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Piercing the Corporate Veil and Its Variations (On the Example of German, American, and English Legal Practices)

The capital form of a corporate entity is currently the most prevalent form of conducting business worldwide, driven by its diverse, profitable, convenient, and investor-oriented structure. Specifically, the privilege of limited liability encourages interested parties to boldly diversify their business portfolios without the risk of losing personal assets. However, this fundamental principle of corporate law also has exceptions, known as piercing the corporate veil. Most developed countries agree that in certain cases, it is unavoidable and necessary to invoke this exceptional measure to maintain or restore justice. This pertains to the personal liability of partners in cases of “abuse of rights” within the corporate structure.

This paper examines the concept of piercing the corporate veil and the various approaches developed and established in different countries. Following the introduction, there is a brief historical overview of the formation of this doctrine, which thematically encompasses the essence of legal entities – legal fictions – and their independent, separate legal status, logically leading to the possibility of disregarding this separation through exceptional measures.

It is crucial to highlight the legal foundations that legitimize the application of traditional piercing of the veil in the judicial practices of different countries, making the essence of the sub-types of this doctrine comprehensible to the reader. Additionally, the research aims to showcase the similarities and differences with variations such as reverse veil piercing in American law and the doctrine of lifting the veil in English law. Furthermore, the paper presents the latest approaches of German courts regarding the application or restraint from piercing the veil, where the aforementioned American/English terminology is not used, yet the approaches are fundamentally closely related. The conclusion summarizes the results of the research conducted around the topics discussed in the article.

Keywords: *Piercing the corporate veil; reverse veil piercing; lifting the veil; annihilating interference*

1. Introduction

The personal liability of members (partners/shareholders) in a capital-type company has been a problematic, ambiguous, and unstructured doctrine since its inception in practice, sparking ongoing

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debates among legal scholars and practitioners.¹ This ambiguity has led to the emergence of various theories, foundations, and sub-types surrounding the concept of piercing the corporate veil. This article will address piercing the corporate veil and its sub-types, such as standard (traditional) veil piercing, reverse veil piercing, and their analogs.

The aim of this article is to explore the phenomenon of personal liability of members within the framework of the separate legal personality of the corporation. To this end, the paper is structured to thoroughly examine the sub-types of piercing the corporate veil and their technical mechanisms for application, if such mechanisms exist. Following the introduction, the second chapter presents the essence of the doctrine of piercing the corporate veil, along with a brief historical overview of its origins and development. The third chapter follows with an analysis of its variations – reverse and standard veil piercing – through American doctrine and precedents, while the fourth chapter discusses the United Kingdom's approach to piercing the corporate veil and its variations, highlighting the methodological differences between these types. The concluding chapter will provide a summary of the institutions discussed in the article.

2. The Essence of Piercing the Corporate Veil and a Brief Historical Overview

2.1. Legal Person as a Legal Fiction

The concept of a corporation as a separate legal entity from its members is widely recognized in both common law and civil law countries. Furthermore, it is a fundamental principle of corporate law, which various courts across countries seek to uphold.² Indeed, a corporation, formed through a consensual agreement among physical persons, is today considered equal to a natural person in legal terms, albeit with certain exceptions. The legal recognition ties into the essence of legal fiction, through which a corporation gains legal personality and becomes a participant in relationships.³ Thus, the law grants it the life – capacity to act and own and execute – separate from its founders. This means that a corporation recognized by law as a subject of legal transactions is treated as distinct from the individuals who established it. Consequently, the members of the corporation are individuals with distinct personalities, just as the corporation itself is.

The first precedent for recognizing the separation of a legal person,⁴ which subsequently led to the development of the doctrine of piercing the corporate veil, was the UK court decision in the case

¹ *Ventoruzzo M., Conac P.H., Goto G., Mock S., Notari M., Reisberg A.*, Comparative Company Law, American Casebook Series, West Academic Publishing, 2015, 151; *Robert B. Thompson*, Piercing the Corporate Veil: An Empirical Study, Cornell Law Review, 1991, *Peter B. Oh*, Veil Piercing, Legal Studies Research Paper Series, Working Paper No. 2010-06, Pittsburgh, Pennsylvania, 2010, 85.

² *Tan C.H., Wang J., Hofmann Ch.*, Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives, Barkley Business Law Journal, volume 16, issue 1, 2019, 140.

³ *Lee P. W.*, The Enigma of Veil-Piercing, International Company and Commercial Law Review, vol. 26(1), 28-34, 2015.

⁴ *Pargendler M.*, Veil Peeking: The Corporation as a Nexus for Regulation, University of Pennsylvania Law Review, vol.169:717, 2021, 729.

of *Salomon v. Salomon*.⁵ However, prior to this, various theories existed in the literature of civil law countries, such as Gierke's theory of "the separate personality of the corporation" and Savigny's "theory of fiction." Nevertheless, the issue of a corporation as a limited liability entity and its independent legal personality had not yet been firmly established. Clarity was brought to this matter by the 1896 decision in the *Salomon* case, which recognized the corporation as a separate individual with its own rights, desires, and capacity to act, facilitated through its governing bodies. These governing bodies and their members represent the brain, hands, and feet of the corporation, which collectively are granted artificial personality through legal fiction.⁶

2.2. Exceptional Measures for the Protection of Creditors

Thus, a capital-type company represents a legal entity that is separate from its members and possesses an independent personality. This is ensured, as noted, by the existence of the limited liability institution, which separates the company's founders and members from the corporation, thereby shielding them from claims by the corporation's creditors. In other words, in a capital-type company, the liability of a partner/shareholder is limited, and only the company itself is responsible for its debts.⁷ This is the general definition of limited liability in both common and civil law countries, although it is not "absolute" in all cases.⁸

There are exceptions⁹ to the limited liability institution, which are considered extreme measures.¹⁰ This institution is referred to as "piercing the corporate veil,"¹¹ which implies the personal liability of partners to third parties, particularly creditors, aimed at maintaining justice or protecting creditors. The legal foundations for the application of piercing the corporate veil vary by country, and there may even be differences among court decisions within a single country. However, significant foundations and approaches have recently emerged that legitimize the disregard for limited liability and allow creditors access to the personal assets of members.

⁵ *Salomon v Salomon & Co Ltd* [1896] UKHL 1 (16 November 1896) <https://www.bailii.org/uk/cases/UKHL/1896/1.html>, [06.08.2024].

⁶ *Austin R.P., Ramsey I.M.*, *Ford's Principles of Corporations Law*, Butterworths, Australia, 2010, 115-116; *Bainbridge S., Henderson T. M.*, *Limited Liability, A Legal and Economic Analysis*, Edward Eldar publishing, UK, USA, 2016, 5; *Wormser, I.M.*, *Disregard of the Corporate Fiction and Allied Corporation Problems*, Baker, Voorhis and Company, New York, 1929, 6 and following.

⁷ *Burduli I.*, "Equity Capital and Its Functions," in *Theoretical and Practical Issues of Modern Corporate Law*, Tbilisi, 2009, 268-269; *Burduli, I.*, *Property Relations in Joint-Stock Companies (Especially During the Formation Process)*, (dissertation), 2008, 20-41; *Magradze G.*, *The Issue of Personal Liability of a Business Entity's Director/Manager and Partner/Shareholder*, *Tbilisi State University Law Journal*, No. 1, ed. Burduli, 2017, 144-166.

⁸ *Thompson R.B.*, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell Law Review*, 1991, 1036.

⁹ *Allen N. B.*, *Reverse Piercing of Corporate Veil: The Straightforward Path to Justice*, *St. Jones Law Review*, Volume 85, Number 3, 2011, 1147.

¹⁰ *Wormser M.*, *Disregard of the Corporate and Allied Corporation Problems*, Baker, Voorhis & Co, New York, 1927, 10.

¹¹ *Bainbridge S.M.*, *Abolishing LLC Veil Piercing*, *University of Illinois Law Review*, University Press, Illinois, 2005, 79-80.

2.3. Legal Foundations of the Doctrine of Piercing the Corporate Veil

As noted, the legal foundations for the application of the doctrine of piercing the corporate veil vary significantly by legal system. English courts consider the abuse of corporate form by controlling individuals or entities as sufficient grounds for piercing the veil.¹² In the well-known *Prest* case in 2013¹³, Lord Sumption stated that the application of piercing the corporate veil should be restricted to specific breaches – namely, “abuse” – though the definition of this term remains unclear. This approach has been widely accepted by commentators across Commonwealth countries. All agree that veil piercing is only permissible in the presence of “abuse,” particularly when it serves as a means of preventing a controlling partner from evading obligations.¹⁴

In the United States, there are instrumental and alter ego theories, which require clear evidence of control and domination in specific facts. This may be established through a significant commingling of individual and corporate assets, disregard for corporate formalities, absence of a separate working office, or the use of the corporation simply as an instrument without its own workforce and assets. All of this must confirm either the “unity” between the individual and the corporation or the occurrence of an unjust result if personal liability is not applied.¹⁵

In contrast to England and the United States, the application of piercing the corporate veil is even rarer in Germany. It is no longer sufficient to merely establish undercapitalization or asset commingling, which were once considered valid grounds based on general tort norms, specifically BGB §826.¹⁶ The only sufficient ground for applying piercing the corporate veil was viewed as “annihilating interference,”¹⁷ which was first articulated in the 2001 *Bremen Vulkan* case.¹⁸ This refers to instances where a company is on the verge of insolvency or destruction. Consequently, the draining of company assets by a partner is no longer considered a basis for imposing personal liability and is not a sufficient basis for creditors to access the personal assets of partners, since recent German court practice views this as directly harming the corporation rather than the creditor. The legal basis is seen in the tort norm (BGB §826) along with §30-31 of the BGB (capital maintenance norms) rather than direct piercing of the corporate veil.

Today, this new approach established in German court practice, first articulated in the 2007 *Trihotel*¹⁹ decision, differs from previous approaches both doctrinally and practically. Creditors can no longer base their claims on tort norms because the harm caused by the partner is directed at the

¹² *Tan C.H., Wang J., Hofmann Ch.*, Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives, *Barkley Business Law Journal*, volume 16, issue 1, 2019, 158.

¹³ *Prest v Petrodel Resources Ltd*, [2013] 3 WLR 1.

¹⁴ *Lee P. W.*, The Enigma of Veil-Piercing, *International Company and Commercial Law Review*, vol. 26(1), 2015, 28-34.

¹⁵ *Klein W.A., Coffee Jr. J.C., Partnoy F.*, *Business Organization and Finance: Legal and Economic Principles*, Thomson Reuters/Foundation Press, 2010, 148.

¹⁶ KBV, BGH judgment 24 June, 2002, *NeueJuristische Wochenschrift* 2002, 3024.

¹⁷ “existenzvernichtender Eingriff”.

¹⁸ *Bremer Vulkan*, The Federal Supreme Court of Germany, BGH, case, [2001], BGH NJW 2001, 3622 (“*Bremer Vulkan*”).

¹⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (*Trihotel*), 2007 *NeueJuristische Wochenschrift* [NJW] 2689.

company itself rather than the creditor. Therefore, the company itself is directly harmed as a result of the depletion of its assets.²⁰ While it is possible to establish the status of the creditor as a secondary victim, this contradicts §13 of the GmbH law, which reinforces the separate subjectivity of the company.

In summary, a significant practical difference between the old and new approaches is that creditors can no longer utilize the doctrine of piercing the corporate veil in the strict sense, meaning they cannot directly access the assets of partners. They only retain the right to indirect claims, that is, against the company, which may ultimately be satisfied from the partner's personal assets as compensation for damage caused by actions owed to the company. Regarding the direct application of piercing the corporate veil, this is only possible in cases of abuse of legal form. In terms of abuse, the court has adopted Zollner's view, considering the existence of abuse only when the action conceals or evades something.²¹

3. Standard and Reverse Piercing

As noted, the legal foundations of the traditional doctrine of piercing the corporate veil differ not only between countries but also among states within the United States. Despite these differences, common elements can still be identified, as briefly discussed in the previous section. However, despite the vague and unsystematic nature of this doctrine, it remains firmly established in various legal systems and court practices. This cannot be said for one variation of piercing, namely reverse piercing.

It is important to highlight the differences between traditional and reverse piercing. Specifically, traditional piercing involves imposing liability on a member (partner) for the actions of the corporation, or in corporate groups, holding a parent company accountable for the actions of a subsidiary. In contrast, reverse piercing considers the corporation as the subject of liability for the actions of its partner²² or a subsidiary for the actions of the parent company.²³

There are internal and external reverse piercing categories, depending on the source of the claim.²⁴ For instance, in the case of internal reverse piercing, the claimant is a member of the corporation, while in external reverse piercing, the claim originates from a third-party creditor. In reality, standard and reverse piercing share identical foundations.²⁵ In both cases, establishing

²⁰ *Ventoruzzo M., Conac P.H., Goto G., Mock S., Notari M., Reisberg A.*, Comparative Company Law, American Casebook Series, West Academic Publishing, 2015, 183.

²¹ *Zhen Qu Ch., Bjorn A.*, Lowering of the Corporate Veil in Germany: A Case Note on BGH 16 July 2007 (Trihotel), Oxford University Comparative Law Forum, 2008, <Lowering the Corporate Veil in Germany: a case note on BGH 16 July 2007 (Trihotel) | Oxford University Comparative Law Forum>, [15.08.2024].

²² *Pargendler M.*, Veil Peeking: The Corporation as a Nexus for Regulation, University of Pennsylvania Law Review, vol.169:717, 2021, 738.

²³ *Allen N. B.*, Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Volume 85, Number 3, 2011, 1153-54.

²⁴ *Mujih E.*, Piercing the Corporate Veil: Where is the Reverse Gear?, London Metropolitan University, 2016, 15.

²⁵ *Richardson M.*, The Helter-Skelter Application of the Reverse Piercing Doctrine, 79 University of Cincinnati Law Review, 2011, 1606.

dominance and control is crucial for the court to apply this doctrine. However, the difference lies in the status of the claimant and the recipient.

Furthermore, traditional piercing allows creditors of the corporation access to the personal assets of the partner, whereas reverse piercing is used when a personal creditor of a partner seeks access to the corporation's assets based on proof of dominance and control, or in the case of a corporate group, targets the assets of a subsidiary (external reverse piercing). In the case of internal reverse piercing, an insider (e.g., a partner) attempts to pierce the corporate veil from within to benefit from claims against third parties²⁶ or protect the corporation's assets from third-party claims.²⁷

In any case, just as with traditional piercing, reverse piercing carries negative implications, posing risks both to the company's creditors and to innocent, faithful partners, who may jeopardize their ability to enforce claims or may see their personal assets become subjects of liability proportional to their share in the corporation. For this reason, in the United States, opinions are divided on the use of reverse piercing; however, considering that federal authorities see significant potential in external reverse piercing, particularly for the collection of state taxes, the future of this doctrine may not yet be settled. The issue is that the federal government's ability to collect state taxes through external reverse piercing could significantly ease enforcement.²⁸ However, at this stage, even federal courts that recognize the potential benefits of reverse piercing may not permit its application if the highest court of the state where the dispute originated does not share this concept.²⁹

4. The Principles of Evasion and Concealment

Unlike the approaches taken by states, English courts often face the dilemma of applying the principles of concealment and evasion. Among these principles, only evasion can be considered within the context of piercing the corporate veil, as it specifically pertains to imposing personal liability on a partner for the obligations of the corporation. The concealment principle, as explained by Lord Sumpton³⁰ in the *Prest* case,³¹ allows for lifting the veil rather than piercing it, enabling the court to ascertain the true facts and identify the individuals and actions behind the corporate facade. Thus, the so-called veil lifting is a justified mechanism that avoids the need for courts to apply a form of liability that is often under scrutiny, while also preserving the separate legal existence of the corporation.

In the aforementioned *Prest* case, Mrs. *Prest*, following her divorce, sought to claim funds specified in their marital agreement from Mr. *Prest*'s company by invoking piercing the corporate veil.

²⁶ *Richardson M.*, The Helter-Skelter Application of the Reverse Piercing Doctrine, 79 University of Cincinnati Law Review, 2011, 1605.

²⁷ *Youabian E.*, Reverse Piercing of the Corporate Veil: The Implications of Bypassing "Ownership" Interest, 33 Sw. U. L. Rev. 2004, 77.

²⁸ *Allen N. B.*, Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Volume 85, Number 3, 2011, 1156.

²⁹ *Burke V.*, Reverse Corporate Veil Piercing: Is the Equitable Remedy Worth the Risk?, George Mason Law Review, vol. 30(4), 2023, 1079-1080.

³⁰ *Adam L.*, Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us Nowhere, The King's Student Law Review, Vol. 5, No. 2, 2014, 70.

³¹ *Prest v Petrodel* [2013], UKSC 34) 2 A.C. 415.

Judge Lord Neuberger, in this instance, suggested using the concealment principle to look behind the corporate veil and identify the real facts.³² However, this did not prompt the use of piercing the corporate veil, even though there were grounds to argue that Mr. Prest, as the controlling partner, used the company as a facade. Instead, the court applied trust norms regarding the management of assets, effectively directing the funds held in the company's name to what were, in reality, Mr. Prest's assets. Ultimately, while piercing was not applied, the reasoning and outcome closely resemble the development of reverse piercing in the United States, where a claim from an external third-party creditor – specifically, a personal creditor of the partner – is satisfied with the assets of the company.³³ In other words, Mrs. Prest was effectively a personal creditor of Mr. Prest, yet her claim was satisfied not from Mr. Prest's personal assets but rather from the company's assets, illustrating a classic example of external reverse piercing.

Thus, American traditional and reverse piercing can be viewed as analogous to English practices, namely, piercing the veil under the evasion principle and lifting the veil under the concealment principle. It is noteworthy that no court in either country agrees on the specific instances of their application, leading to a vague and unsystematic practice.³⁴ Despite this, their application remains active.³⁵ This ambiguity is further compounded by the fact that the potential for applying each of the aforementioned doctrines can be based on the same set of facts^{36, 37} which was indeed confirmed by the differing and opposing opinions of the judges in the Prest case.³⁸

5. Conclusion

In conclusion, the relevance of the issues addressed in this article stems from the immense significance of capital-type organizations within the business sector. It is no coincidence that the majority of registered legal forms are capital-based entities, both in Georgia and in the United States, as well as in other developed economies. This surge of interest, coupled with complex transactions and evolving business ethics, gives rise to numerous questions that the law struggles to address. Consequently, it falls upon the judiciary to adapt existing legislation to these intricate and transformed legal relationships. One such issue is the personal liability of partners within a company, which is

³² *Adam L.*, Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us Nowhere, *The King's Student Law Review*, Vol. 5, No. 2, 2014, 74.

³³ *Dignam A., Canruh D.*, Into Reverse: Redesigning Veil Piercing, *Queen Mary Law Research*, Paper No. 401, 2023, 24.

³⁴ *Hannigan B.*, Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company, *Irish Jurist*, New Series, Vol. 50, 2013, 39.

³⁵ *VTB Capital Plc v Nutritek International Corp.* [2013] UKSC 5, [2013] 2 AC 337) <<https://www.bailii.org/uk/cases/UKSC/2013/5.html>>, [15.08.2024].

³⁶ *Richardson M.*, The Helter Skelter Application of the Reverse Piercing Doctrine, 79 *University of Cincinnati Law Review*, 2011, 1606.

³⁷ *Burke V.*, Reverse Corporate Veil Piercing: Is the Equitable Remedy Worth the Risk?, *George Mason Law Review*, vol. 30(4), 2023, 1079-1080.

³⁸ *Adam L.*, Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us Nowhere, *The King's Student Law Review*, Vol. 5, No. 2, 2014, 74.

arguably impossible to legislate comprehensively, given the ambiguous and metaphorical³⁹ justifications surrounding the doctrine of piercing the corporate veil.⁴⁰ Nevertheless, in common law jurisdictions, precedent is given priority, which diminishes the urgency for legislative clarity.

The types of personal liability forms are continually refined and developed in the legal frameworks of various countries. Therefore, enriching national legislation to keep pace with rapidly evolving processes would represent a valuable contribution to corporate law, especially in light of the scarcity of regulatory and judicial practice. This article has conducted a theoretical and practical examination of different forms of personal liability to aid national courts in addressing various dilemmas and improving existing, albeit limited, practices by considering established doctrines and practices from developed countries, while also taking into account the adequacy of their implementation in national legal systems.

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³⁹ Justice Cardozo, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." See: *Berkey v. Third Avenue Railway Co.* [1926] 44 N.Y. 84, 155 N.E. 58).

⁴⁰ *Thompson R.B.*, Piercing the Corporate Veil: An Empirical Study, *Cornell Law review*, 1991, 1036.

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