thereto without the exercise in his favour by that other company of such a power; or (b) That a person's appointment thereto follows necessarily from his appointment as director of that other company; or (c) That the directorship is held by that other company itself or by a subsidiary of it.

Apart from the CA⁹²¹ stipulates that in determining whether one company is a subsidiary of another- (a) any shares held or power exercisable by that other in a fiduciary capacity shall be treated as not held or exercisable by it; (b) subject to the two following paragraphs, any shares held or power exercisable- by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity); or by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity; shall be treated as held or exercisable by that other; (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded; (d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in paragraph (c) shall be treated as not

⁹²¹ Companies Act, s 487(3)

held or exercisable by that other if the ordinary business of that other or its *subsidiary*, as the case may be, includes the lending of money and the shares are held or power is exercisable as above by way of security only for the purposes of a transaction entered into in the ordinary course of that business. Moreover the Act⁹²² states that for the purposes of this Act, a company shall be deemed to be another's holding company or alternatively its parent company if, but only if, that other is its subsidiary.

The doctrine of corporate veil piercing is not as such given in the Companies Act of Tanzania but could be inferred from number of provisions. This means that there are circumstances in which the corporate veil may be lifted and the shareholders or directors or any other officer be liable for the obligations of the company⁹²³. The circumstances may:

Reduction of members below the minimum. According to the CA at any time the number of members of a company is reduced below two, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and knows that it is carrying on business with fewer than two members, shall be liable (jointly and severally with the company) for the payment of the whole debts of the company contracted during that time.⁹²⁴

⁹²² Companies Act, s 487(4)

⁹²³ Zervos, N., Ndyetabura, J., Mramba, C., Gasper, G., Mayeye, H. Establishing Business in Tanzania, 2019, p.1

⁹²⁴ Companies Act, s 26

Increasing the number of members of the company beyond the registered number. It is stated in the CA of Tanzania that where an unlimited company or a company limited by guarantee has increased the number of its members beyond the registered number, it shall, within fourteen days after the increase was resolved on or took place, give to the Registrar notice of the increase, and the Registrar shall record the increase and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.⁹²⁵

Failure to send copies of memorandum and articles to members. In this context the liability is extended either to the company or officer⁹²⁶ responsible. The CA provides explicitly that a company shall, on being so required by any member, send to him a copy of the memorandum and of the articles, if any, and a copy of any Act or Ordinance which alters the memorandum, subject to payment, in the case of a copy of the memorandum and of the articles of such fee as the Minister may prescribe in regulations, and in the case of a copy of an Act, of such sum not exceeding the published price thereof.⁹²⁷ It is further stated that if a company makes default in complying with this section, the company and every officer of the company who is in default shall be liable for each offence to a fine.⁹²⁸

Improper use of limited or public limited company. The CA states that If any person trades or carries on any business or profession under a name or title of which

⁹²⁵ Companies Act, s 10-(3)

⁹²⁶ Companies Act, s 22-(1)

⁹²⁷ Companies Act, s 22-(1)

⁹²⁸ Companies Act, s 22-(2)

"limited", or any contractions or imitation of that word, is the last word, that person, unless duly incorporated with limited liability, is guilty of an offence.⁹²⁹

Civil liability for misstatements in offer document. For instance, the CA provides that subject to the provisions of this section, where an offer document invites persons to acquire shares in or debentures of a company, the persons responsible shall be liable to pay compensation to all persons who acquire any shares or debentures in reliance on the offer document for the loss or damage they may have sustained by reason of any untrue statement included therein.⁹³⁰

The criminal Liability for misstatement in the offer document. The CA provides that where an offer document issued after the commencement of liability for this Act includes any untrue statement, any person who authorized the misstatement issue of the offer document shall be liable on conviction to imprisonment, or a fine, or both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the offer document, believe that the statement was true.⁹³¹

It may be in the context of directors certificate of solvency- when any director of a company giving a certificate under this section without having reasonable grounds for his opinion shall be liable to imprisonment or to a fine or to both; and if the company is wound up in pursuance of a resolution passed within the period of twelve

⁹²⁹ Companies Act, s 34-(I)

⁹³⁰ Companies Act, s 50 (1)

⁹³¹ Companies Act, s 51 (1)

months after the giving of the certificate, but its debts are not paid or provided for in full within the period stated in the certificate, it shall be presumed unless the contrary is shown that the director did not have reasonable grounds for his opinion.⁹³²

Impersonation of shareholders-If any person falsely and deceitfully impersonates any owner of any share or interest in any company, or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner, he shall be guilty of an offence, and shall on conviction thereof be liable to imprisonment or to a fine or both.⁹³³

In the offences in connection with share warrants the Act stipulates that-if any person: (a) with intent to defraud, forges or alters, or offers, or disposes of, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon; or by means of any such forged or altered share warrant, coupon or document, demands or endeavours to obtain or receive any share or interest in any company under this Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon or document to be forged or altered, he shall be guilty of an offence and shall on conviction thereof be liable to imprisonment or to a fine or both.⁹³⁴

⁹³² Companies Act, s 70 (1)

⁹³³ Companies Act, s 86

⁹³⁴ Companies Act, s 87

Failure of company to register charges created by company- If a company fails for a period of forty-two days, or such extended period as the court may have ordered, to deliver to the Registrar for registration the particulars of any charge created by the company, or of the issue of debentures of a series requiring registration, then, unless the registration has been effected on the application of some other person, the company and every officer or other person who is a party to the default shall be liable to a default fine.⁹³⁵

Failure to endorse certificate of registration on debentures -If a person knowingly and willfully authorizes or permits the delivery of any debenture or certificate of debenture stock which under the provisions of this section is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be liable to a fine.⁹³⁶

Failure to inspect instruments creating charges-If inspection of the said copies or register is refused -any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, shall be liable to a fine and a further fine for every day during which the refusal continues, and the court may by order compel an immediate inspection of the copies or register.⁹³⁷

⁹³⁵ Companies Act, s 100(3)

⁹³⁶ Companies Act, s 103(2)

⁹³⁷ Companies Act, s 109(1)(2)

Lack of registered office of the company-a company shall, at all times have a registered office to which all communications and notices may be addressed but if default is made in complying with this section the company and every officer of the company who is in default shall be liable to default fine.⁹³⁸

Failure to publish the name by company and form of seal.⁹³⁹ Every company all paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in easily legible letters;... If a company does not paint or affix its name in manner directed by this section, the company and every officer of the company who is in default shall be liable to a fine and if a company does not keep its name painted or affixed in manner so directed, the company and every officer of the company who is in default shall be liable to a default fine.

Premature trading- As regards to the restrictions on commencement of the business the Act states that “if any public company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a default fine.”⁹⁴⁰

Failure to deliver annual returns-if a company fails to deliver an annual return in accordance with this chapter within twenty eight days of the return date, the company and every officer of the company who is in default shall be liable to a fine

⁹³⁸ Companies Act, s 110(1)(2)

⁹³⁹ Companies Act, s 112(1)

⁹⁴⁰ Companies Act, s 114(1)(2)

and, in the case of a continued failure to deliver an annual return, to a default fine. For the purpose of this subsection, the expression "officer" shall include any person in accordance with whose directions or instructions the directors of the company are accustomed to act.⁹⁴¹

Personal liability for company's-where person acts a person is personally responsible for all the relevant debts of a company if at any time -(a) in contravention of a disqualification order he is involved in the management of the company, or debts (b) as a person who is involved in the management of the company, he while acts or is willing to act on instructions given without the leave of the court by a person whom he knows at that time to be the subject of a disqualification order or to be an undischarged bankrupt.⁹⁴²

During winding up -In the event of a company being wound up, every present and Contributory past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories.⁹⁴³ However, contributories to the companies limited by guarantee- in the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.⁹⁴⁴

⁹⁴¹ Companies Act, s 128(3)

⁹⁴² Companies Act, s 198.-(1)

⁹⁴³ Companies Act, s 268.

⁹⁴⁴ Companies Act, s 270

Statutory declaration of solvency-Any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration, shall be liable to imprisonment or to a fine or to both; and if the company is wound up in pursuance of a resolution passed within the period of thirty days after the making of the declaration, but its debts are not paid or provided for in full within the period stated in the declaration, it shall be presumed until the contrary is shown that the director did not have reasonable ground for his opinion.⁹⁴⁵

Falsification of books-If any contributory of any company being wound up destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, he shall be guilty of an offence and be liable to imprisonment.⁹⁴⁶

Failure of the company to account for loss of company's property-If any person being a past or present officer of a company which is being wound up under the provisions of this Act, on being required by the official receiver at any time or in the course of his examination by the court under the provisions of section 325 to account for the loss of any substantial part of the company's property incurred within a period of one year next preceding the commencement of the winding up, fails to give a satisfactory

⁹⁴⁵ Companies Act, s 338(3)

⁹⁴⁶ Companies Act, s 379.

explanation of the manner in which such loss occurred, he shall be guilty of an offence and be liable on conviction to imprisonment.⁹⁴⁷

Failure to keep proper accounts of the company-If in the course of the winding up of a company it is shown that proper books of account were not kept by the company at any time during the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, whichever is the shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on the default was excusable, be liable on conviction to imprisonment or to a fine or to both.⁹⁴⁸

Fraudulent and wrongful trading-If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.⁹⁴⁹ On the other hand, wrongful trading the CA provides that subject to subsection (3), if in the course of the winding up of a company it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that person is to be liable to make such contribution to the company's assets as the court thinks just.⁹⁵⁰

⁹⁴⁷ Companies Act, s 380.-(1)

⁹⁴⁸ Companies Act, s 381.-(1)

⁹⁴⁹ Companies Act, s 383.-(2)

⁹⁵⁰ Companies Act, s 384.-(2)

Prosecution of delinquent officers and members of company-If it appears to the court in the course of a winding up by the court that any past or present officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, the court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator to refer the matter to the Attorney-General.⁹⁵¹

Corrupt inducement affecting appointment as liquidator- Any person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator shall be liable to a fine.⁹⁵²

Disqualification of body corporate for appointment as receiver-A body corporate shall not be qualified for appointment as receiver of the property of a company, and any body corporate which acts as such a receiver shall be liable to a fine.⁹⁵³

False statement-If any person in any return, report, certificate, accounts, or other Penalty for document, required by or for the purposes of any of the provisions of false statements. This Act, willfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of an offence, and shall be liable on conviction to imprisonment and to a fine.⁹⁵⁴

⁹⁵¹ Companies Act, s 386.-(1)

⁹⁵² Companies Act, s 388

⁹⁵³ Companies Act, s 406

⁹⁵⁴ Companies Act, s 472

Acting against a disqualification order of the court-The Act stipulates that if a director is a convicted of an offence regarding the management of the company in his capacity as a director and orders were issued to disqualify him as a director then he shall not enter into any obligation or arrangement on behalf of the company. If at all the director subject to disqualification enters into a liability on behalf of the company, then, such person (director) shall be personally liable for all relevant debts of the company⁹⁵⁵

4.4 Judicial Piercing of the Corporate Veil-Piercing in Tanzania

In Tanzania, the principle of piercing the corporate veil was first established in the case of *Yusuf Manji v Edward Masanja & Another, Civil Appeal No. 78 of [2002]*⁹⁵⁶. This was an appeal case⁹⁵⁷ from the decisions of the High Court of Tanzania at Dar es Salaam where the issue was whether the principle of lifting the veil of incorporation applies to managing director of the company. In answer to this issue the Court referred to the case of *Solomon v Salomon and Co. Ltd [1897] AC 22* where the Court of Appeal held the Managing Director that is, Salomon liable but the House of Lords reversed the decision holding that the companies being a legal person its numbers including Salomon were not liable for its debts. However in certain special and exceptional circumstances, the court may go beyond the purview

⁹⁵⁵ Companies Act, s 198(1)

⁹⁵⁶ *Yusufu Manji Appellant v Edward Masanja 1st Respondent Abdallah and Juma 2nd Respondent, Civil Appeal No. 78 Of 2002* (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) (Kyando, J.) dated the 8th day of February, 2002 in Misc. Civil Application No. 227 of 2002 accessed from www.saflii.org/tz/cases/TZCA/2005/5.pdf

⁹⁵⁷ *Civil Appeal No.78 Of 2002 Court of Appeal of Tanzania at Dar Es Salaam [Coram: Lubuva, J.A, Msoffe, J.A, and Kaji J,A Yusufu Manji .. Appellant Vs Edward Masanja... 1st Respondent Abdallah Juma.. 2nd Respondent*

of this principle by what was described in Salomon (Supra) lifting the veil. Based on Solomons case [supra] the Court of Appeal of Tanzania held that it would serve the best interests of justice to lift the corporate veil and hold the directors of the company liable where it is apparent that the directors were concealing assets of the company in their own names.⁹⁵⁸ This case shows that there are instances in which the corporate legal personality may be lifted by the court in case the directors or members of the company seek to avoid legal obligations or perpetrate improper conduct under the name of the company.⁹⁵⁹

The *second case* is of *Musa Shaibu Msangi v Sumry High Class Limited and Another*⁹⁶⁰. In this case the applicant sought for the order of arrest and detention as a civil prisoner, Mr Hamoud Mohammed Sumry a director of judgment debtor companies for his failure and neglect to pay the decretal sum, the applicant a decree holder for a period of one year had been trying, rather unsuccessfully to execute the decree against the judgment debtors, the respondents. The application was vehemently opposed by Mr. Sumry who argued that although he was one of the directors of judgment debtors companies, he was not in personal capacity, a party to the proceedings giving rise to the decree sought to be enforced against him. He further argued that since the company to which he is a director is a separate legal entity from him as a director, the decree in question cannot be executed against him. The respondent further submitted that the decree was not enforceable debtors had already instituted an appeal which was pending to the court of appeal. Based on these

⁹⁵⁸ Ibid 1

⁹⁵⁹ Ibid 1

⁹⁶⁰ *Musa Shairu Msangi v Sumry High Class Limited and Another* (High Court of Tanzania), Commercial Division, Songoro, J.(Miscellaneous Commercial Cause, no. 20 of 2012)

material facts the court framed two issues for determination: first whether the application was properly framed and secondly whether special circumstances existed to warrant the invocation of courts inherent power to lift the corporation veil and hold the directors or shareholders liable for company debtors.

*Held:*⁹⁶¹

First in terms of order XXI rules 9 and 10 of civil the decree holder who wants to execute a decree has to apply to the court indicating the mode of execution and the court is duty bound to facilitate the execution against the judgment debtors;

Second the mere fact that there is a pending appeal without order of execution does not bar the execution of a court decree;

Third since the decree was issued one year ago and until today it has not been honoured the court is highly persuaded that the respondent and directors are neglecting to pay the decretal sum;

Fourth the long standing principle of corporate personality as was held in *Solomon v Solomon* [supra] and reflected under section 15(1) and (2) of the Companies Act of Tanzania that a company has a legal personality separate and distinct from its shareholders or directors is not absolute and there are special circumstances where the court uses inherent powers to lift the veil of incorporation and hold directors of the company personally liable for the debts of the company;

⁹⁶¹ Ibid no.20 of 2012.

Firth since the companies act and transact their business through their directors and since Mr. Sumry is one of the directors of the judgment debtors companies which has not honoured the court decree for one year now the court cannot permit Mr Sumry to hide under corporate veil to evade his legal obligation as a director to pay to pay the decretal sum:

Third in the view of the neglect which has been demonstrated by the judgment debtors companies, their directors including Hamoud Mohammed Sumry the court apply and invokes its inherent powers vested under section 95 of the civil procedure code, cap 33[R.E. 2002] to lift the two veils of the respondents companies (Sumry High Class and Sumry Bus Services Limited) which covers the directors and hold Hamoud Mohammed Sumry who is the director of the two companies accountable and liable to pay the decretal sum.

The *third case* is that of *Hamoud Mohamed Sumry v Mussa Shaibu Msangi, Sumry High Class Ltd & Sumry Bus Services Ltd*⁹⁶² This application by notice of motion under Rule 11(2) (b), (c) and (d) of the Court of Appeal Rules seeks for stay of the decision of the High Court of Tanzania, Commercial Division, in which he ordered the applicant to pay the decretal amount the 1st respondent was granted in Commercial Case No. 20 of 2012. The decretal amount granted was TZS 179,

⁹⁶² In The Court of Appeal of Tanzania at Dar Es Salaam (Coram: Kimaro,L.A. (Luma, L.A., And Mziray,L.A.), Civil Application No. 257 of 2015 Hamoud Mohamed Sumry- Applicant Versus 1. Mussa Shaibu Msangi 2. Sumry High Class Ltd 3. Sumry Bus Services Ltd Respondents (Application for Stay of Execution of the Ruling of the High Court of Tanzania Commercial Division) (Songoro, J.) Dated 30th October, 2012, in Commercial Case No.20 Of 2012 Ruling Of The Court 24th February & 4th March, 2016 Kimaro, L.A.:

379,980/=. The decree holder started the execution process by attachment of the properties of the judgment debtors. He attached buses of the second and third respondents. He did not continue with that process to finality. He filed another application for arrest and detention of the applicant as a civil prisoner. The applicant contested the application. His point of contention is the distinction between a corporate personality and an individual person. After hearing the parties, the trial court lifted the corporate veil of the second and third respondents and ordered the applicant as a Managing Director of both respondents to individually pay to the 1st respondent the decretal sum. The applicant was granted thirty days within which to make the payment. The applicant was aggrieved by the order and he filed this application. The notice of motion is filed under Rule 11(2) (b), (c) and (d) (i) (ii) and (iii) and (e) of the Court of Appeal Rules 2009. The grounds given are: first the balance of convenience, common sense and hardship weighs in favour of the Applicant who was not a party to the suit all along the trial; second that if the order of the High Court is executed before the application for revision is yet to be determined it is likely to cause substantial and irreparable injury to the applicant; third the interest of justice in the circumstances of the case necessitates awaiting the results of the revision proceedings pending in this court; fourth the 1st respondent has filed an application for arrest and detention of the Applicant herein in execution of the decree in which the Applicant was not a party.

The court referred to the case of *Yusuphu Manji v Edward Masanja and Abdallah luma [2006] T.L.R 127 [supra]* the issue that was involved was that of execution. It was an execution by lifting the veil of incorporation and making the managing

director of the company personally responsible. The court held that:- having regard to the relationship of the company at the time with the appellant as the managing director, the alleged concealment of the assets of the company by the appellant which was not denied in the counter affidavit; this was a proper case in which the principle of lifting the veil of incorporation. “The circumstance under which the case of *Yusuph Manji* [supra] was determined is similar to the present application. As the applicant has not fulfilled all the requirements laid down under Rule ii (d), the application is bound to fail and it is hereby dismissed with costs.

The *fourth case* is that of *Yara Tanzania Limited versus Ada Africans Procurements Limited and Another*.⁹⁶³The material facts were as follows, the plaintiff, a limited liability entity incorporated under the laws of Tanzania instituted this suit on the 30.07.2015 against the defendants jointly and severally praying for the following reliefs: first a declaration that the defendants defrauded the plaintiff and thereby obtained fertilizers from the plaintiff unlawfully; second a declaration that the defendants are in breach of the very supply contract said to be obtained by fraudulent means; third an order to lift the 1st defendant's corporate veil as against the 2nd defendant and hold him responsible for the plaintiff losses; fourth an order for payment of TZS 211,200,000/= being the value of the said fraudulently obtained fertilizers; five interest at the commercial rate of 25% from the date when the debt became due to the date of judgment; six interest on the decretal sum from the date of judgment to the date of full settlement of the debt; seven General damages; eight

⁹⁶³In The High Court Of Tanzania (Commercial Division) At ... - E-Law Library Elaw. Locus attorneys.Co.Tz/File/841/Download?Token=F0uaej_Zyara Tanzania Limited. Plaintiff. Versus. Ada Africans Procurements Limited. Ibrahim Mutasa Kcb Bank (T) Ltd L Defendant

costs of this suit; and last any other reliefs that this honorable court shall deem just and equitable to grant

*Held:*⁹⁶⁴

First Under the Commercial Court Procedure Rules, when the Defendant is served through publication or otherwise and fails to file defense, the plaintiff may file an application for a default judgment in terms of Rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012;

Second conditions for the grant of default judgment are proof of service to the defendants by the plaintiff and failure to file defence by the defendants;

Third prudence has it that a default judgment must be issued without prejudice to the duty of the court to scrutinize the pleadings as well as the documents attached in ascertaining the veracity of the prayers before granting the same;

Fourth for the prayer to lift the corporate veil of a company to be granted, the plaintiff should disclose either that the Company is no longer a going concern or that it is unable to discharge its debts by reason of lack of funds or property.

Fifth a decree of the default judgment issued under the commercial Court procedure Rules cannot be executed unless the decree holder publishes in newspapers within a

⁹⁶⁴ Yara Tanzania Limited v Ada Africans Procurements Limited Elaw.Locus attorneys.Co.Tz/.../Yara-Tanzania-Limited-Versus-Ada-Africans-Procurements

period of ten days from the date of the default judgment in terms of Rule 22(2)(a) and (b) of the Rules.

The *last case* is that of *Hared Mallac Tanzania Limited v Junaco (T) Ltd; Commercial Case no 159 of [2014]; High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported)*.⁹⁶⁵ The issue was whether chief executive officer of a company can be arrested and imprisoned as a means to execute a decree. The material facts were as follows: this applicant *Harel Mallac Tanzania Limited*⁹⁶⁶ (hereinafter-the decree holder) obtained a decree against the respondent *Junaco limited* for payment of TZS 2,476,406,485.00. To date, about six (6) months after the decree was passed it had not been satisfied. The decree holder is now seeking to executed it and the mode of execution sought is by arrest and detention as a civil prisoner of the Judgment debtor's Managing Director Mr. Justin Lambert. The Application is strongly resisted by Mr. Justine Lambert on the ground that he is not 'a judgment debtor because he (as a person) was not a party to Commercial Case No. 159 of 2004 from which this decree emanates.

*Held:*⁹⁶⁷

First the general rule is that an officer of a company cannot be imprisoned in execution of a decree against the company until and unless the corporate veil is lifted. The purpose of lifting a corporate veil is to allow the court to see inside the

⁹⁶⁵[Hared Mallac Tanzania Limited versus Junaco \(T\) Ltd | E-LAW website elaw.locusattorneys.co.tz/content/hared-mallac-tanzania-limited-versus-junaco-t-ltd](http://elaw.locusattorneys.co.tz/content/hared-mallac-tanzania-limited-versus-junaco-t-ltd)

⁹⁶⁶At Dar-es-salaam. commercial case no. 159 of 2014 harel mallac...elaw.locusattorneys.co.tz/file/843/download?token=Ch37sz-s

⁹⁶⁷[Hared Mallac Tanzania Limited versus Junaco \(T\) Ltd | E-LAW website elaw.locusattorneys.co.tz/content/hared-mallac-tanzania-limited-versus-junaco-t-ltd](http://elaw.locusattorneys.co.tz/content/hared-mallac-tanzania-limited-versus-junaco-t-ltd)

company and determine who actually transact for the company and who is responsible for the transaction and acts which results into a decree against the company and who is legally liable to satisfy the decree in execution. (Cited *Transport Equipment Limited and Another v Devram Valambia; Civil Appeal No. 44 of 1994 (CA) (Unreported)*).

Second in special circumstances the court may go beyond the principles set in the case of *Solomon v Solomon Co. Ltd (1897) AC 22* and deal with the officers of the company directly. (Cited *Yusuf Manji v Edward Masanja and Another; Civil Appeal No 78 of 2002 (CA –Unreported)*).

Third Execution of a decree by way of arrest and imprisoning as a civil prisoner of chief executive officer of a company can be granted if there is evidence that the company does not own attachable property or that it is insolvent and it does not have sufficient amount in its bank accounts to satisfy the decree against it.

4.5 Conclusion

The chapter dealt with piercing of corporate veil in the context of group companies in Tanzania. It started by providing the laws for piercing of the corporate in Tanzania. It was disclosed just piercing of corporate veil is act that requires justice to be done to either party. In so doing piercing of corporate veil cannot be done contrary to the constitution implying that for justice to be seen done it must be a judicial activity as per article 107(A) of the CURT. Apart from that the meaning of Group Companies was provided as per CA of Tanzania including the provisions on

holding and subsidiary relationship. It was further observed that the Company Act mentions several times about Group Company as well as the circumstances under the court may pierce the corporate veil. Nonetheless, the concept of piercing the corporate veil is silent in the Act. This situation leads to uncertainties and inconsistencies for courts when piercing the corporate veil. This was observed in the cases (supra) where judges used mostly the cases elsewhere than the CA of Tanzania in order to pierce the corporate veil.

Importantly, the chapter has provided the land mark case related to piercing of corporate veil in Tanzania (the case of *Yusuf Manji v Edward Masanja & another, Civil Appeal No. 78 of [2002]* where all other cases of the same sort were referred to by the courts. It was disclosed that in Tanzania, piercing of corporate veil has remained to be one the overarching problem despite the doctrine being one the most discussed issue in the corporate law. There is lack of uniform approach to guide the overall process of the lifting the corporate law. Piercing of the corporate veil remains to be one of the neglected area by Tanzania legal authorities has neglected it. The laws responsible for lifting the corporate are silent on the issue. There is no uniformity as to what is being done in the courts for instance; the CA of Tanzania does not even mention the word lifting the corporate veil. The issue becomes worse when it comes to the lifting of the corporate veil of the Group Companies. It is clear that the law and even judicial cases presented indicated that piercing of corporate veil is still a myth in Tanzania. This is because there are numerous multinational corporations in the country operating their business in parent-subsidiary relationship perpetuating illicit behaviours, which are detrimental to the economy. Nevertheless,

the legal authorities in Tanzania have been hesitant if not relying on unsubstantiated and unwarranted argument when it comes to the issue of piecing their corporate veil piercing of such multinational corporations. This may be observed in the recent scandal of the so called “Makinikia” between Acacia and the government of Tanzania where all measures taken seemed not to benefit either side. Generally, there is no substantive nor procedural laws which explicitly and categorically provide procedures on how to pierce the corporate veil in group context in Tanzania. Thus, based on the analysis of this chapter and judicial cases presented results reveal that the Companies Act of Tanzania is inadequate in piercing of the corporate veil of the group companies.

CHAPTER FIVE
KEY FINDINGS ON CORPORATE VEIL PIERCING LEGAL FRAMEWOK
IN TANZANIA

5.1 Introduction

This chapter presents critical legal analysis of the findings on piercing of corporate veil framework in Tanzania. This chapter functions as the base of crafting piercing of the corporate veil to suit the local contexts in Tanzania.

5.2 A Critical Analysis

The critical legal analysis of corporate veil piercing legal framework in Tanzania shows that the CA of Tanzania is inadequate on piercing of corporate veil in the context of group companies despite the limited circumstances provided for corporations to establish parent subsidiary relationship. The CA of Tanzania has been lagging behind due to the following reasons.

First, the doctrine of corporate veil piercing is silent in the CA. In other words, piercing of the corporate veil is not explicitly mentioned in the Act. This situation perpetuates misinterpretation of term, which may render judgments fatal when judges are confronted with issues related to piercing of corporate veil. The absence of doctrine in the Act culminates different legal perceptives, which may be detrimental to corporate law. Hence, the absence of the doctrine in the Act may be considered as a serious omission, which creates challenges related to the meaning and interpretation in the application of the law. Beside the doctrine being silent in the

CA of Tanzania the doctrine of corporate veil piercing remains to be one of the most litigated and recognized concept of corporate law.⁹⁶⁸ Yet, from a doctrinal point of view, the concept is underdeveloped and exceedingly murky in Tanzania.⁹⁶⁹ This implies that piercing the corporate veil is the subject that raises many questions both at national and international level, both from academic point of view and from point of view of legal practice.⁹⁷⁰ It needs not to be neglected just as a normal concept in the corporate law.

Second there is a big discrepancy on the notion of group companies as provided in the Act. According to the CA the word group means parent or holding company and its subsidiary but the subsequent provisions therein do not define clearly how to pierce the corporate veil of such group in order to establish a single economic activity in case the plaintiff is praying corporate veil piercing for group context. Such discrepancies create misinterpretation when Group Company engages into malpractices and it becomes a challenge to judges when confronted with cases that require disregarding of the corporate veil. The Act is does not explicitly stipulate how to pierce the corporate veil of such group companies in case of defaults. For instance, the case of *Yara Tanzania Limited v Ada Africans Procurements Limited and Another; Commercial Case No 88 of [2015]: High Court of Tanzania (Commercial Division) at Dar es Salaam (Unreported)* where the court held that “For the prayer to lift the corporate veil of a company to be granted, the plaintiff should

⁹⁶⁸ Singhof, B. "Equity Holders' Liability for Limited Liabilities Companies' Unrecoverable Debts-Reflections on Piercing the Corporate Veil under German Law." *Loy. LA Int'l & Comp. L. Rev.* 22 (1999): 143.

⁹⁶⁹ *Ibid* 143

⁹⁷⁰ Vandekerckhove, K. Piercing the Corporate Veil. *Eur. Company L.*, 2007, 4, 191.

disclose either that the Company is no longer a going concern or that it is unable to discharge its debts by reason of lack of funds or property.” This shows that besides that the doctrine of piercing the corporate veil has long been a debated phenomenon globally and remains to be unprincipled and clarity in Tanzania.⁹⁷¹ Such situation contributes to inconsistencies in the application of the doctrine in Tanzania.

Third there is lack of clarity on what has been established as the circumstances under which the corporate veil is pierced as provided under numerous sections in the Act. The law does not distinguish if type of company to in which the law is to be disregarded. The loopholes are observed more to companies with parent-subsiary relationship. This context contributes to lack of standardized approach to be relied upon by judges when uplifting the corporate veil of the group companies. This situation has forced courts to appeal to different authorities apart from the Act. Lack of well established approach over the principle has grown to the extent of judges referring to other jurisdictions in order to uplift the corporate veil piercing of group companies. For instance, in the case of *Zebedayo Mkodya v Best Microfinance Ltd and others*, Songoro J stated that “...in special circumstances, shareholders and directors may be sued with their company and the circumstances permits lift of the corporate veil.”⁹⁷² There are numerous questions, which can be raised in this case; few of them are what are these special circumstances in which the judge is trying to referring? Why did the judge set aside the CA of Tanzania and appealed to authorities outside the main legislation? Such questions show that there is a mischief

⁹⁷¹ Glazer, S. R. Piercing the Corporate Veil of the Close Corporation with the Tax Administration Act (Doctoral dissertation, University of KwaZulu-Natal, Durban). 2015,p.45

⁹⁷² High Court, Commercial Case no. 95, 2016

to be addressed as the current study is trying to endeavor in. Despite the such lacuna in law the fact remains that in order to reach out to the shareholders and make the shareholders liable, one needs to pierce the veil of incorporation⁹⁷³; but in order for one to be successful in piercing the corporate veil, one must show the following two prongs: that there is such unity of ownership and interest in the firm that the separate personalities of the corporation and shareholder no longer exist; and that the court's refusal to allow piercing would promote an injustice or sanction a fraud.⁹⁷⁴ Such prongs require the presence of Act, which explicitly standardized means in which plaintiffs as well as judges could rely on order to be in a good position to disregard the corporate veil of the group companies.

Fourth the analysis of the legal framework shows that the CA of Tanzania is unfit to meet the contemporary challenges of piercing corporate veil of group companies. The composition of the current law in piercing of corporate veil in the context of Group Company in Tanzania is still imprecise and inconsistent. The Act cannot match with the new approaches being observed by multinational companies in profit maximization, which is done in shrewd manner including transfer pricing related tax avoidance. There have been numerous illicit behaviours from multinational corporations conducting business in parent-subsiary relationship to the extent of attracting piercing of the corporate veil as per the recent conflict *between Acacia Gold Mining v the United Republic of Tanzania*. However, the challenge remains on the main legislation, which does not match with illicit behaviors' of the multinational companies operating in a group context. Such constraints culminates improper

⁹⁷³ FB Attorneys, Piercing the Corporate Veil, 2017, p.1

⁹⁷⁴ Ibid 1

application of the Act related corporate veil cases leading to continuation of numerous malpractices of corporations being delayed and some judgments rendered vague in the courts of law like the *BAE saga*, *EPA scandal* and the *Richmond case*.⁹⁷⁵ The difficulties of using the Act may also be seen in the instances reported on cheating/fraud against the *Indian Companies by Tanzania Companies* in the field of cashew nuts.⁹⁷⁶ Such issues related to companies operating dishonestly in Tanzania add risks to the nation because of inadequacies of the CA to regulate the prevailing malpractices.

Firth inadequacies of the law have also been triggered the drastic increase of disputes between the multinational corporations and the Government of Tanzania (GoT) as per the disputes in the mining sectors. The loopholes in the CA of Tanzania open the room to sham corporations working in the context of Group Company. Recently, it has been reported that the corporations working in the mining sector in Tanzania are currently at stiff disputes with GoT numerous challenges. Some corporations have decided to declare dispute with the government when they find their interests of accumulating wealth in a shrewd manner can easily be done due to lack of strong provisions in the CA to regulate their operations. For instance, Canadian-based company namely Montero Mining and Exploration is currently in dispute with the government over a repossessed retention mining license that being so the company has delivered a notice of intent to submit a claim to Arbitration to the Attorney General of Tanzania in accordance with the 2013 Agreement for the Promotion and

⁹⁷⁵ United Republic of Tanzania, Current affairs in Tanzania, retrieved from <https://www.tzaffairs.org/2011>.

⁹⁷⁶ APEDA, Cheating-Fraud, Retrieved from apeda.gov.in/aped_website/Announcements/Cheating-Fraud.pdf, June 5, 2015

Reciprocal Protection of Investments in the Bilateral Investment Treaty (BIT) between Canada and Tanzania.⁹⁷⁷

Sixth the inadequacies of the law has been perpetuated by the so-called lack well established principles to rely upon by the judges when it comes to lifting of corporate veil in the context of the group companies. This situation has created a lacuna in law perpetuated by uncertainties, inconsistencies, impreciseness, and unsubstantiated, unwarranted and unfounded claims in piercing of the corporate veil in the context of the group companies in Tanzania. This is probably caused by the mode in which the current law came into force as per Richmond Scandal. It evolved abruptly as a way of trying to fill the gap of multinational companies, which were flocking into the country due to liberalization measures. Though the law had three years before coming into force, its enactment is questionable as it was done haphazardly because of the shift from protectionism and state planned economy towards liberalization. The enactment of the CA was just a matter of copying and pasting from other jurisdictions like India and UK which have a great influence to the laws of Tanzania. Apart from that, most of the issues contained in the Companies Act can be said to have been copied from the repealed ordinances.⁹⁷⁸ So the Act contains issues which have been crafted elsewhere but they are being implemented in Tanzania. This situation resulted into crafting the Companies Act inadequate to meet the local

⁹⁷⁷All Africa, Tanzania: Third Miner Declares Dispute with Tanzania Government <https://allafrica.com/stories/202001190140.html>

⁹⁷⁸ According to section 2 of the CA of Tanzania of 2002, the repealed ordinances means the Indian Companies Act, 1882 as applied in Tanzania.

contexts surrounded by mushrooming of the multinational corporations operating through parent-subsidary relationship.

Seventh the inadequacies of the CA piercing the corporate veil of multinational companies in group context poses difficulties to the cases, which are sent to international arbitration. This is due to the fact that piercing the corporate veil of multinational corporations working in group context has not been easy task as it demands international arbitration as in the case of *Standard Chartered Bank v United Republic of Tanzania, (ICSID Case No.ARD/10/12)*⁹⁷⁹, whereby claims arising out of the outstanding invoices under a loan agreement concluded claimants subsidiary and a company that had contracted with State owned enterprises for the construction and operation of an electricity generating facility, followed by the government control over the power plant and the refusal by Tanzania courts to enforce a LCIA award in favour of the investor. However, the tribunal dismissed the case with lack of jurisdiction and each party to bear its own costs.

Eight the inadequacies of the law have made courts to be reluctantly if not uncertain when it comes to piercing corporate veil of group companies, probably due to lack of solid rules for blurring the shield between the parent and the subsidiary as per the case of *Barick Gold Mining-Tanzania and its subsidiary Acacia and the Meremeta Company Case*.⁹⁸⁰ It is not known exactly as to what should be the standard measure for piercing such group companies. Such situation raises several legal issues as

⁹⁷⁹ Italaw, *Standard Chartered Bank v The United Republic of Tanzania*, Award, 2015

⁹⁸⁰ United Republic of Tanzania, *Current Affairs in Tanzania*, retrieved from <https://www.tzaffairs.org/2011>.

regards to the practices of piercing corporate veil of group companies while leaving some other related matters unattained. Up to now, it is not known as to what should be done differently to unravel the malpractices of group companies in Tanzania due to the loopholes contained in the CA.

Ninth the inadequacy of the CA has lagged behind in piercing of corporate veil of group companies intensifying loss of revenue caused by multinational companies operating in parent-subsidiary relationship as per the *Acacia Gold Mining in v the United Republic of Tanzania (unreported)*. This situation is likely to hamper the economy of Tanzania as most of group companies operate in shrewd way including diverging tax as well as primitive accumulation of capital for the purpose of profit maximization. Such situation occurs due to malpractices of the directors or members of the company by seeking to avoid legal obligations or perpetrate improper conduct under the name of the company.⁹⁸¹ For example, International companies extract gas, coal or rare earth minerals on a large scale in Tanzania, but they pay very little in taxes; in doing so, they rely on subsidiaries in one of the world's many tax havens.⁹⁸² Revelations by the International Consortium of Investigative Journalists (ICIJ) show that companies in Africa use internationally proven methods of tax avoidance whereby many of the profits made in Africa are officially hidden away in offshore tax havens, where companies only exist on paper.⁹⁸³ It should be known that tax

⁹⁸¹ Breakthrough Attorneys, Company Law Update: Responsibilities and Liabilities of Directors of a Company in Tanzania.

⁹⁸² Sullivan, A. Offshore: the legal and the not so legal, 2017. <https://www.dw.com/en/offshore-the-legal-and-the-not-so-legal/a-41257375>

⁹⁸³ Sullivan, A. Offshore: the legal and the not so legal, 2017. <https://www.dw.com/en/offshore-the-legal-and-the-not-so-legal/a-41257375>

avoidance is one of the biggest economic issues of our time. According to International Monetary Fund (IMF), developing countries including Tanzania currently lose \$ 100- \$ 300 billion of tax revenue through tax avoidance while one among many reasons for such a problem is inefficient taxation of extractive activities and the inability to fight abuses of transfer pricing by multinational enterprises.⁹⁸⁴

Hence, the risk under which the current study is trying to address evolves mostly from the loss of revenue which is currently being experienced in the due illicit behaviour of group companies operating dishonestly. Hence, Tanzania seems to benefit less with the presence of the multinational corporations in the country operating in the group context. Such situation contradicts with article 27 of the constitution of Tanzania of 1977 which stipulates that every person has a duty to protect the natural resources of United Republic of Tanzania.⁹⁸⁵ The loss of revenue which is caused by companies operating in the group context also contradicts with section 4(1) of the Permanent Sovereignty Act of 2017 which stipulates that the people of United Republic of Tanzania shall have a permanent sovereignty over all natural wealth and resources.⁹⁸⁶

Tenth the inadequacies of the CA of Tanzania has forced courts to opt for traditional common law judgments to in piercing the corporate veil of group companies. For instance in the case of of *Yusuf Manji v Edward Masanja & Another, Civil Appeal*

⁹⁸⁴ Ngaillo, N. Tax Avoidance and the Extractive Industries, 2016, p.1

⁹⁸⁵ HakiRasilimali, The Downfall of Acacia Mining Plc in Tanzania: Will Tanzania Get a Better Deal? 2019.

⁹⁸⁶ Ibid

*No. 78 of 2002*⁹⁸⁷ where the court used the traditional common law judgment to arrive at the dislodging the corporate veil. Thus, the Court of Appeal held⁹⁸⁸ that it would serve the best interests of justice to lift the corporate veil and hold the directors of the company liable where it is apparent that the directors were concealing assets of the company in their own names. Such situation occurs when owners fail to take the appropriate steps to maintain the corporations as a separate entity run the risk of having the corporate veil pierced and being held personally liable for any corporate transgressions.⁹⁸⁹

Moreover, the inadequacies of law in piercing corporate veil in group context have made courts in Tanzania not to use the provisions of the CA of Tanzania. For example, the High Court of Tanzania⁹⁹⁰ in the case of *Musa Shaibu Msangi v Sumry High Class Limited and Another [2016] TLS LR 430* did not make reference to the Companies Act. In this case⁹⁹¹ court stated that directors can be held personally liable for the debts of their companies (even when no suggestion of a guarantee by a director exists). Thus, the problem of corporate veil piercing in Tanzania has been growing rapidly due to inadequacies contained in the Companies Act in dealing with the contemporary challenges associated with mushrooming of multinational companies operating their business in group context.

⁹⁸⁷ Breakthrough Attorneys, Company Law Update: Responsibilities and Liabilities of Directors of a Company in Tanzania.

⁹⁸⁸ Ibid

⁹⁸⁹ Zatezalo, Z. Piercing the Corporate veil: Factors to Follow to Avoid Personal Liability, 2018, p.1

⁹⁹⁰ Velma Law, Director liability for corporate debts (“lifting the corporate veil”), 2017, p.1

⁹⁹¹ Velma Law, Director liability for corporate debts (“lifting the corporate veil”), 2017, p.1

Furthermore, in piercing the corporate veil courts have been applying and invoking the inherent powers of the courts as provided under section 95 of the civil procedure code Cap33 (R.E 2002). This situation has made the overall exercise piercing the corporate veil by courts to be a confused and difficult exercise. Lack of standard measure remains to be a problem though piercing of corporate veil though it is still the most litigated issue the corporate law of Tanzania. This may be observed in the case of *Musa Shaibu Msangi v Sumry High Class Limited and Sumry High Class Limited* and whereby Songoro J stated The long standing principle of corporate personality as was held in *Solomon v Solomon* [supra] and reflected under section 15(1) and (2) of the Companies Act of Tanzania that a company has a legal personality separate and distinct from its shareholders or directors is not absolute and there are special circumstances where the court uses inherent powers to lift the veil of incorporation and hold directors of the company personally liable for the debts of the company;

5.3 Conclusion

The analysis of the legal framework of piercing corporate veil in group context has disclosed serious omissions and inadequacies concerning the CA of Tanzania. The CA of Tanzania remains to be the sole law that to regulates the management company in the country. Such situation adds disputes especially commercial disputes between group companies and the government of Tanzania. The CA has portrayed clearly that some provisions are unworkable despite being well construed in the Act. This situation is accompanied by lack of clarity as some provisions contradict each other. The circumstances of piercing the corporate veil as provided in the Act are too

general. It is difficult to discern under the current Act how group companies are supposed to be disregarded in case there are defaults. There is increasing of cases being filed in courts as well as international arbitration due to omissions in the Act. Such discrepancies of the CA are likely to affect Tanzania in terms of revenue as most of the corporations operating in group context tend to operate dishonestly.

Moreover, the analysis of legal framework shows that most of factors for piercing corporate veil of group companies are those which have been used in other jurisdiction. They include factors like fraud, loss of revenue, failure to follow corporate facilities and agency where some of these factors are unfit to meet the current challenges linked to piercing of corporate veil in the context of group companies in Tanzania. Lack of standard measure provides remains to be a problem though piercing of corporate veil is still the most litigated issue the corporate law of Tanzania. The courts lack well established principles to rely upon when it comes to lifting of corporate veil in the context of the group companies.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

This chapter provides conclusions and recommendations.

6.2 Conclusion

The study did a critical legal analysis on corporate veil piercing in the context of group companies. The focus of the study was on the risk of failure of Tanzania legislative process to properly address the adequacy of CA in piercing of the corporate veil of the group companies in a manner suits the local contexts as well as international standards. This study used doctrinal legal research methodology to provide scrutiny over the letters of law concerning the problem under study. The following are the major insights of the study which are presented in chapter wise.

Chapter one dealt with the contextual framework of the study which showed that piercing of the corporate veil is so mammoth problem due to lack of standardized approach despite its long history in corporate law hence it justified the need of undertaking this study in Tanzanian context. The chapter begun in depth presentation of the background to problem in order to set the context of the study. Thereafter, the problem was stated showing the risk of having inadequate legislative structure in corporate veil piercing in group context. It further delineated the literature review related the problem under study where it was observed that despite the efforts taken by other scholars in writing about piercing of corporate veil there is a huge lacuna on the adequacy the companies Acts in moderating the overall process in a group

context. Hence, it was observed in this chapter that despite the long existence of the doctrine piercing of the corporate veil, it has created a lacuna in law perpetuated by uncertainties, inconsistencies, impreciseness, and unsubstantiated, unwarranted and unfounded claims which makes piercing of the corporate veil in the context of the group companies difficult to localize it in Tanzania courts. Hence, the current study intended to disentangle the problem.

Chapter two dealt with concepts, origins and theories related to corporate veil piercing. It presented an in-depth examination corporate personality by showing that the shareholders and the company are two different persons. It was shown that the shareholders are natural persons while the company is the artificial person. This distinction was affirmed in the Salomon principle, which views the company as a legal person distinct from the shareholders. More importantly, the chapter has shown that in case there are malpractices in the corporation shareholders are held responsible. However, such situation demands blurring of the insulation between the shareholders and the company. This shows that the corporate veil and corporate personality have close relationship. Thus, piercing the piercing the corporate veil would entail direct effect towards corporate personality due to the symbiotic relationship existing between the two concepts.

Moreover, this chapter analyzed the concept of veil piercing from various legal perspective. It was revealed that there is a great variation in understanding the concept by different jurists. The analysis showed that concept corporate veil is the most litigated doctrine in the corporate law yet it is lacks standard references when the

need arises. The concept was widened by unraveling various circumstances under which corporate veil could be lifted which included fraud as well as failure to adhere to the formalities of the establishment of the corporation. This review has shown that sometimes Solomons' principle which laid down the legal personality doctrine can bring undesired results perpetuated by unfair prejudices and fraudulent behaviours as well failure to follow corporate formalities. When such malpractice occurs in the corporation, the plaintiff may resort to piercing the corporate veil in order to hold the shareholders accountable for the purpose of protecting the creditors as well as those who have stake to the corporation.

As far as the origins and theories of piercing the corporate veil is concerned, the review showed a great contribution made by Powell when compared to other jurists in the history of corporate law, for instance, he is credited for formulating the doctrine of instrumentality. The overall analysis disclosed that the concept of piercing the corporate veil has been fundamental since time immemorial. However, despite being a long litigated doctrine in the in corporate law, there has not been the best theory to be applied when piercing the corporate veil. The analyses of its origin and the theories piercing the corporate veil therein have been applied depending in the context and the causal factors attributed to illicit behaviours, omission and acts of the respective corporation and shareholders. The findings have disclosed that in order to pierce the corporate veil of the group companies, there should be prior initiatives of establishing that parent and its subsidiary as a single economic entity.

Chapter three provided the international perceptive on corporate veil piercing. The chapter begun by providing an overview on corporate veil piercing at the

international level. The overview disclosed that most of multi-corporations operate their businesses beyond their national boundaries in form of parent-subsiary context. However, it was further observed the operations of these multinational corporations have been problematic in the way they exercise the parent-subsiary relationship in the host country. They have sometimes found to engage in illicit behaviours, which are detrimental to the economic growth of host country. Such situation demands the host country to use their domestic and international laws in order to pierce the corporate veil of such group companies. The use of both national and international laws has not been easy especially when it comes to the issue of piercing such international corporations. Nonetheless, piercing the corporate veil of such companies demands taking the parties to the international arbitration.

The first problem experienced is on the choice of the law to be used and the second one was whether to include the non-signatories. It was disclosed that in order to pierce the corporate veil of such multinational corporations, it is important to take into account the place of incorporation. It was observed that adjudication of corporate veil cases invokes the law of contract in litigating corporate veil-piercing issues at the international arbitration; the parties involved in litigation must adhere to the general principle of contract law namely privity to contract. That means that only parties to the agreement should be involved in the process of litigation.

However, this is a general principle; as there can be exception depending on the prevailing circumstances of the case. Hence, opting to the general principle at least simplifies the process of litigating as well as choice of the law to be used.

Nonetheless, the fact remains that piercing the corporate veil at the international arbitration is the matter of the agreement between the parties.

Moreover, the chapter reviewed corporate veil cases from different jurisdictions. Results disclosed there are great distinction perpetuated by uncertainties and inconsistencies in piercing of corporate veil between nations. Such divergence sometimes may go to the extreme cases as in the United States of America where there is also divergence between states. This situation is caused by lack of universal approach in disregarding corporate veil as a result it remains to be vague concept in the corporate law. Unlike the distinction disclosed, there are some points where the nations do converge in the process of piercing the corporate law.

For instance, the common approaches on the use of factors like single economic argument, the existence of fraud or façade cases, agency and enemy character as the grounds for piercing the corporate veil. The chapter further disclosed that there are the best practices and experiences that Tanzania can learn from other jurisdictions in corporate veil piercing of the group companies. They include taking the matter to international arbitration as well as establishing single economic argument when adjudicating matters relating to multinational corporations operating in the group context.

Chapter four dealt with legal framework for corporate veil piercing in Tanzania. The study revealed that in Tanzania, piercing of corporate veil particularly in the context of Group Company is still imprecise and inconsistent and sometimes lacking proper jurisdiction. This is due to the fact that the legal authorities in Tanzania are still

hesitant when it comes piercing of corporate veil in the context of group companies though the Act provides the circumstances for corporations to establish parent subsidiary relationship. Moreover, the concept of piercing corporate veil is silent in the Company Act. In other words, the concept is not explicitly mentioned in the Act.

Despite that the Company Act provides circumstances under which the courts in Tanzania use to lift the corporate veil if it is misused. For instance, Sections (2), (465), (466), (467) and (487) of the of the Company Act mention about the group companies as well as the contexts establishing parent and subsidiary relationship in Tanzania. The sections provide clearly what is to be a group company implying that if such circumstances are omitted or acted upon contrarily may open the room for lifting the corporate veil. Importantly, the courts in Tanzania have continued to rely on common law approaches due to lack of strong legislative authority in piercing of the corporate veil with parent-subsidiary relationship.

Furthermore, the study has disclosed that piercing of corporate veil in the context of group companies is still vague if not unknown at all leading to impreciseness and inconsistencies in the adjudication for such cases. The courts have continued to rely on factors like fraud, revenue, single economic argument, failure to follow corporate facilities and agency in piercing of corporate veil in Tanzania. Lack of universal approach as in other jurisdictions remains to be a critical problem though piercing of corporate veil is still the litigated issue the corporate law of Tanzania. The problem is extrapolated further when courts are faced with issues related to lifting of corporate veil in the group companies.

Chapter five dealt with the key findings on the corporate veil piercing framework in Tanzania. The critical analysis revealed that the Company Act of Tanzania mentions several times about Group Company and it provides the circumstances under the court may use to pierce the corporate veil of the Group Company. Nonetheless, the concept of piercing the corporate veil is silent in the Act. The Act only provides the circumstances under which corporate veil occur. This situation creates high risk due to uncertainties and inconsistencies of the courts when piercing the corporate veil of the group companies. This was observed in the cases (supra) where judges were forced to apply different legislations as well as referring to different cases when adjudicating matters related to corporate veil instead of using the CA of Tanzania. Importantly, the chapter has provided the land mark case related to piercing of corporate veil in Tanzania (the case of *Yusuf Manji v Edward Masanja & Another, Civil Appeal No. 78 of 2002*) where all other cases of the same sort were referred to by the courts. Generally the analysis reveals that the CA of Tanzania is inadequate in piercing the corporate veil of the Group Companies.

Piercing of the corporate veil is not explicitly mentioned in the Act. This situation perpetuates lack of standardized approach for courts to rely on when faced with issues related to piercing of corporate veil. Generally, the analysis of practices disclosed the common factors for piercing the corporate veil like fraud, revenue, single economic argument, failure to follow corporate facilities and agency have been linked to piercing of corporate veil in the context of group companies in Tanzania. Lack of standard measure provides remains to be a problem though piercing of corporate veil is still the most litigated issue the corporate law of

Tanzania. The courts lack well established principles to rely upon when it comes to lifting of corporate veil in the context of the group companies. This situation has created a lacuna in law perpetuated by uncertainties, inconsistencies, impreciseness, and unsubstantiated, unwarranted and unfounded claims in piercing of the corporate veil in the context of the group companies in Tanzania.

6.3 Recommendations

The study recommends that the Company Act of Tanzania should be amended to uncover the omissions in order to provide well précised and consistent approach in piercing of the corporate veil in the context of group companies. The act of piercing the corporate veil until now remains one of the most controversial issue in corporate law in Tanzania especially piercing the corporate veil in the group context, and it would continue to remain so, even for the years to come if drastic measures including amending company law are not taken into consideration.

Importantly, adjudication of corporate veil cases in group context should take into consideration the single economic entity and agency in issues related to group companies in order to establish a clear position of holding and subsidiary relationship as understood in the corporate law. However, it should be stressed that not every group company should be held as a single economic entity as doing so requires the level of dominance in parent and subsidiary companies. Piercing of corporate veil should adapt more liberal approach than relying on the common law which seems outdated in the current situation dominated by trade wars among the nations doing business through corporations with parent-subsidiary relationship.

Generally, all the statutes which deal with lifting of corporate veil should be amended to accommodate the current mushrooming of group companies in Tanzania. Therefore, the amendment of the company law of Tanzania should take into account the following aspect in corporate law.

Firstly, the law should be amended in order to incorporate the provisions on corporate veil piercing. As observed in previous chapter three the law is silent on the notion of lifting corporate veil. Neither the constitution nor the CA contains such important phrase in the corporate law.

Secondly, there is a need to provide clear definition of terms and phrases in the company law. For instance, group company, holding company, and subsidiary company.

Thirdly, there should be capacity building among the legal authorities in order to equip them with corporate veil piercing practices.

Fourthly, public education should be provided on lifting of the corporate veil in order to enhance awareness among the parties in the case. The plaintiffs should know that before holding the defendant responsible for the malpractices they need to start with corporate veil piercing.

6.4 Suggestions for Future Research

The study did a critical legal analysis of piercing the corporate veil in the context of group companies in Tanzania. Since the study used mainly doctrinal methodology supplemented by comparative, it was limited in terms of empirical studies and in one country namely Tanzania. Thus, it is recommended that a more comprehensive study

to be conducted in in East Africa for the purpose of comparative analysis using a larger sample as well as using the identified variables to establish grounds for piercing of corporate veil in the context of group companies.

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