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"PIERCING THE CORPORATE VEIL DOCTRINE IN POLAND?" A COMPARATIVE PERSPECTIVE

Abstract

This article explains the concept of piercing the corporate veil doctrine which is widely recognised in common law countries. Generally, 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. This dissertation focuses on differences between American and British attitudes towards the doctrine and analyses the grounds for the what is known as "judicial piercing" and "statutory piercing". Nevertheless, the main purpose of this paper is to answer the question of whether the piercing doctrine can be applied to the Polish legal system. Officially, it has never been recognised by Polish jurisprudence and courts. However, in-depth research on that issue can provide really surprising results. It seems that 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 article also touches on the problem of shareholders' tort liability under Polish law. Furthermore, the article sheds light on the new Polish Insolvency Act and its consequences for the concept of corporate liability as well as the "Amber Gold" case, one of the biggest financial scandals in Poland for many years.

Keywords

piercing doctrine – corporate governance – corporate veil – civil law – business organisations

I. INTRODUCTION

Taking advantage of the fact that the role of business and human rights has lately become more significant and a new binding treaty on business and human rights has been proposed, it is an appropriate time to analyse the issue of parent corporations' liability for their subsidiaries' misbehaviours.

Although the outline of the new treaty is rather hypothetical, the spirit of the global mindset on business and human rights can be drawn from the United Nations' Guiding Principle on Business and Human Rights¹

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¹ See generally: The UN Guiding Principles on Business and Human Rights, HR/

which implemented the United Nations' "Protect, Respect and Remedy" Framework. It was developed by the Special Representative of the Secretary General, John Ruggie, on the issue of human rights, transnational corporations, and other business enterprises. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 on June 16, 2011. The framework presented by Professor John Ruggie rests on differentiated but complementary responsibilities: (1) the State duty to protect against human rights abuses by third parties, including business, (2) the corporate responsibility to respect human rights, and (3) the need for more effective access to remedies². Intentionally or not, Professor Ruggie remarked on the problem of "piercing the corporate veil doctrine" stressing its international dimension and the need for the possible liability of the parent company for the wrongs committed by its subsidiary at the international level. In his paper, he identified that the parent corporation and its subsidiary continue to be construed as distinct legal entities. Consequently, the parent company is generally not liable for its subsidiary's action, even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent company that the law of agency can be applied. Therefore, each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates³.

Because of globalisation, international corporations, through their subsidiaries, can affect whole societies and even the welfare of whole States, sometimes influencing the compliance with human rights in particular areas i.e. employment. What can be taken from Prof. Ruggie's statement on parent corporation-subsidiary relationship is that the parent corporation could still be found liable for its subsidiary's wrongs if there was evidentiary support that the subsidiary was a "mere dummy" closely integrated with its parent.

On January 30, 2013 the District Court in The Hague rendered a judgment in the Royal Dutch Shell PLC (Shell PLC) case over the claim for damages caused to Nigerian farmers by oil spills in Nigeria between 2004 and 2007. The District Court in The Hague found the non-Dutch subsidiary, Shell Petroleum Development Company of Nigeria Ltd (Shell Nigeria), liable for damages caused abroad, particularly in Nigeria. The District Court assumed jurisdiction over the claim against Shell Nigeria for oil spills caused in Nigeria explaining that the cases had been heard

PUB/11/04.

² See J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Innovations*, Spring 2008, p. 191.

³ *Ibidem*, pp. 191-192.

by the Dutch district court as the claims were not only directed against Shell Nigeria, but also against the current British parent company of Shell, which has its headquarters in The Hague⁴. As lawyers have remarked, this precedent court decision was a milestone for the Dutch judiciary in corporate disputes⁵. Business and human rights overlap the doctrine of "piercing the corporate veil", well established by the common law judiciary, which allows the aggravated party to seek remedy not just against a corporation, but also against its shareholders, officers, directors etc.

The first part of this dissertation analyses the problem of the limited liability of the corporation and piercing the corporate veil doctrine in different common law countries, including the USA, the UK, Australia, Hong Kong, Singapore, and Malaysia. It will focus on differences and similarities between the approaches arising out of different legal cultures in common law countries. Furthermore, this paper will illustrate examples of "statutory piercing" throughout the world that have been enacted in the aforementioned jurisdictions. Notwithstanding, the dissertation will not be concerned with the problem of the reverse piercing doctrine as, though it is important, the application of the reverse piercing doctrine in common law countries does not play a significant role in corporate disputes. The subsequent part, as a central thesis, will analyse the Polish legal system and Polish provisions concerning the liability of shareholders or officers (particularly members of the management board) for wrongs committed caused by corporations. This analysis will make reference to the provisions of the Code of Commercial Partnerships and Companies, the Insolvency and Rehabilitation Act, as well as, the Protection of Consumers and Competition Act. The central purpose of this paper is to answer the question of whether the piercing of the corporate veil doctrine can be applied to the Polish legal system regarding current statutory measures. Though officially it has never existed or been recognised by jurists and courts in Poland, this research will try to shed light on the liability of board members and officers in Poland and answer the question of whether our Polish provisions on corporate liability are moving gently towards the piercing doctrine regarding the latest amendments passed by the legislature. The dissertation will also, through the problem of corporator's liability, analyse the Amber Gold case – one of the biggest financial scandals

⁴ Rechtbank Den Haag 30.01.2013, *Akpan and Vereniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd*, available at: www.rechtspraak.nl. 135 Rechtbank Den Haag 30.01.2013, no. 4.29 (NL).

⁵ A. Denny, *The Shell Nigeria cases – an important precedent for transnational claims*, available at: <http://www.allenoverly.com/publications/en-gb/Pages/The-Shell-Nigeria-cases-an-important-precedent-for-transnational-liability-claims.aspx> [last accessed on 31.01.2016].

in Poland for many years. This paper will omit the issues of the criminal liability of corporations and of agency law and will also not concern itself with types of business vehicles other than companies and corporations i.e. general partnerships, limited partnerships, or limited liability partnerships. Furthermore, it will not provide in-depth research into Polish Corporate Law and into the differences between a limited liability company and a joint stock company. For the purpose of this paper, it will use the terms: “corporations” or “companies” interchangeably. Additionally, so-called “insiders”: shareholders, directors, and officers will collectively be called “corporators” in the part devoted to the UK legal system, unless otherwise specified.

II. PIERCING OF CORPORATE VEIL AND LIMITED LIABILITY OF THE COMPANY

The separate corporate identity independent from shareholders and officers, stemming from a company’s registration, is the biggest advantage of a company. It protects shareholders and officers from liability for a company’s debts⁶ and, at the same time, encourages shareholders to take risky business decisions whilst investing their money. The milestone case *Salomon v. A Solomon & Co Ltd* (1887)⁷, cited by all jurists dealing with corporate law, established the standard of the separate legal personality. Once a company is registered in a manner required by law, it establishes for itself a new legal entity separate from managers and shareholders, even if it is a so-called “one-person company”⁸.

Nevertheless, each rule always has some exceptions. Sometimes, due to extenuating circumstances, a distinct corporate identity should be questioned. The court should then adjudicate, not on whether the company was validly formed, but on whether the separate legal personality should be ignored in the pursuit of justice. That means that the liability for a company’s debts should be extended to the shareholders and officers or, at least, to some of them under specific circumstances prescribed by law.

The thesis uses the names “company” and “corporation” interchangeably when describing the corporate veil doctrine; however, the term “company” should simply be associated with the UK and other common law systems,

⁶ R.W. Hamilton, J. Macey, D. Moll, *Cases and Materials on Corporations including Partnerships and Limited Liability Companies*, St. Paul, MN 2010, p. 208.

⁷ *Salomon v. A Solomon & Co Ltd* (1887) AC 22 (UK).

⁸ *Henry Browne Ltd v. Smith* [1964] 2 Lloyd’s Rep 476 (UK).

while the term "corporation" describes a type of business organisation under US law. Throughout the jurisdictions, various phrases for the "piercing the corporate veil" doctrine have been used, such as "lifting the corporate veil", "disregarding legal personality" as well as "challenging the corporate status". The term "piercing the corporate veil doctrine" was formulated by American jurisprudence whilst "lifting the corporate veil" should be properly affiliated with the UK legal system.

However, the discrepancy goes deeper as N. Grier states, "lifting is in effect the entire removal of the veil, whereas piercing suggests that the veil is still in place though not in all respects". Therefore, where the veil has been lifted, the company loses the privilege of having a separate legal personality in its entirety and the members or officers become responsible for the company's debts⁹. But if the veil had been only pierced, it means it would still have existed, but some of the shareholders or officers would have been liable only to some extent depending on circumstances.

Some jurists also put forward the concept of reverse piercing of the corporate veil. The reverse doctrine of the corporate veil sets forth that a debt due to the company should be paid to its shareholders, where the extenuating requirements provided by law are met¹⁰. Commentators stress that, in practice, the reverse piercing doctrine is less established¹¹ and the circumstances under which the doctrine exists are vague. However, it is fairly obvious that courts would likely pierce the corporate veil when justice demands it and there are also no exceptions to the reverse piercing doctrine¹².

The doctrine of the piercing of the corporate veil is widely recognised by American jurisprudence. Although among courts there is a common opinion on the piercing rule, some jurists note that there is still vagueness in the application of the rule. More often than not, courts, when trying a piercing case, mention the factors as follows: undercapitalisation, failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at a material time, siphoning of funds of the corporation by the dominant shareholder, assets stripping, absence of corporate records, the fact that the corporation is merely a *façade* for

⁹ N. Grier, *UK Company Law*, Chichester, New York 1998, p. 27.

¹⁰ *Ibidem*, p. 24.

¹¹ N.B. Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, *St. John's Law Review* 2011, no. 3, p. 1148; G.S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, *Journal of Corporation Law* 1990, vol. 16, pp. 36-37; *Cargill, Inc. v. Hedge* [1985] 375 N.W. 2d 477 (USA).

¹² See *State v. Easton*, 169 Misc. 2d 282,289,647 N.Y.S.2d 904 (Sup. Ct. Alnay Cnty. 1995) (USA).

the operations of the dominant shareholders. The decision to disregard corporate identity must involve a number of such factors and consider an element of injustice or fundamental unfairness¹³.

US courts constantly face the problem of vagueness in the scope of the piercing doctrine, when describing the doctrine and applying the doctrine to a case. Courts often use phrases or metaphors such as “*alter ego*”, “*sham*”¹⁴, “*façade*”, or “*fraud*”. For many years, jurists throughout the world have been looking for a legal basis for piercing the corporate veil. British jurists hold that in tort cases, where a shareholder of a corporation commits a tort in the course of business, the basis for shareholder liability should be general tort law or agency law¹⁵.

As noted by P. Blumberg, the doctrine “does not contribute to legal understanding because it is an intellectual construct, divorced from business realities”¹⁶. Courts are likely to disregard corporate identity when finding that the corporation is an “*alter ego*” but, at the same time, they are unlikely to invoke proper factors as grounds and reasoning for such decisions.

At the end of 1990, Professor Robert Thompson did research into the application of the veil piercing doctrine by US courts. The survey showed the following patterns. Firstly, the piercing of the corporate veil is entirely the domain of closely-held corporations and one-person corporations. Additionally, none of the closely-held corporations in which piercing occurred had more than nine shareholders¹⁷. Secondly, not all of the shareholders are personally liable for obligations of the corporation. Some of the shareholders will still be protected by the corporate shield of limited liability. Professor Thompson’s survey pointed out that shareholders who are only passive investors, as the shareholders of a large corporation, will still be exempt from liability, while those who take an active role in the business will be subject to liability. When a court finds that a separate legal entity would produce injustices and inequitable consequences, then it is entitled to pierce the corporate veil¹⁸.

Although among jurists there was an established common opinion that

¹³ See *DeWitt Truck Brokers v. W. Ray Flemming* [1976], 540 F.2d 681. (USA).

¹⁴ See V. von Wachter, *The Corporate Veil*, New Law Journal 2007, vol. 157, p. 990.

¹⁵ J. Shade, *Business Associations in a Nutshell*, St. Paul, MN 2010, p. 89.

¹⁶ See generally: P.L. Blumberg, *The Law of Corporate Groups: Procedural Law*, Boston/Toronto 1983, p. 8; F.H. Easterbrook, *Limited Liability and the Corporation*, The University of Chicago Law Review 1985, vol. 52, p. 89.

¹⁷ R.B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, Wake Forest Law Review 1997, vol. 32, pp. 9-10.

¹⁸ See *Farmers Feed & Seed, Inc. v. Magnum Enter, Inc.*, 344 N.W.2d 699, 701 (S.D. 1984) (USA).

courts are more likely to pierce the corporate veil in cases that involve tort claims rather than contract claims, Professor Thompson's survey proves otherwise. The conclusion of the research is that courts are less likely to pierce the veil in cases involving tort claims as opposed to those involving contractual claims¹⁹.

The UK legal system distinguishes two bases for lifting the corporate veil: the "judicial lifting veil" and the "statutory lifting veil". This tendency is rather typical of common law systems such as Malaysia, Singapore etc. except for the US, where "piercing the corporate veil" cases are the domain of the case law of each state. The "judicial lifting veil" is based on judicial decisions, judgments and case law in general, whereas the "statutory lifting veil" has its roots in statutes passed by legislature. The first outcome which arises at this point is that when looking to the origins of the "judicial lifting of the veil", we in truth are heading towards the sense of justice and equity. Conceivably, this is the main reason why judgments over the lifting of the veil are so imprecise. As commentators say, it is not possible to distil any single principle from the decided cases as to when the courts will "lift the veil", nor will any two commentaries categorise case law precisely in the same way²⁰.

Lately, the question has arisen of whether the piercing of corporate veil doctrine can be a sufficient basis for establishing the court's jurisdiction over a dispute arising out of a contract to which the defendant is not privy, assuming that the contract includes the jurisdiction clause and assuming that the plaintiff wants to extend the scope of the jurisdiction clause towards a defendant. Some jurists represent the point of view that the piercing the corporate veil doctrine suffices to circumvent the doctrine of privity of contract as a basis for establishing jurisdiction under Article 23 of Regulation Brussels I (an equal regulation is set forth in Article 25 of a new Regulation Brussels I bis)²¹; however, the English courts reached the conclusion that, using the doctrine of piercing the corporate veil to make a person who is not privy to a contract become bound by it in order to establish jurisdiction under art 23 of Regulation Brussels I, could not be recognised under English law²². In the aforementioned case, it

¹⁹ R.B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, Connecticut Journal of International Law 1999, vol. 13, pp. 384-385.

²⁰ S. Gouling, *Principles of Company Law*, London 1996, p. 49.

²¹ Ch.S.A. Okoli, *English Courts Address the Potential Convergence between Doctrines of the Corporate Veil, Party Autonomy in Jurisdiction Agreements and Privity of Contract*, Journal of Business Law 2014, p. 261.

²² See VTB Capital [2012] EWCA Civ 808: [2012] 2 Lloyd's Rep. 313 at [61],[73], [88]-[96] (UK); Alliance Bank JSC [2012] EWCA Civ 1588: [2013] 1 All E.R. (Comm) 819 at [32] (UK).

appears that the doctrine of contract privity would be the prevailing one.

Nevertheless, the most recent cases against Shell Nigeria and its parent company – based in the UK (Shell PLC) – commenced before a Dutch court in The Hague indicated that the piercing of the corporate veil doctrine can be a sufficient basis for establishing court jurisdiction over a dispute arising from torts that have been caused by a corporation's subsidiary on the other side of the world, although in the cases of Shell, the piercing doctrine was not invoked at all. It is easy to understand that the piercing the corporate veil doctrine can exist in many variations.

III. PIERCING THE CORPORATE VEIL DOCTRINE IN VARIOUS JURISDICTIONS

A. THE USA

The piercing of corporate veil doctrine is widely recognised by American courts; however, the scope of application of the doctrine varies from state to state. Firstly, it must be stressed that the disregard of corporate identity, the same as with cases involving internal matters of the company, is mostly regulated by state law²³. Each state has established its own rules on the piercing of the corporate veil doctrine and applies different measures when hearing piercing cases.

Currently, a unification of corporate law in the USA has been getting underway, regarding also shareholders' and officers' liability for a company's debts. Recently, many states have adopted statutes on corporate law that have been patterned upon the Delaware General Corporation Law (hereinafter referred to as "DGCL")²⁴ or the Model Business Corporation Act ("MBCA")²⁵. Nevertheless, they both set forth that shareholders are not liable for a corporation's debts (§ 102 (b) (6) of DGCL and § 6.22 of MBCA). Therefore, piercing doctrine in the USA still remains the domain of a state's case law.

American courts generally admit that when a separate legal personality which would produce injustices and inequitable consequences is found,

²³ Shade, *supra* note 15, p. 73.

²⁴ Available at: <http://delcode.delaware.gov/title8/c001/index.shtml> [last accessed: 26.03.2016]

²⁵ Available at: http://www.lexisnexis.com/documents/pdf/20080618091347_large.pdf [last accessed: 26.03.2016]

then the court is entitled to pierce the corporate veil²⁶. Mostly, piercing claims are based on the following grounds: (1) fraudulent representation by corporation directors; (2) undercapitalisation; (3) failure to observe corporate formalities; (4) absence of corporate records; (5) payment by the corporation of individual obligations; (6) use of the corporation to promote fraud, injustice, or illegalities (7) instrumentality or the "*alter ego*" doctrine including parent-subsidary cases or (8) "commingling"²⁷. Some other courts put forward other factors such as (1) the non-payment of dividends, (2) the insolvency of the debtor corporation at a material time, (3) the siphoning of funds of the corporations by the dominant shareholder, (4) the non-functioning of other officers or directors, or (5) the fact that the corporation is merely a *façade* for the operations of the dominant shareholder²⁸.

Although many states waived the statutory requirements for the minimum share capital of a corporation at the moment of registration, it seems that the problem of undercapitalisation is still an issue. As jurists point out, the capital put into the corporation by shareholders should be reasonably adequate for its prospective liabilities²⁹.

The *alter-ego* or instrumentality doctrine is mostly invoked when facing parent-subsidary relationships. To prevail in an *alter ego* claim a plaintiff must prove: (1) that a parent and a subsidiary operated as a single economic entity (2) that an overall element of injustice or unfairness existed, though fraud is not a necessary factor and (3) that the control or wrongful act caused injury or unjust loss. All the foregoing factors must be found together³⁰. A court would be likely to check then whether the corporation was solvent, had paid dividends, kept minutes of general meetings of shareholders, and observed other formalities. Sometimes courts use metaphors such as "mere instrumentality"³¹, "mere dummy".

The *alter ego* doctrine and parent-subsidary are often associated with "commingling". The reason why it happens is that sometimes the complete domination over the company manifests in "commingling" of assets or officers, where the assets of corporations or boards of directors overlap one another. J. Shade, as an example, cites the failure to keep separate bank

²⁶ See *Farmers Feed & Seed, Inc. v. Magnum Enter, Inc.*, 344 N.W.2d 699, 701 (S.D. 1984) (USA).

²⁷ See *Baatz v. Arrow Bar*, Supreme Court of South Dakota, 1990, 452 N.W.2d 138 (USA); Shade, supra note 16, pp. 96-99.

²⁸ See *DeWitt Truck Brokers v. W. Ray Flemming Fruit, Co.* 540 F.2d 681 (USA).

²⁹ Hamilton, Macey, Moll, supra note 6, p. 210.

³⁰ *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986) (USA); *Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990) (USA).

³¹ Hamilton, Macey, Moll, supra note 6, p. 237.

accounts for the corporation and for the controlling shareholder³². The court must then find a balance between the *alter ego* doctrine and limited liability of the corporation. Parents and subsidiaries frequently have overlapping boards of directors while maintaining separate business operations³³. The doctrine cannot be overused, otherwise that would jeopardise the whole concept of limited liability.

Facing that problem, the Texas legislature passed a statute regulating shareholders' liability, and doing so very similarly to the veil piercing rule. In accordance with the Texas Business Organizations Code, shareholders or affiliated corporations shall not be liable for a corporation's debts unless any of a contractual obligation arises out of fraud, or failure of the corporation to observe any corporate formality³⁴.

Although the piercing doctrine is closely affiliated with contract law or tort law, there are a number of cases where administrative liability was strictly attributed to the shareholders by piercing the corporate veil i.e. in cases involving liability for environmental pollution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)³⁵, where shareholders can be held liable when a parent corporation actively participates in the subsidiary's operation as an operator of a polluting facility owned or operated by its subsidiary.

B. THE UK

The UK legal system, as mentioned previously, distinguishes two bases for lifting the corporate veil, the "judicial veil-lifting" and the "statutory veil-lifting". UK Courts, when piercing the corporate veil, use synonyms to describe a company as follows: "fiction or myth", "sham", "façade"³⁶, "for fraudulent purpose", "cloak or sham", "device or stratagem" or "mask of solicitation"³⁷. The corporate veil would likely be pierced when "special circumstances exist indicating that the company is mere a *façade* concealing the true facts"³⁸. Some commentators invoke "the interest of justice" as a

³² Shade, *supra* note 15, p. 97.

³³ *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309,314 (Del.Super.Ct.1973) (USA).

³⁴ Texas Business Organizations Code sec. 21.223-21.225.

³⁵ Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. § 9601 (11); *US v. Bestfoods* 524 U.S. 51 (1998) (USA).

³⁶ *Adams v. Cape Industries plc* [1990] Ch 433 (UK); P. Davies, *Principles of Modern Company Law*, London 2007, p. 204.

³⁷ *Gilford Motor Co Ltd v. Horne* [1933] Ch 935 (UK); Goulding, *supra* note 21, p. 50.

³⁸ *Woolfson v. Strathclyde RDC* 1978 SLT 159 (UK); *Lonrho Ltd v. Shell Petroleum Co Ltd* [1980] 1 WLR 627 (UK); *Dimbleby & Sons Ltd v. NUJ* [1984] 1 WLR 427 (UK).

potential basis for lifting the corporate veil claiming, at the same time, that the concept is inherently vague³⁹.

According to the decisions of British courts, the corporate veil would be likely to be pierced if the court found (1) fraud and the use of equitable remedies, (2) a subsidiary operating as an agent or nominee of the parent company, or (3) abuse of the form of the corporate group in a particular case. By fraud, courts would probably understand the use of the registered company for fraudulent purposes or for evasion of contractual existing obligations⁴⁰. Concerning strictly contractual liability, it must be mentioned that the corporate veil would be pierced only when corporate forms were used to evade contractual limitations already imposed on the incorporator or to violate rights already possessed by an aggrieved party or third party⁴¹. It means that the veil would not be pierced if the corporate form was being used to evade such rights as a third party may acquire in the future⁴².

Some commentators point to an agency⁴³ or a trusteeship as grounds for corporate veil piercing. In the aforementioned situation, the principal would have been deemed to be an entity pulling the strings exclusively⁴⁴, just as the subsidiary would have been deemed to be a puppet, or simply a creature⁴⁵. However, without express agency agreements, this argument appears to be extremely difficult and unlikely to succeed⁴⁶. However, in the case *Petrodel Resources Ltd v. Prest*⁴⁷, the court applied a trusteeship concept although there had been no trust agreement between the parties before. It turns out that the court would apply the piercing doctrine only as a last resort, when no other less intrusive remedy left.

The modern attitude of British courts towards piercing cases borders on the view that each company even in a group of companies is a separate legal entity with its own rights and liabilities, even though they could be considered economically as one entity⁴⁸. That is completely justified as the UK legislature passed a law which allows disregard of the separate legal entity principle under certain, limited circumstances, establishing the

³⁹ Davies, *supra* note 36, p. 206; B. Pettet, *Company law*, Harlow 2005, p. 26.

⁴⁰ Goulding, *supra* note 20, p. 50.

⁴¹ *Gilford Motor Co Ltd v. Horne* [1933] Ch 935 (UK); *Jones v. Lipman* [1962] 1 WLR 832 (UK); Okoli, *supra* note 21, p. 252.

⁴² Goulding, *supra* note 20, p. 51.

⁴³ Davies, *supra* note 36.

⁴⁴ *Wallersteiner v. Moir* [1974] 1 WLR 1013 (UK).

⁴⁵ *Littlewoods Mail Order Stores Ltd v. IRC* [1969] 1 WLR 1241 (UK).

⁴⁶ Goulding, *supra* note 20, p. 54.

⁴⁷ *Petrodel Resources Ltd v. Prest* [2013] UKSC 34; [2013] 2 A.C. 415 (S.C.) (UK).

⁴⁸ *Albacruz v. Albazero The Albazero* [1977] AC 774 (UK); *Bank of Tokyo v. Karoon* [1987] AC 45 (UK); Davies, *supra* note 36, pp. 228-229.

grounds for the so-called “statutory lifting the veil” (i.e. s 213 Insolvency Act 1986).

This is a common feature of common law countries to establish statutory grounds for “lifting the corporate veil” although the judicial grounds floating from case law still exist and are binding. This tendency is widely manifested in countries like Australia⁴⁹, Malaysia and Singapore⁵⁰, or Hong-Kong⁵¹. In the USA, the piercing the corporate veil rule is still the domain of case law. On the contrary, in Germany, only the statutory law provides for a parent-company’s liability for its subsidiary’s losses and debts (Durchgriffshaftung) inside the holding structure (Konzernrecht)⁵².

In most statutory “lifting the veil” cases in the UK, provisions impose liability on directors, other officers, or so-called “outside directors” (i.e. shadow directors), people representing a company’s “direct mind and will” or simply pulling strings behind actions taken by the company⁵³. To simplify nomenclature, this dissertation will use the term “corporator” to describe both shareholders and directors as well as people not appointed as officers, but having great influence over managers and carrying on business⁵⁴. Under UK statutory law, the court would likely disregard the legal personality of the company if the following were found in cases: (1) reduction of members; (2) fraudulent trading; (3) wrongful trading; (4) insolvency of the Company; or (5) employer’s liability towards an employee under Trade Union and Labour Rights Act 1992.

Section 24 of the Companies Act 2006 requires at least two members of a company to continue business. If a company continues to do business without having at least two members for longer than six months, a person, who for the whole or any part of that period continues business after those six months, becomes jointly and severally liable with the company for the company’s debts. The person continuing business

⁴⁹ L. Gallagher, P. Ziegler, *Lifting the Corporate Veil in the Pursuit of Justice*, Journal of Business Law 1990, p. 294.

⁵⁰ B. Collier, *Common Law Principles Applicable to Lifting the Corporate Veil in Malaysia and Singapore*, Canterbury Law Review 1998-2000, vol. 7, p. 48.

⁵¹ T.K. Cheng, *The Lifting the Corporate veil Doctrine in Hong Kong: An Empirical, Comparative and Development Perspective*, Common Law World Review 2011, vol. 40, p. 207 et seq.; P. Kwan, *Hong Kong Corporate Law*, Hong Kong 2006, p. 88.

⁵² C. Altig, *Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View*, Tulsa Journal of Comparative and International Law 1995, vol. 2, no. 2, p. 220 et seq.

⁵³ Pettet, *supra* note 39, p. 28.

⁵⁴ See *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262 (UK); under s 251 of Companies Act 2006 “a shadow director is a person in accordance with whose instructions the directors of the company are accustomed to act” though he or she could be an outsider, not appointed as a director, officer or employee of the company.

must know about the fact that he or she is the only one member of the company⁵⁵. A similar solution exists in Singapore and Malaysia⁵⁶.

The Statute also removes the advantage of limited liability from the corporator when the court finds that the corporators have perpetrated fraudulent or wrongful trading. Fraudulent trading is mostly detected when directors or officers commit fraud and force the company into liquidation. It is simultaneously a civil tort and a criminal offence⁵⁷. The effectiveness of a claim based on fraudulent trading has been questioned over the years as a person who uses a company in such a way exposes himself to charges of the criminal offence of perpetrating fraud. Thus, the courts have been applying the same strict standards of proof in criminal proceedings whilst adjudicating civil liability cases against corporators⁵⁸. For its purpose, this dissertation concerns only civil liability under the Insolvency Act 1986.

In accordance with s 213 of the Insolvency Act 1986, if, in the course of winding up the company, it appears that any business of the company has been carried on with the intent of defrauding creditors of the company, or creditors of any other person, or for any fraudulent purpose, then the liquidator can apply to the court for a declaration that any persons who were knowingly parties in carrying on the business in this way will be liable to make such contributions to the company's assets as the court deems proper. When trying cases against corporators, courts have used synonyms as follows to describe fraudulent trading: "fraud", "fraudulent purpose", and "dishonesty"⁵⁹. The fraudulent trading provisions, as S. Goulding says, had been deemed to be ineffective compensatory remedy due to the strict standard of proof, the same as in criminal cases.

Consequently, the legislature adopted new provisions on wrongful trading, "which did not require dishonesty to be proven and which would apply in cases of not only fraudulent but also unreasonable trading"⁶⁰. Under s 214 of the Insolvency Act 1986, the court can make an order against a corporator when, at some time before the commencement of winding up, the corporator knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and that the corporator was a director or shadow

⁵⁵ Goulding, *supra* note 20, p. 59.

⁵⁶ Collier, *supra* note 50, p. 56.

⁵⁷ Davies, *supra* note 36, p. 215.

⁵⁸ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

⁵⁹ *Re Patrick & Lyon Ltd.* [1933] Ch 786 (UK); *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262 (UK); *Re Williams C Leitch Brothers Ltd* [1932] 2 Ch 71 (UK); *Re White and Osmond (Parkstone) Ltd* (1960) unreported (UK).

⁶⁰ Goulding, *supra* note 20, p. 63.

director of the company at the material time. A claim for wrongful trading can only be brought during winding up proceedings. In both fraudulent trading and wrongful trading cases, the court's discretion to declare the director's liability is large and therefore, the court can lower or enlarge the contribution from the director accordingly based on the nature of the facts of each case⁶¹. The liability for fraudulent trading or wrongful trading, that is similar to the aforementioned standards, is set out also in Malaysia and Singapore⁶². Corporators can avoid liability stemming from wrongful trading by proving that, after the time when they first knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into liquidation, they took every step with a view to minimising the potential loss to the company's creditors. For that purpose, the court would be likely to assess a director's activity and apply the test of a diligent person. By s 214 of the Insolvency Act, a director is supposed to act as a reasonably diligent person and shall be assessed on?: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as carried out by that director, and (b) the general knowledge, skill and experience that a director has. Therefore, a claimant does not have to prove dishonest intent or fraud caused by a director. It is to be noted that the persons potentially liable are the directors, shadow directors, and active investors, rather than the shareholders⁶³.

Except for the Insolvency Act, there are numerous statutory provisions which have the effect of "lifting the corporate veil" as regards directors, shadow directors or active investors⁶⁴. For example, the Companies Act 2006 regulates the parent-subsidiary company relationship for various purposes. Apart from the Companies Act 2006, Section 297 of the Trade Union and Labour Relations Act 1992 provides that two employers shall be treated as "associated" if operating in one corporate group where one is a company over which the other (directly or indirectly) has control or both are companies over which a third person (directly or indirectly) has control⁶⁵.

⁶¹ Goulding, *supra* note 20, p. 65.

⁶² A. Bidin, *Liabilities of Directors under Malaysian Insolvency Laws and Recovery of Assets During Corporate Insolvency*, *Journal Undang-Undang dan Masyarakat* 2004, vol. 8, pp. 1-18.

⁶³ Davies, *supra* note 36, p. 217.

⁶⁴ Goulding, *supra* note 20, p. 65.

⁶⁵ *Ibidem*, p. 68.

C. CONCLUSION

To encapsulate, American jurisprudence has developed over the years in the doctrine concerning piercing the corporate veil. It is still a case law domain; however, some states' efforts to enact the piercing doctrine indicate that a new tendency to replace case law by statutory law has arisen. Courts from state to state apply different measures when hearing piercing doctrine cases. Although the most numerous circumstances invoked by courts are: undercapitalisation, instrumentality (*alter ego*), single entity doctrine, and failure to observe corporate formalities. They are not sufficient to disregard the corporate personality if there is no fraud or negligence or if veil piercing causes inequity, injustice or is simply unfair. When piercing the corporate veil, US courts are inclined to keep their discretion and operate among metaphors such as "*façade*", "fraud", "sham"⁶⁶, "public convenience"⁶⁷, analysing the facts of each case individually. US theorists signal the problem of the piercing doctrine's vagueness.

It is not just an American tendency as the same problem is faced by courts in other common law countries when trying piercing claims. Exactly the same epithets are used by British jurists: "a fictional corporation", "sham", "*façade*"⁶⁸. That manifests only a need to formulate common guidelines on the application of the piercing doctrine for courts in order to ensure some degree of certainty in the law. British courts would prefer to reserve discretion to themselves to judge a case on its merits⁶⁹. Nevertheless, it seems that courts appear to be rather prone to disregard corporate form in cases with a parent–subsidiary background⁷⁰.

The UK legal system provides both a judicial and a statutory basis for piercing the corporate veil. The UK courts have indicated that the piercing of the corporate veil doctrine has limited scope and can only be applied when a person is evading existing legal obligations or duties, or if a person uses a separate legal personality to commit fraud.

Similar to the UK, Australia as well as Hong Kong, Malaysia, and Singapore have statutory bases for piercing claims that primarily concern the

⁶⁶ von Wachter, *supra* note 14, p. 990.

⁶⁷ J.H. Farrar et al (eds), *Farrar's Company Law*, London 1998, p. 78.

⁶⁸ C. Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, *Company Financial and Insolvency Law Review* 1999, vol. 3, p. 16.

⁶⁹ Mitchell, *supra* note 68, p. 15.

⁷⁰ Hamilton, Macey, Moll, *supra* note 6, p. 214.

directors' and officers' liability as distinct from the liability of shareholders. In Germany, the statutory law provides a parent-company's liability for its subsidiary's losses and debts inside holding structure.

IV. POLAND

A. POLISH LAW ON CORPORATE LIABILITY

This analysis will consider the provisions of the Code of Commercial Partnerships and Companies (CCPC)⁷¹, the Insolvency Act (IA) after significant amendments in 2015⁷², as well as the Consumers and Competition Protection Act (CCPA)⁷³. The central purpose of this paper is to answer the question of whether the piercing of the corporate veil doctrine can be introduced into the Polish legal system in regard to current statutory measures, though officially it has never existed and has never been recognised by jurists and courts in Poland.

Polish commentators hold that if a company is duly formed and registered, it has its own rights and duties, can sue and can be sued. It has its own legal identity and legal capacity, although it is an "artificial" person⁷⁴. Polish law divides companies into two groups: joint stock companies and limited liability companies. For the purposes, of this paper, we will not conduct in-depth research into the differences between limited liability companies and joint stock companies in Poland. The paper will focus solely on the basic concept of corporate liability as a policy in general. It will concern itself only with duly formed companies and will ignore the existence of the "company in organisation", which, under Polish law, is essentially, a company which has been established by contract or statute by incorporators, but is still not registered by the National Court Registrar. In accordance with the Polish CCPC (Article 13 of CCPC), a company in an organisation actually enjoys the same rights as a duly formed company; however, as long as it is not officially incorporated, persons acting on the behalf of the company can be personally liable for the companies' debts.

⁷¹ The Code of Commercial Partnerships and Companies of 15.09.2000.

⁷² The Insolvency Act of 28.02.2003.

⁷³ The Consumers and Competition Protection Act of 16.02.2007.

⁷⁴ M. Rodzynkiewicz, *Commentary on Article 151 of CCPC*, [in:] M. Rodzynkiewicz (ed.), *Kodeks spółek handlowych. Komentarz [Code of Commercial Partnership and Companies. Commentary]*, Warszawa 2014.

This is also true for shareholders, but only up to the value of contributions that they are obliged to pay for issued shares.

Polish jurisprudence has denied that the piercing doctrine exists in the Polish legal system. Likewise, jurists cannot find any legal basis for piercing claims. Nevertheless, the most recent events, which have revealed the mass scale of corporate shield abuses and fraud perpetrated by corporators in the Amber Gold case, have shocked public opinion and put forward the question of whether the corporate shield should protect "confidence tricksters" who have obviously committed fraud.

As already stated, Polish commentators generally agree that the piercing doctrine does not exist in the Polish legal system because there is no proper statutory basis for such a claim⁷⁵. However, the analysis of current statutory measures in Poland and the comparison between the Polish provisions and *common law* definitions of the piercing doctrine could indicate something different. Concerning the prevailing opinion amongst jurists, the piercing doctrine relates to the liability of shareholders for a company's debts. From this point of view, the shareholders cannot be found liable for those company debts which clearly stem from CCPC provisions. Article 151 § 4 of the CCPC sets forth that shareholders are not liable for a company's debts. Nevertheless, what will be explored in the next part of this thesis is that they can bear tortious liability resulting from wrongs committed whilst abusing the corporate identity of the subsidiary, or simply of the company they control. In this instance, their liability would be shaped by the Polish Civil Code (PCC) provisions on tortious liability i.e. Article 415 of the PCC.

Nonetheless, the statutory grounds for piercing the corporate veil in the United Kingdom extend corporate liability toward officers, directors, and "shadow directors" under specific circumstances i.e. in the case of fraudulent trading. From that point of view, the piercing doctrine also has its statutory basis in the Polish legal system under the Insolvency Act (IA) and CCPC, though it has not been called a piercing claim or lifting claim by jurists.

Historically, the liability of board members for a company's debts had been regulated in Article 298 of the Polish Commercial Code of June 27, 1934. Its wording did not differ much from the current Article 299 of CCPC. The purpose of the aforesaid regulation was to prevent entrepreneurs from committing frauds through a corporate shield. It is completely natural and understandable that entrepreneurs want to mitigate their risk of

⁷⁵ P. Czarnecki, *Odpowiedzialność pracodawcy a rozwój struktur holdingowych* [Employer's Liability Concerning the Holding Structure], Warszawa 2014, p. 118.

liability for a company's debts when establishing a company. Nonetheless, limited liability cannot trigger illegal activities, frauds, or manipulations⁷⁶. Therefore, people holding down a managerial position in the company should be personally liable for its debts, unless no fault can be attributed to them.

Under Article 299 of the CCPC, after amendments in 2015, if enforcement proceedings against the company become ineffective, the members of the management board ("board members") will be jointly and severally liable for its obligations. However, a board member can be released from liability under specific circumstances: (1) if he proves that in due time an application for bankruptcy has been made; (2) or if in due time a court's decision on commencement of restructuring proceedings has been rendered; (3) or if in due time court has approved arrangements with creditors ; (4) or if the failure to file the bankruptcy petition or the lack of the court's approval for arrangements with creditors were not his fault; (5) or despite the failure to file petition or initiate restructuring proceedings or the failure to approve of the arrangements with the creditors, the creditor suffered no damage. A new article 299¹ of CCPC extended such liability towards liquidators of the company, except for those appointed by court. The Article 299 of CCPC can be deemed as tantamount to a widely recognised piercing doctrine in common law countries⁷⁷.

In 2015 Poland passed significant amendments to the current Insolvency Act, and these came into force on January 1st, 2016. The new legislation prolongs the period of time during which board members can report insolvency to up to one month in place of two weeks from the date of insolvency. Moreover, it changes the current rules on the board members' duty to file a bankruptcy motion. In accordance with the new Article 21 of IA, that mirrors the abovementioned CCPC regulation, everyone who under the statute or the memorandum of association is entitled to conduct a company's business or to represent the company solely or jointly is obliged to file a bankruptcy petition. Thus, the duty to file a bankruptcy petition within 30 days of the date when insolvency has occurred binds not only board members, but other people accountable for conducting a company's business.

Regarding the term "due time for bankruptcy motion" mentioned in Article 299 of CCPC it seems at first glance that it should mirror strict time

⁷⁶ S. Buczkowski, *Ograniczona odpowiedzialność przedsiębiorcy. Studjum prawno-handlowe [Limited Liability of the Entrepreneurs. Legal and Commercial Studies]*, Warszawa 1937, p. 36.

⁷⁷ A. Kappes, *Odpowiedzialność członków zarządu za zobowiązania spółki z o.o. [Board Member's Liability for LLC's Debts]*, Warszawa 2009, p. 53.

periods prescribed by the Insolvency Act (30 days period). That stance has been supported by many jurists⁷⁸ and currently it is the prevailing one. Nevertheless, some courts criticise that point of view. They claim that the term "due time" should be construed independently from the provisions of the Insolvency Act. Thus, an interpretation of the abovementioned provisions should concern the interests of creditors and the possibility of redressing their loss at least in part⁷⁹. Therefore, the application of a motion for bankruptcy could have exempted the board members from their liability for company's debts, if there had been real prospects for the settlement of those debts during the winding-up proceedings, even partially. However, as it was mentioned before, more acclaimed is an opinion that merely filing a bankruptcy motion within 30 days of the date of insolvency abolishes the board members' liability for a company's debts.

The Insolvency Act uses the terms: "the date of insolvency", "the date when insolvency has occurred" etc. Article 11 of the New Insolvency Act sets out a new presumption that the insolvency occurs when the debtor's liabilities are overdue for longer than 3 months or when the value of the liabilities simply exceeds the value of company's assets for longer than 24 months. This is important as, until January 1, 2016, the term "insolvency" had been incoherently construed by courts and the definition of the term "insolvency" formulated by courts and jurisprudence in Poland had indicated that the insolvency could have occurred whenever the debtor had had any overdue liabilities without any specific time limitation. Such a strict point of view exposed board members to great risk of being liable for a company's debts where it could be unjustified. On one hand, the new regulation extends the duty to file a bankruptcy petition toward other people than board members, accountable for conducting a company's operations. On the other hand, it clarifies the concept of "insolvency" in Polish law⁸⁰.

The joint and several liability of board members for the company's debts is simply a rule under article 299 of the CCPC. However, officers can still avoid liability if they report bankruptcy within one month after the

⁷⁸ A. Kidyba, *Kodeks Spółek Handlowych. Komentarz. T. I, Komentarz do art. 1-300 KSH* [Code of Commercial Partnerships and Companies. Commentary on Articles 1-300, vol. I], Warszawa 2007, pp. 1175-1176; M. Litwińska, *Kodeks Spółek Handlowych. Komentarz* [Code of Commercial Partnerships and Companies. Commentary], Warszawa 2002, p. 675.

⁷⁹ Kappes, supra note 77, p. 271; the judgment of the Supreme Court of 7.05.1997, II CKN 117/97; the judgment of the Supreme Court of 6.06.1997, III CKN 65/97.

⁸⁰ For more information: K. Osajda, *Uwagi o pojęciu niewypłacalności w świetle nowelizacji prawa upadłościowego* [Remarks on the Term „Insolvency” in the Light of the Last Amendments to the Insolvency Law in Poland], *Przegląd Prawa Handlowego* [Commercial Law Overview], p. 11 et seq.

insolvency of the company has occurred, prove that they were not at fault in causing such a delay when reporting insolvency, or if the delay has not caused any harm to the creditors. Polish courts explain that the members of the management board are liable severally and jointly regardless of their real impact on business conduct and involvement in business operations. Polish courts also do not distinguish between passive and active officers or investors⁸¹. Unlike British solutions, Polish courts do not recognise any kind of subjective standards of knowledge of managers, holding that an objective standard is crucial and board members should be evaluated through the factors which can be reasonably expected from a person in a managerial role⁸².

The flawed part of the concept is that insolvency at some stage of indebtedness is, in most cases, extremely hard to detect. Determining the date of insolvency requires in-depth discovery through financial statements, balance sheets, and the history of money transfers. During the winding-up proceedings, the insolvency date is almost always determined by expert witnesses⁸³. If the court needs experts to determine the exact insolvency date and decide whether board members are liable, then how can the court expect the same standard of prudence, experience, and knowledge from board members as from experts? Nonetheless, Polish courts hold that the absence of adequate education and experience needed to manage the affairs of a company should be deemed a violation of due diligence⁸⁴. According to this statement, the company appoints officers at its own risk.

Among jurists and courts over the years, there has been a dispute over the character of the liability of board members for a company's debts. Some courts and jurists hold that the liability is strictly tortious⁸⁵, while others claim that it is rather a guaranteed liability for the company's debts⁸⁶.

⁸¹ The judgment of the Supreme Court of 15.05.2014, II CSK 446/13; the judgment of the Supreme Court of 20.01.2011, II UK 174/10.

⁸² The judgment of Appellate Court in Lodz of 16.06.2015, I ACa 20/15.

⁸³ The judgment of the Supreme Court of 15.06.2011, V CSK 347/10; K. Osajda, *Odpowiedzialność członków zarządu spółek z o.o. za ich zobowiązania w orzecznictwie Sądu Najwyższego z 2011 r.* [Board Members' Liability for Company's Debts in the Light of the Supreme Court Judgments], *Glosa* [Gloss] 2012, no. 3, p. 7.

⁸⁴ The judgment of Appellate Court in Lodz of 16.06.2015, I ACa 20/15.

⁸⁵ R. Lewandowski, P. Wołowski, *Prawo upadłościowe i naprawcze* [Insolvency and Rehabilitation Act], Warszawa 2011, p. 79; the judgment of the Supreme Court of 23.07.2015, I CSK 580/14.

⁸⁶ The judgment of the Supreme Court of 18.04.2007, V CSK 55/07; A. Śmieja, *Charakter prawny odpowiedzialności z art. 299 k.s.h.* [Legal Character of the Liability Specified in Article 299 of CCPC], [in:] J. Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach* [Code of Commercial Companies after Five Years], Wrocław 2006, pp. 847, 851; M. Allerhand, *Kodeks handlowy. Komentarz* [Commercial Code. Commentary], Bielsko-Biała 1991, p. 164; J. Namitkiewicz, *Kodeks handlowy. Spółka z ograniczoną odpowiedzialnością z komentarzem i skorowidzem rzeczowym* [Commercial

Nevertheless, the current attitude of Polish courts towards the liability of board members seems to easily approach the concept of tortious liability. It means that the calculation of the potential creditors' damages would concern itself only with the gap between the creditors' loss, incurred by the delay in reporting a bankruptcy and the creditors' loss in the situation where the bankruptcy had been duly reported. This effectively excludes the creditors from demanding damages in full⁸⁷.

On the other hand, creditors do not have to wait until the whole enforcement proceedings become ineffective. This should be confirmed in the enforcement officer's decision on the discontinuance of enforcement proceedings. Instead of that, clear evidence that the company does not have adequate assets to satisfy its creditors suffices to justify bringing a lawsuit against board members under Article 299 of the CCPC⁸⁸. Although this paper does not touch on the problem of tax liabilities that are in the public domain, it is worth mentioning that similar provisions on the liability of board members exist in Polish Tax Ordinance 1997 under Article 116, which enables the head of the tax office to impose tax liability for corporate tax arrears on board members.

Furthermore, the board members' liability can also operate in an administrative law dimension. In most cases, it will essentially be combined with tort liability. One of the most important regulations in dealing with board members' liability appears in the Antitrust Law in Poland.

In 2014, Polish legislature passed a new provision on officers' liability in case of violation of fair competition rules by a company on the market. Under Article 106a of the Protection of Competition and Consumers Act (PCCA), the President of the Office for Competition and Consumers Protection (OCCP) can impose a fine of up to 2 000 000 zloty, on a person who manages a company, for violating the fair competition rules of the market. The term "person who manages the company" seems construed to be broader than "board member".

Article 4, point 3a of the PCCA provides the definition of a person who manages a company as: a person managing a company should be deemed

Code. Limited Liability Company with Commentary], p. 361; A. Kidyba, *Spółka z ograniczoną odpowiedzialnością. Komentarz [Limited Liability Company. Commentary]*, Warszawa 2002, p. 819; Kappes, supra note 77, p. 176.

⁸⁷ The resolution of the Supreme Court of 4.07.1997, III CZP 24/97; Kappes, supra note 77, p. 307.

⁸⁸ The judgment of Appellate Court in Białystok of 7.05.2015, I ACa 27/15; A. Kidyba, *Komentarz do art. 299 Kodeksu Spółek Handlowych [Comment on Article 299 of CCPC]*, [in:] A. Kidyba, *Kodeks Spółek Handlowych. Komentarz [Code of Commercial Companies. Commentary]*, LEX 2011.

as a person who is a head of undertaking, in particular a person holding a managerial position or being a member of the board. The provision extends the liability for unfair market practices to board members and other corporate officers⁸⁹. According to the PCCA, board members and other officers can be held liable in cases of entering into agreements which, as their object or effect elimination, have a restriction or any other infringement of competition in the relevant market i.e. by fixing, directly or indirectly, prices and other trading conditions by limiting or controlling production or sale as well as technical development or investments; or dividing markets of sale or purchase (Article 6 of the PCCA).

Commentators indicate that the new regulation can be interpreted extremely broadly and its scope can also embrace entities which have a real impact on a company's operations and assets although they are outsiders or do not hold any managerial positions in the company⁹⁰. Such an interpretation could be deemed controversial, taking into account the fact that, in the Polish legal system, the British concept of a "shadow director" does not exist⁹¹.

Regarding shareholders' liability, the first thing that must be said is that, under the CCPC, the shareholders cannot be liable for the company's debts. This is clearly expressed in Article 151 of the CCPC. So, as long as they do not hold down any managerial position in the company and are not board members, the liability for the company's debts cannot be extended towards them. However, jurists sometimes recognise that the corporate shield is a *façade* for fraud, and even shareholders, generally protected by the limited liability of the company, should not elude responsibility for such misdemeanors. For that reason, among commentators and courts in Poland, there is an acceptance of piercing the corporate veil, but strictly only in tort cases⁹². Courts justify the application of the piercing doctrine when the legal personality of the company is overused or simply abused by a dominant shareholder and damage is thereby caused to the third party.

⁸⁹ A. Piszcz, „Osoba zarządzająca” w rządowym projekcie ustawy zmieniającej ustawę o ochronie konkurencji i konsumentów [„Managing Person” in the Government’s Draft of a New Law on Protection of Competition and Consumers’ Rights], Internetowy Kwartalnik Antymonopolowy i Regulacyjny [Electronic Antitrust and Regulation Quarterly] 2013, no. 7(2), p. 30.

⁹⁰ M. Kulesza, Zakres podmiotowy pojęcia osoby zarządzającej w znowelizowanej ustawie o ochronie konkurencji i konsumentów [The Scope of the Term „Managing Person” in a New Law on Protection of Competition and Consumers’ Rights], Internetowy Kwartalnik Antymonopolowy i Regulacyjny [Electronic Antitrust and Regulation Quarterly] 2015, no. 4, p. 109.

⁹¹ Kappes, supra note 77, p. 147.

⁹² T. Targosz, Odpowiedzialność wspólnika wobec wierzycieli spółki [Shareholder’s Liability Towards Company’s Creditors], Przegląd Prawa Handlowego [Commercial Law Overview] 2003, no. 4, p. 27; Czarnecki, supra note 75, pp. 118–119.

Exploitation of the company's legal personality occurs when dominant shareholders exercise their control over the company in a way that completely deprives the controlled company of its own "mind and will". Tortious liability extended to shareholders can take place when shareholders operate their company with the purpose of causing losses in the company's assets or simply leading the company to insolvency. Undoubtedly, the overwhelming control over the company's operations can cause damage to a third party as well as causing damage to the controlled company itself, especially when it is in the shareholders' best interests.

Jurists clearly express the opinion that such shareholders' liability can be addressed under the general provisions on tortious liability set forth in Article 415 of the Polish Civil Code (PCC)⁹³ and that point of view seems to be prevailing among commentators in Poland. Article 415 of the PCC stipulates that anyone who causes damage, by a fault on his part, to another person is obliged to redress it. The Polish Supreme Court also pointed out that in the case of abusing the corporate legal personality by shareholders, where the damage is caused to third party – particularly the company's creditors, the third party can seek remedy on the basis of tortious liability against shareholders; however, the damage must be proved directly⁹⁴. Moreover, the court held that there would be no legal obstacles to imputing liability to shareholders for the company's contractual obligations if these obligations arose when the company entered into contract with a third party with a clear purpose of causing damage on the demand and under control of the shareholders.

That point of view resembles Belgian and French solutions. In Belgium and France piercing claims can be pursued in two possible ways. Firstly, under provisions of the Civil Code on tortious liability (Article 1382 of the French Civil Code and the Belgian Civil Code), where a parent company's supervision over its subsidiary exposes the subsidiary's creditors to a loss.

In French and Belgian law, as elsewhere, the liability toward an individual shareholder or parent company under tortious liability can be assigned when three factors have been proved: a fault, damage, and a causal link between them. Fault in this case means a breach of statutory

⁹³ Targosz, *supra* note 92, p. 27; Czarnecki, *supra* note 75, pp. 118-119.

⁹⁴ The judgment of the Supreme Court of 24.11.2009, V CSK 169/09.

obligations or a violation of a duty of care⁹⁵. It seems that the aforesaid tortious liability encompasses also a *de facto* director, in other words: a shadow director⁹⁶.

As jurists point out, a causal link between a parent company's action and damage sometimes may be impossible to prove. It is not entirely clear whether under French law is it necessary to prove a causal link⁹⁷, whilst under Belgian law proving causal link according to the *equivalence doctrine* is crucial⁹⁸.

Secondly, the parent company's liability for a subsidiary's debts can be established under the doctrine of the abuse of rights. In Belgium, creditors of the company can rely on the doctrine of abuse of rights to hold the parent company liable for the debts of the subsidiary⁹⁹. In French law a proper basis for such claim would be then concealment, fraud, or creation of false appearances¹⁰⁰.

In Poland some theorists also point to the violation of social co-existence principles under Article 5 of the PCC as a potential ground for a piercing claim¹⁰¹. In accordance with Article 5 of the PCC, one cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed to be an exercise of that right and is not protected. Nevertheless, that concept of corporate liability is assessed rather sceptically because Article 5 of the PCC cannot be the sole legal basis for any civil claim¹⁰².

⁹⁵ S. Demeyere, *Liability of a Mother Company for Its Subsidiary in French, Belgian and English Law*, *European Review of Private Law* 2015, no. 3, p. 392.

⁹⁶ Z. Gallez, [in:] C. Brûls (ed.), *La responsabilité de la société mère pour sa filiale: réflexions sur la levée du voile social*, in *Les multinationals - Statut et réglementations*, Brussels 2013, p. 163.

⁹⁷ Demeyere, *supra* note 95, p. 393.

⁹⁸ W. van Gerven, *Verbintenisrecht*, Leuven 2006, p. 367.

⁹⁹ A. Lenaerts, *Le principe général du droit fraus omnia corrumpit: une analyse de sa portée et de sa fonction en droit privé belge*, *Revue Générale de Droit Civil Belge* 2014, no. 3, pp. 98-115.

¹⁰⁰ Demeyere, *supra* note 95, p. 397-398.

¹⁰¹ A. Szumański, *Grupy Spółek [Holding Groups]*, [in:] S. Soltysiński, *System Prawa Prywatnego tom 17a [System of Private Law]*, Warszawa 2011, p. 729.

¹⁰² The judgment of the Supreme Court of 23.10.2002, II CKN 873/00; Czarnecki, *supra* note 75, p.119.

B. PARENT-SUBSIDIARY RELATIONSHIP IN HOLDING GROUP

At that point, the problem of shareholder liability should be translated into a parent-subsidiary relationship, where the parent company controls several subsidiaries within one holding group. Generally speaking, Polish company law does not recognise a group of companies as a single, economic unit. Nevertheless, the CCPC assumes that a relationship of domination can arise up between companies, where one company, the so-called "dominant company", is holding the majority of shares in the second company that is described by the CCPC as "dependent company". This is the same as if the dominant company directly or indirectly control a majority of votes at the general meeting of shareholders or is entitled to appoint or dismiss a majority of board members or members of the supervisory board of the dependent company (Article 4 point 1.4 of the CCPC). From this relationship Polish law draws legal consequences i.e. the duty of notification.

Under Article 6 section 1 of the CCPC, the dominant company, within two weeks of the date on which the domination relationship has arisen, must notify the dependent company that the relationship of domination has arisen, otherwise the exercise of the right to vote with the shares of the dominant company, representing more than 33 per cent of the share capital of the dependent company, shall be suspended. Furthermore, the acquisition or exercise of the share rights by the dependent company shall be deemed to be an acquisition or exercise of rights by the dominant company (Article 6 point 2 of the CCPC). Thus, where the exercise of share rights i.e. preemptive rights is at stake, the Polish legislature decides to stop maintaining that two closely related companies are independent and independently make business decisions. However, for some purposes, Polish law accepts that the companies can exist in capital group companies i.e. for tax purposes.

When dealing with parent-subsidiary structure, the strict line between abuse of corporate legal personality and spreading the business risk among companies inside one holding group becomes vague. The dominant company, which benefits from the existence of the group, always faces the problem of how to find a balance between the interests of the whole group, the interests of the dominant company, and lastly the interests of subsidiaries. Also, the subsidiary's officers seem to be left in a predicament¹⁰³. In this situation, the next question arises. To whom do the

¹⁰³ K. Postrach, *Działanie na szkodę spółki zależnej – aspekty prawne* [Causing Damage to the Subsidiary – Legal Aspects], *Zarządzanie i Finanse* [The Journal of Management and

officers and board members owe the fiduciary duty: to the company, to the parent company, or perhaps to the interest of the whole group?

Polish law does not give definitive answers to these questions¹⁰⁴. Nonetheless, courts in Poland have started recognising the interest of the holding group as a justifying factor for business decisions made by the dependent company's officers, even if that business decision contravenes the interest of the dependent company¹⁰⁵. However, some jurists believe that the interest of a holding group cannot prevail over the interest of a single company existing in the group¹⁰⁶.

Although Polish statutory law does not touch on the problem of the interest of a holding group as a consequence of stemming from a parent-subsidary relationship, some commentators indicate that the business interests of the group are a crucial element for the existence of a holding group¹⁰⁷. Also, courts admit that the interest of a group of companies, though not required by law, is necessary to establish the group of companies. As mandatory factors which constitute a group of companies, jurists indicate the following: 1) at least two companies mutually related; 2) where the relationship of domination between them exist permanently; 3) where there is an common interest of a group of companies¹⁰⁸.

In 2010, the Polish legislature was on the verge of passing a new law on holding groups which would thereafter have been regulated by new provisions put into the CCPC¹⁰⁹. Notwithstanding this, work on the reform was canceled and the new provisions were not passed. The proposed shape of the bill had been criticised by experts¹¹⁰. Although the proposed amendments did not come into force, the spirit of the reform showed that the legislature's approach to the new law concerning holding groups was getting closer to the piercing doctrine in parent-subsidary relationships.

Under the new Article 21¹ § 1 of CCPC, the dominant company and the dependent company could have taken the interests of group of companies

Finance] 2013, no. 2, p. 371.

¹⁰⁴ A. Szumański, *Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie* [Dispute over the Role of a Group Interest and its Relationship to the Sole Interest of a Company Belonging to the Group], *Przegląd Prawa Handlowego* [Commercial Law Overview] 2010, no. 5, pp. 9-17.

¹⁰⁵ The judgment of the Appellate Court in Katowice of 3.12.2012, V ACa 702/12); the judgment of the Appellate Court in Szczecin of 6.05.2009, II AKA 142/08.

¹⁰⁶ Szumański, *supra* note 101, p. 683.

¹⁰⁷ Szumański, *supra* note 101, p. 677.

¹⁰⁸ *Ibidem*.

¹⁰⁹ The draft of the new CCPC dated on 22.03.2010.

¹¹⁰ G. Domański, J. Schubel, *Krytycznie o projekcie prawa grup spółek* [Critique on a Draft of the Law on Holding Groups in Poland], *Przegląd Prawa Handlowego* [Commercial Law Overview] 2011, no. 5, pp. 5-13.

into consideration if it had not contravened the interest of the dominant or dependent company, or the interest of creditors or minority shareholders of the dependent company. Jurists have pointed out that the new reform could extend the liability of the parent company for its subsidiary's debts if the parent company did not take the interests of creditors or minority shareholders of the dependent company into consideration while making business decisions that could affect the whole group¹¹¹.

The working group, in the bill of the new CCPC, explained that the new law reflected the global tendency towards regulating parent-subsidiary relationships and the parent's liability for damages caused to the third party (i.e. minority shareholders, creditors) through the operations of its subsidiary. While preparing the draft, experts invoked the "piercing doctrine" as well as the Rozenblum¹¹² case, which established standards for the exemption from liability of the subsidiary's officers who caused the damage to the subsidiary by following the parent's instructions¹¹³.

As a comparison, French and Belgian law recognises an "interest of a group" as a factor justifying directors and officers of a subsidiary acting in a parent corporation's interest instead of the subsidiary's best interest. The whole concept of the so-called *Rozenblum* doctrine requires a group policy that includes the subsidiary in a long-term perspective reasonably expecting that disadvantages will eventually be swept away by advantages, both based on the integration of the subsidiary within the group¹¹⁴.

Despite the fact that the Polish legislature's attempts to pass a new law became futile, the whole shape of the proposed amendments to the current provisions, as well as the Supreme Court judgments on the tortious liability of shareholders, proves that the adjustment of company law concerning shareholders and officers' liability and parent-subsidiary relationship is inevitable. It is just a matter of time as to when the new amendments will be proposed. In 2014 the Supreme Court rendered an extremely important judgment concerning parent-subsidiary relationships. The Supreme

¹¹¹ Domański, Schubel, supra note 110, p. 10.

¹¹² Rozenblum, *Chambre Criminelle der Cour de Cassation – Cass. crim. 4.02.1985*, Juris-Classeur périodique, édition Entreprise (JCP/E) 1985, II, 14614.

¹¹³ Domański, Schubel, supra note 110, p. 5.

¹¹⁴ Ch. Windbichler, „Corporate Group Law for Europe”: *Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law*, European Business Organization Law Review 2000, no. 1, p.267.

Court ruled that in case of a breach of equal treatment in employment it is permissible to assess and compare the situation of an employee of a parent company and that of an employee of a subsidiary¹¹⁵. So the concept of veil piercing in Polish labour law has started evolving.

C. THE AMBER GOLD CASE

In 2012, one of the biggest financial scandals was revealed in Poland – the Amber Gold case¹¹⁶. To illustrate the whole problem of the futility of the civil action brought against the board members of Amber Gold, it is necessary to briefly summarise the facts of the case.

Between 2010 and 2012, the company Amber Gold, advertising itself as an investment company, had been publicly offering investments in gold and other precious metals. The offer was mainly addressed to consumers and non-professional investors. Amber Gold offered interest rates standing at 15% per year. Thereafter, Amber Gold distributed certificates among investors proving the amount and weight of gold bought on behalf of the investors. Furthermore, Amber Gold started offering loans to consumers; however, it is worth mentioning that Amber Gold had never been authorised to conduct any banking activity.

In the intervening time, Amber Gold set up a number of subsidiary companies such as the airline OLT Express. After two years, OLT Express was mainly operating extremely cheap regional flights before announcing bankruptcy. Then, in 2012, Amber Gold filed a bankruptcy motion as a result of the pressing of criminal charges against board members. The board members had been accused of fraud. While the criminal proceeding and insolvency proceedings were pending, it transpired that the assets of *Amber Gold* had been bouncing around Amber Gold's subsidiaries and chain of intermediaries. The whole case revealed that the investment scheme was purely fictional and that clients' money had vaporised.

On October 10th, 2012 a group of clients brought a class action against the board members of Amber Gold. The lawsuit claimed the tortious liability of board members (Article 415 of the PCC) and the liability of board members for the company's debts, provided by Article 299 of the CCPC, as a legal basis. The Regional Court in Gdańsk rejected the plaintiffs' petition and the

¹¹⁵ The judgment of the Supreme Court of 18.09.2014, III PK 136/13.

¹¹⁶ The Economist, *After the Gold Rush*, available at: <http://www.economist.com/blogs/easternapproaches/2012/08/polands-shadow-banking-scandal> [last accessed: 28.03.2016].

Appellate Court in Gdańsk upheld the decision¹¹⁷. The Court explained that the case could not be heard as the lawsuit did not meet the requirements for a class action as set out in the Polish Class Action Act (PCAA)¹¹⁸. Moreover, whilst the clients had been entering into contracts with Amber Gold, the composition of the Amber Gold management board had changed several times. It was therefore left to creditors to determine whom an action should be brought against, which depended on who was the board member at the material time and when the particular client concluded the contract with Amber Gold. By that time, the lawsuit was impermissible as, under Article 1 of the PCCA, claims must be of the same kind (monetary or non-monetary) and must be based on the same or common factual grounds.

Although it seems that the court's decision was justified and fulfils the requirements provided by law, the public in Poland feel a sense of dissatisfaction over the weakness of the judiciary. Despite pressing the charges against Amber Gold board members, a class action based on tort liability still cannot be heard owing to procedural obstacles that jeopardise the possibility of returning money to creditors – even just in part – while the Amber Gold assets are simply melting.

The facts of the case addressed two problems. Firstly, there is a lack of an effective legal device for the aggravated party to redress the damages caused by a company's shareholders that operate behind the corporate shield, even if there is clear evidence that fraud is involved. Secondly, civil liability cases last too long, and while the courts are obsessed with procedural requirements which, incidentally, could be construed in various ways (i.e. requirements for class action under PCAA), the fraudsters confidence tricksters get extra time. Jurists have pointed out that the Polish state and especially Polish judiciary are completely vulnerable when facing the abuses of corporate legal personality¹¹⁹.

V. CONCLUSION

The piercing the corporate veil doctrine is fairly balanced in common law countries i.e. the USA, UK, Hong Kong; however, even a typical civil law system as in Germany provides for a parent company's liability for its subsidiary's debts, at least to some extent. Also Belgian or French systems

¹¹⁷ The decision of Appellate Court in Gdańsk of 19.05.2015, I ACz 286/15.

¹¹⁸ The Polish Class Action Act of 17.12.2009.

¹¹⁹ T. Targosz, *Nadużycie osobowości prawnej [Abuse of Legal Personality]*, Kraków 2004, p. 265.

seem to move gently toward the piercing doctrine concerning the tortious liability of shareholders or directors.

Jurists often indicate that the piercing doctrine's application is vague. Courts are often keen to adjudicate piercing disputes by using metaphors such as "*alter ego*", "*sham*", "*façade*" or "*fraud*", at the same time keeping wide discretion.

In the USA, courts, when trying piercing cases, mostly invoke the requirements as follows: undercapitalisation, instrumentality (*alter ego*), single entity doctrine, and failure to observe the corporate formalities. However, they are not sufficient to disregard the corporate personality, if there is no fraud, negligence, or if veil piercing causes inequity, injustice or is simply unfair.

UK law provides both a judicial and statutory basis for piercing the corporate veil, in the same way as in Hong Kong, Singapore, or Malaysia. Unlike US courts, British courts are rather reluctant to apply the piercing doctrine. The UK Supreme Court has indicated that the piercing of the corporate veil doctrine has limited scope and can only be applied when a person is evading existing legal obligations or duties, or if a person uses a separate legal personality to commit fraud. Furthermore, the statutes set forth the liability of directors and officers for fraudulent trading and wrongful trading. The same solutions were implemented by other common law systems i.e. Australia, Hong Kong, Malaysia, and Singapore. In summation, the corporate veil would be pierced if justice so demanded and if otherwise an unjust result would be reached.

The Polish legal system does not recognise the piercing doctrine although the current statutory measures prove that the provisions on board members' liability for a company's debts, under Article 299 of the CCPC, can easily be compared with the "statutory piercing" under British law. It would then appear that the Polish legal system sets forth stricter liability for board members than British law for directors and officers in cases of fraudulent or wrongful trading. In Poland, jurists and courts agree that piercing claims can take priority over the provisions regulating tortious liability under Article 415 of the PCC, however the damage must be proved directly.

Furthermore, the Polish legislature attempted to pass a new law on holding groups and regulating the parent-subsidiary relationship. Although the attempts were to be futile, they displayed a changing attitude amongst Polish jurists and legislature towards the parent-subsidiary relationship and piercing the corporate veil doctrine. The last amendments

to the Protection of Consumers and Competition Act and Insolvency Act prove that the tendency to provide stricter liability for board members and officers is evolving.

There has been a noticeable increase in the role of Business and Human rights in an international dimension over the years. Jurists and courts have started to recognise how large a role multinational companies play in local markets. As a consequence, jurists and courts have realised that transnational companies are almost always operating in local markets through their subsidiaries, which makes potential creditors or tort victims from other countries unable to seek a remedy against a parent company which is sometimes fully responsible for its subsidiary's operations. This problem, addressed by Prof. Ruggie, is also a bigger picture of that portrayed in the Shell case. Purposely or not, it touches on the problem of piercing the corporate veil.

The phenomenon such as the increase in importance of business activity and human rights, globalisation, and the overlapping of jurisdictions, have greatly influenced the development of Polish law and the Polish courts' attitude towards corporate liability. The last amendments to the PCCA and the IA, as well as the attempts to regulate the parent-subsidiary relationship in the CCPC, mean that Polish law on officers' liability for a company's debts is smoothly approaching the statutory piercing doctrine. Nevertheless, the Amber Gold case revealed that Polish law and the Polish judiciary are still vulnerable when facing the abuses of corporate legal personality.

