

Piercing the Corporate Veil Doctrine in Comparative View

หลักการไม่คำนึงถึงสภาพนิติบุคคลของบริษัท กรณีศึกษาเปรียบเทียบ

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ABSTRACT

The foundation of corporate law leads to separation and segregation of corporations from shareholders. The maxim of limited liability hauls shareholders out from puddle of corporate liability unless in extraordinary circumstances, advancing modern capital investment on corporate business until present day. Nevertheless, this expedient mechanism can be abusively applied and end up spoiling third parties' interest. Therefore, this paper will comparatively provide and analyze the framework of 'piercing the corporate veil doctrine' from the perspectives of Japan, U.S. and Thailand as practical solutions for this crux.

Keywords: piercing the corporate veil, disregard the corporate entity, limited liability of shareholders, corporate liability

บทคัดย่อ

การก่อตั้งขึ้นของกฎหมายบริษัทส่งผลให้บริษัทมีสถานะและตัวตนแยกออกจากผู้ถือหุ้น ส่วนหลักการของการจำกัดความรับผิดนั้นก็ส่งผลให้ผู้ถือหุ้นหลุดพ้นจากความรับผิดของบริษัท เว้นแต่ในสถานการณ์ที่พิเศษอย่างยิ่งยวด หลักการเช่นนี้ทำให้การลงทุนในรูปแบบของบริษัทแพร่หลายมากขึ้นจนกระทั่งถึงปัจจุบัน อย่างไรก็ตาม มีการนำหลักการดังกล่าวไปใช้ในทางที่ผิดอยู่บ่อยครั้ง ทำให้บุคคลภายนอกเสียผลประโยชน์และได้รับความเสียหาย ดังนั้น บทความฉบับ

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นี้จึงต้องการนำเสนอและวิเคราะห์เกี่ยวกับหลักการ “กระชาkmานคลุมของบริษัท” ในมุมมองเชิงเปรียบเทียบของทั้งประเทศญี่ปุ่น สหรัฐอเมริกา และไทย อันจะนำไปสู่ทางแก้ไขปัญหาดังกล่าว

คำค้นหา: หลักการเจอะม่านคลุมของบริษัท, การไม่คำนึงถึงสภาพนิติบุคคลของบริษัท, ความรับผิดจำกัดของผู้ถือหุ้น, ความรับผิดของบริษัท

Introduction

The firm establishment of legal principles identified a corporation as a separate and distinct legal entity apart from its shareholders. A corporation is obliged to be liable as a corporate entity, while liability of shareholders exist only when the business venture is got into “at risk” position by their shareholders’ conducts.¹ The notable term “limited liability” is widely recognized as a mechanism of liability segregation. Limited Liability is initially purposed to enhance advancement of commerce and industry because shareholders, encouraged by this promotion, are able to invest their capital on companies with no worrisome concern about their private properties to corporate risks.²

In the nineteenth century, this kind of business-investment-friendly principle was named as the most significant legal innovation.³ It is also plausible for the incentive value of limited shareholder liability to be “outweighed by the competing factor of basic fairness to parties dealing with the corporation.”⁴ However, this acumen doctrine has high tendency to become a double-edged sword if it is abusively applied to deceptive or fraudulent conducts in order to circumvent personal legal liability. Therefore, courts occupy discretion to enforce “piercing the corporate veil”⁵ as a suppressive measure to impose personal civil liability on the shareholders for the obligations of the corporation. A comparative examination on the “piercing the corporate veil doctrine” that appears in the law of Japan and U.S. will be asserted in this paper. The discussion about trend of this doctrine in Thai law, together with problematic issues regarding the codification of piercing the corporate veil doctrine in Thai Law will also be finally included.

¹David H. Barber, Piercing the Corporate Veil, 17 Willamette L. Rev. 371, 371 (1980-1981).

²Id.

³Id. at 372.

⁴Id. and See Labadie Coal Co. v. Black.

⁵Id.

Fundamental Frame of Thai Corporate (or Company) Law

A theory of corporate body has been commonly accepted and broadly engaged in Thai Law. The consideration of corporation existence, which is independent from its shareholders, is an essence of this doctrine, conceptualizing one of the “limited liability” of shareholders’ gambit.⁶ Due to this type of legal design, a corporation acquires its own legal entity, be able to possess or obtain ownership over assets, conduct any business transactions, file a law suit against other entities or, on the contrary, be subjected to legal liability offended by others. In addition, although there is substitution among shareholders, a corporation can still maintain its legal entity.⁷

Under Thai law, a corporation becomes true separate legal entity from shareholders when the registration process is completed. The shareholders are not liable for any debt created by the corporate⁸ but they are limitedly liable only for any unpaid on the shares respectively held by them.⁹

Therefore, a corporation is a category of legal entity which is legally entitled to conduct commercial matters within the scope of the memorandum. It is capable of enjoying rights and being subject to obligations as a natural person, except the rights and obligations which may be only enjoyed or incurred by a natural person, according to Civil and Commercial Code section 68, 69, 70, 72(4).¹⁰

By its nature, corporation cannot be established and run without the most significant composition, which are shareholders. This group of people do not indeed “own” a corporation but they are a corporate itself and hold a status as common owners of all corporate assets. In brief, each shareholder is the composition of a corporation¹¹ which makes a corporation becomes a legal entity or juristic person and holds any rights

⁶WinitChai SamnaoPhan, Khwam Rapphit Khong Phuthuehun Lae Kammakan Khong Borisat Phaitai Lakkan Mai Khamnueng Thueng Saphap Nitibukkhon Khong Borisat [The liability of shareholders and directors of corporations under piercing the corporate veil doctrine] 4 (Apr. 16, 1987) (LL.M. thesis, Thammasat University) (on file with Sanya Dharmmasak Library, Thammasat University).

⁷Id. at 5.

⁸Pramuan Kotmaiphaeng Lae Phanit [Civil and Commercial Code] § 1015.

⁹Id. at § 1096.

¹⁰SamnaoPhan, supra note 6 at 6.

¹¹PitiKun ChiRaMongkhonPhaNit, Kan Mai Khamnueng Thueng Saphap Nitibukkhon [Piercing the corporate veil doctrine] 4-6, available at www.lawthai.org/read/achampitikul16.doc.

and liability separately from its shareholders.¹² A corporation is the *de jure* owner of assets, plus capable of carrying out as a creditor or debtor and ‘corporatively’ holds rights and liability.¹³

According to corporate principles, any rights and liability arising from business operation directed by shareholders within the business scope of the corporation are authentically the rights and liability of the corporation itself. This leads to the consequence that the creditor of the corporate is entitled to enforce his compulsory performance against the corporate only from its assets, but not from personal assets of the shareholders.¹⁴ On the other hand, a personal creditor of the shareholders cannot enforce his compulsory performance against the assets of the corporation as well. In addition, creditors of the corporate are entitled to enforce their compulsory performance prior to personal creditors of shareholders.¹⁵

From shareholders’ angle, they are not personally liable for the third party if a corporation establishes any debts. Additionally, in case of bankruptcy or insolvency, shareholders can still enjoy such protection of limited liability shield, guarding them from liability to the third party. This is because a corporation is a true legal debtor of the third party is the corporation, while shareholders themselves are held liable only for the amount of unpaid on the shares respectively held by them.¹⁶ The core of separate legal entity between shareholders and a corporation is also affirmed in Thai Civil and Commercial Code, which stipulates that a shareholder cannot avail himself of a set-off against the corporate as to payments on shares.¹⁷ It is acknowledged that status of shareholders is precisely an investor and they obtain benefit by being paid with dividends.¹⁸

¹²Id.

¹³Id.

¹⁴Id.

¹⁵SamnaoPhan, supra note 10.

¹⁶Pramuan Kotmaiphaeng Lae Phanit [Civil and Commercial Code] § 1096.

¹⁷Id. at § 1119.

¹⁸SamnaoPhan, supra note 15.

Piercing the Corporate Veil as a Gap Filler

Isolation of legal entities between a corporation and shareholders has been conceptualized from time to time, together with structural legal design of limited liability of shareholders.¹⁹ Their significance and common acceptance come from the ground that limited liability enhances level of diversification for shareholders more effectively than imposing full liability on investors for corporate debt, since their exposition to the risk would be too overweigh to handle. Under this reasoning, diversification under dimness of unlimited liability wing tends to engage shareholders with increasing risk.²⁰

In addition, limited liability benefits the transfer of shares by allowing them to be moved more freely. Severe impairment of trading in public market may occur if shareholders had to encounter risk of exposing themselves to personal liability each time they trade shares. Moreover, in practical, when investors engage in more risk, they tend to be more careful on their agents or managers' conducts; therefore, limited liability approach can manage monitoring cost more economically by diminishing the necessity to keep eyes on their managers.²¹ Besides, it stimulates reduction of budget spending on watching over other shareholders because if the wealth of other shareholders becomes greater, the plausibility that assets of any single shareholder will not be taken to satisfy a judgment will become higher.²² In addition, purposes of limited liability are to "limits the potential loss of a shareholder to the amount invested in the enterprise" and to "shift a substantial portion of the risk of business failure to creditors and away from shareholders."²³ However, these privileged consequences of limited liability are not highly be sensed in close corporations, where combination of status between shareholders and managers are commonly noticed.

Nonetheless, there are two sides to every coin, including the coin named the strict limited liability rule. This functional legal design can occasionally be abusively brought in to play. Fraudulent conducts and evasion of legal liability can easily be pandered by

¹⁹Id. at 8.

²⁰Gordon Smith & Cynthia A. Williams, *Business Organizations: Cases, Problems, and Case Studies* 208 (2004).

²¹Id.

²²Id.

²³Peter French, *Parent Corporation Liability: an Evaluation of the Corporate Veil Piercing Doctrine and Its Application to the Toxic Tort Arena*, 5 *Tul. Envtl. L.J.* 605, 607 (1992).

misappropriated use of limited liability concept. For example, a corporate entity may be held liable instead of shareholders themselves in contractual obligations, tortious acts or tax levy by “veiling” a corporate entity as a cover to hide their inner objectives²⁴ which leads to problematic conditions for innocent third parties who have legal binding with those corporations.

Illustratively, according to most corporate statutes, there are common articles which prohibit a corporation from lending money to its own director, in order to suppress conflict of interest. To circumvent this legal obstacle, such director may documentarily establish a new corporation where he solely becomes a major shareholder. As a consequence, he then is able to take advantage from this new corporate entity by borrowing money from the corporation that he still positions as a director under the entity of the new corporation as a borrower.²⁵

Another exemplification of untruthful exercising on handiness of limited liability or corporate entity is in the circumstance when a person has clinched the deal on an agreement binding him not to operate a business that will compete with his party’s business. In order to unlock the shackle, a new corporation can be formed which he become the major shareholder and the director so that he can operate any kind of business under the name of such corporation and lawfully gain beneficial profit.²⁶

Additionally, a corporate veil can also be used as a camouflage to escape from legal liability by being formed in the mode of undercapitalized corporation while capital level of such corporation will remain so little that any anticipated debts are implausible to be paid. Then, after running the business under the shade of such deceit corporation, as a result, any creditors of the corporation (including the creditor by contract and tort) of that veiled corporate will suffer from insolvent status of the corporation and any of their debt repayment would be under very uncertain positions.

Accordingly, realizing hazardous collateral impacts of corporate entity from the above problematic incidents, various jurisdictions have developed legal framework to install protective mechanism for innocent third party and restrain any conduct of business operations that show tendency of such abusive corporate veil. The framework has been

²⁴SamnaoPhan, supra note 6 at 8.

²⁵Id. at 9.

²⁶Id.

agreeably conceptualized to consider approval of an alleviative exception for limited liability of corporate entity doctrine by enforcing “piercing the corporate veil” or “disregarding the corporate entity” doctrines to fill up the legal gap of corporate entity regulation.²⁷

Once a veil of a corporation has been removed or pierced, it will become the identical person as a shareholder or the “alter ego”²⁸ of a shareholder that leads to unification of legal entity of a corporation and its shareholders. It illustrates a non-isolated status of legal entity between a corporation and its shareholders, in other words, this doctrine will deem that the business operation conducted by a corporation is the personal conduct of the shareholders or the director of such corporation. Therefore, the shareholders or directors of the corporation who truly manipulate behind the corporation and, in bad faith, take advantage from limited liability or separate legal entity of the corporation as a veil or commit fraudulent shall be unlimitedly liable together with the corporation for any debts that their corporation caused.²⁹

However, revocation or declination of limited liability and corporate legal entity are not the aim of piercing the corporate veil doctrine. It does not either dissolve a corporation; instead a corporation is able to remain its normal operation since this doctrine will focus on spotlighting to the insider or persons who are behind the curtain and should really be jointly liable to the third party with the corporation. It is, nevertheless, notable that the standing of this doctrinal measure is an exception of corporate entity concept for maintaining equity in specific circumstances. It will be effective only for a corporation that is unfaithfully run to estoppel a shareholder from raising any defense based on the limited liability rule. As a result, he has to be liable for the debt beyond the unpaid amount on the shares respectively held by him. In other words, the liability that he needs to bear will no longer be limited to the amount of his unpaid share.³⁰

²⁷Barber, supra note 1.

²⁸the other self”, see Elizabeth S. Miller, Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities, 43-FALL Tex. J. Bus. L. 405, 406 (2009).

²⁹SamnaoPhan, supra note 6 at 11.

³⁰Id. at 12.

U.S. Law and Evolution of Piercing the Corporate Veil Doctrine

The phrase “piercing the veil” was initially emitted since 1912 by Professor Maurice Wormser³¹ while the doctrine of limited liability began to formalize itself in U.S. long before, with no precise starting date. An enactment of five variant statutes launched by Massachusetts parliament, from 1809 until 1830, legislating liability of shareholders seems to be the first milestone of expansive adoption on limited liability doctrine in United States. The judicial decision in case of *Wood v. Dummer*³² granted an approval for the principle of limited liability.³³

Reluctance of granting damages award against corporations could be sensed from U.S. judicial decisions in primal age of U.S. corporate law, and for this reason, the removal of corporate veil was scarcely expected³⁴, in accordance with enormity and desirability of corporate being which devoted to financial and economic advantages.³⁵ The remarkable phrase quoted from Chief Justice Marshall even defined the corporation as “an artificial being, invisible, intangible an existing only in contemplation of law.”³⁶ Illustratively, according to 18th Century Mill Acts in New England, it prohibited owners of the land adjacent to mills from claiming damages if flood occurred on their properties because of water storage and discharge. Although the primary purpose of statutes focused on compact-sized mills of the colonial era, mill factories that caused flood on wide area of land was later also under enforcement of this statutes³⁷

It is notable that an approach to the problematic issue of individual shareholder is mostly based on tracing through development of decisions that the courts made because there is no uniform binding rules. Moreover, purity of state-law domination was a legal nature of corporate establishment in the United States.³⁸ This excessive variety urged Judge Cardozo to leave a statement of opinion in *Berkey v. Third Ave. Railway Co.* that

³¹Douglas C. Michael, To Know a Veil, 26 J. Corp. L. 41, 43 (2000).

³²30 F. Cas. 435 (C.C.D. Me. 1824).

³³Carsten Alting, Piercing the Corporate Veil in American and German Law-Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. & Int’l L. 187, 192 (1994-1995).

³⁴Id.

³⁵Peter French, supra note 23 at 605.

³⁶Id.

³⁷Alting, supra note 33 at 193.

³⁸French, supra note 35 at 609.

“the whole problem of the relations between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor.”³⁹ Moreover, Professor Elvin R. Latty from Duke Law School remarked that “what the formula comes down to, once shorn of verbiage about control, instrumentality, agency and corporate entity, is that liability is imposed to reach an equitable result.”⁴⁰

Although development of theories has been being acknowledgeable, the summary noted by Judge Sanborn brightened the passage in *United States v. Milwaukee Refrigerator Transit Co.* and provided descriptive approach to the problem:

“If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.”⁴¹

One of significant issues that should be notified is regarded to difference between piercing the veil and other issues in which owners of a corporate entity shall be personally held liable whatsoever without necessity to apply piercing mechanism. For example, an individual obligation or tortuous acts may be occurred from individual conducts of a shareholder, instead of a corporate entity. He or she may induce a creditor that his or her actions are made individually, not on behalf of the corporation.⁴² Decisions on these cases will be made without applying the rules of piercing the corporate veil because an occurrence of individual liability is caused by the shareholder.

Another theoretical evolution of piercing the veil doctrine was also remarked by Professor Adolf A. Berle of Columbia Law School, as an approach of “enterprise entity theory.”⁴³ Professor Berle noticed that when a business was divided into various entities under supervision of the parent corporation, there was an inconsistency between economic reality and the legal organization. Therefore, he commented that the subsidiary’s debt is not the only liability which the parent should bear, but the parent

³⁹Alting supra note 37.

⁴⁰Id.

⁴¹Id.

⁴²Id.

⁴³Id. at 194.

should also be liable for “all of the comprised assets available to a creditor of any of the enterprise’s corporations.”⁴⁴

The cases of New York taxi-cab are another source which can increase the illustrational level. Many cabs were paired and separately incorporated by each of their owners. The purpose is to enjoy the limitation of tortious liability arisen from the use of one cab and prevent the other “cab entity” from the flak of liability that may spread to them by incorporating in pairs. Therefore, only the lowest amount of third party insurance was the responsibility of the individual cabs, which often could not suffice obligations incurred.⁴⁵

Rejection on Berle’s enterprise entity theory was made by the court in the case of *Berkey v. Third Ave. Railway Co.*⁴⁶ This case involved a parent corporation which was an owner of many subsidiary companies and controlled the operation of a railway transportation system in Manhattan. The court refrained from favoring the plaintiff, who caught one of the subsidiaries’ street cars and suffered from injury by negligence, by refusing to impose shareholder liability. In an alternate taxi-cab case, *Walkovszky v. Carlton*, a reference to Berle’s conception was made by the court. The conclusion was mostly narrated that extension of liability to the enterprise was plausible but not to the individual shareholders. However, it can be evidently sensed from the conclusion of the court that other factors such as undercapitalization and commingling of the corporation’s affairs had been focused and magnified more, rather than concentrating only on camouflaged separation of an enterprise by incorporating its own divisions.⁴⁷

There are other theoretical approaches which, instead of focusing on Professor Berle’s enterprise entity theory, take more glances at creditor’s view point. For example, Professor Wormser maintained that the lawful fictional status of a corporate separation is a privileged existence conferred by a state and it can be used only to reasonably and administratively serve legitimate purposes. Consequently, achievement of justice and prevention of shareholders from circumvent their legal liability should be the purposes of

⁴⁴Id.

⁴⁵Id.

⁴⁶Id.

⁴⁷Id.

the pierce. Moreover, it is his belief that because of an involvement of the complex relations, statutorization of these piercing rules could not be feasible.⁴⁸

A similar approach to Professor Wormser's can be seen in California. Californian courts have more readiness than other states to disregard the entity. The courts concentrated on an application of a two-prong test, mostly known as the "alter ego" doctrine. The requirements of this test are comprised of: "(1) a unity of interest between the shareholders and their entity so that a separation of them no longer exists and (2) an inequitable result would follow if the acts objected to by the creditors were only treated as those of the corporation."⁴⁹

Another comparable approach is a theory asserted by Professor Powell. He made a suggestion on how to apply a three-prong test, widely known as the "instrumentality rule."⁵⁰ Adoption of this rule initially occurred in *Lowendahl v. Baltimore & Ohio R.R.*⁵¹ Powell's test depends upon: "(1) control or complete domination of an entity, (2) fraud or wrong committed by the use of this control or domination, and (3) injury or loss suffered by the plaintiff caused by the aforesaid act." The original purpose of development of the test was for parent-subsiary cases, but enforcement of the test to other cases, which were related to the domination of an entity, were also seen in various jurisdictions.⁵²

In order to decide when a corporate entity should be disregarded, Powel also provided a tabulation of eleven key-factors for determination. Addition of other factors can also be found. These additional factors can be extracted, by focusing on their mutual essences, into three factual formats. These are comprised of "situations of control or domination, undercapitalization, and commingling of assets or disregard of corporate

⁴⁸Id. at 195.

⁴⁹Id. and see note 28.

⁵⁰Id.

⁵¹In this case, "...two insolvent individuals had, prior to the entry of the judgment against them in favor of Lowendahl, transferred substantially all of their assets to a newly-created corporation in exchange for forty-nine percent of its stock. The defendant B&O Railroad was the majority shareholder of such corporation and, when Lowendahl failed to recover against either the individual debtors or against the insolvent transferee corporation, he sued B&O on the theory that the corporate veil of the transferee corporation should be pierced to hold B&O liable..." See <http://www.krendl.com/CM/Publications/Piercing-Corporate-Veil.asp>.

⁵²Alting supra note 33 at 195.

formalities.” Piercing the veil will become a concerned issue when these situational patterns are visible.⁵³

Another U.S. scholar, Davis H. Barber, possesses some similar conceptualization on an issue of piercing the corporate veil. He maintains that academically, enforcement of the piercing doctrine shall be raised upon publicly held and closely held of family corporations.⁵⁴ Notwithstanding, a diagnosis of plenty of the case laws evidences that there is no case in which personal liability for the obligations was found at the shareholders of a corporation whose stock was publicly marketed or broadly negotiated. Therefore, “the piercing doctrine applies primarily to closely held corporations”.⁵⁵

Financing closely held corporations can be practically committed by one of two approaches. For the first one, the promoters are necessarily required. Their responsibilities are not only management of the corporation but also incorporation and contribution of their partial personal assets into the initial capital of the newly-born corporation, expecting the corporate veil to guard the remaining portions of their personal assets from business risky situation.⁵⁶ The second approach requires partial contribution of initial capital from the promoter-managers including the raise of additional amounts from shareholders whose expectations are to refrain from managing the business. Therefore, if piercing of the veil becomes a consequence, personal liability will rest upon only shareholders who truly engaged in management of the corporation. Although reasonability can be sensed in this discriminative liability among shareholders in order to serve the rational purpose of limitation on shareholder liability, dicta⁵⁷ in a couple of cases are the only legal supports of this rationality.⁵⁸

⁵³Id.

⁵⁴Barber supra note 1.

⁵⁵Id.

⁵⁶Id.

⁵⁷Dicta are “the plural form of dictum. A statement of opinion or belief considered authoritative because of the dignity of the person making it. The term is generally used to describe a court’s discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar. Judicial dictum is an opinion by a court on a question that is not essential to its decision even though it may be directly involved.” See <http://www.law.cornell.edu/wex/dicta>.

⁵⁸Barber supra note 1.

Additional noteworthy point of piercing policy for closely held corporations is that U.S. courts have applied the corporate veil piercing in the conditions of parent-sub subsidiary corporation situation, for example, when there is a contract between a plaintiff and the subsidiary and upon default, action of an attempt to impose the liability on parent corporation is apparent.

However, since limited liability for shareholders was initially invented in state corporation law to serve the purpose of promoting commerce, therefore, U.S. courts have shown reluctance on piercing the corporate veil, even when incorporation was directly aimed for limiting the liability of corporate founders.⁵⁹ Consequently, it might be implied that justification of applying piercing the corporate veil requires something more than inner intention of the shareholders to evade personal liability. However, accurate tabulation of such requirement has not been evidently established. Equitability becomes the destination of a party in the lawsuit who seek to disregard the corporate entity. Generally, the trial court considers various circumstantial factors in order to decide whether reasonability to pierce the veil is reachable.⁶⁰

While U.S. courts are allowed by a “totality of the circumstances” doctrine to make a decision on each case based on its own facts, such doctrine is not useful for entrepreneurs who are searching for firm guidelines about how to avoid personal liability. Notwithstanding, the piercing doctrine has been synchronized and analyzed into the enlisted version of elements that is applied by U.S. courts, especially when an issue whether to pierce the corporate veil becomes an important matter in the case to determine. A revelation extracted from the case law illustrates that one or more of the following factors were apparent in each piercing model:⁶¹

“(1) commingling of funds and other assets of the corporation with those of the individual shareholders (Corporation XYZ holds no separate bank account but deposits the receipts from its business transactions in the personal account of A, its sole shareholder);

(2) diversion of the corporation’s funds or assets to no corporate uses (to personal uses of the corporation’s shareholder);

⁵⁹Id.

⁶⁰Id. at 374.

⁶¹Id.

(3) failure to maintain the corporate formalities necessary for the issuance or subscription to the corporation's stock, such as formal approval of the stock issue by an independent board of directors;

(4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;

(5) failure to maintain corporate minutes or adequate corporate records;

(6) identical equitable ownership in two entities (Corporation A is owned by the same shareholders and in the same proportions as Corporation B);

(7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);

(8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;

(9) absence of separately held corporate assets;

(10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;

(11) sole ownership of all the stock by one individual or members of a single family;

(12) use of the same office or business location by the corporation and its individual shareholder(s);

(13) employment of the same employees or attorney by the corporation and its shareholder(s);

(14) concealment or misrepresentation of the identity of the ownership, management, or financial interests in the corporation, and concealment of personal business activities of the shareholders (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);

(15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;

(16) use of a corporate entity as a conduit to procure labor, services, or merchandise for another person or entity;

(17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;

(18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity, or use of a corporation as a subterfuge for illegal transactions;

(19) the formation and use of the corporation to assume the existing liabilities of another person or entity.”

In order to figure out which of these elemental factors will conquer the legitimate presumption of upholding the institutional concept of corporate entity, the balancing test⁶² between economic value on shielding shareholders from personal liability and the equitability of piercing shall be taken into consideration.⁶³

Japanese Approach on Piercing the Corporate Veil

Japanese jurisdiction also grants significant concern on synchronization of piercing the veil doctrine 「法人格否認の法理」 as well, since after the World War II many corporations have been established to serve the flourish of economy, some of them were formed with hidden intention to abusively shield the individual shareholders from legal enforcement, such as delinquency of taxes.⁶⁴ The term 「法人格否認の法理」 (*houjinkakuhininnohour* or “disregard of the corporate personality doctrine”) was initially defined in the paper of Prof. Kenichiro Osumi 「大隅 健一」 in 1950.⁶⁵ Equitability and justifiability, as in U.S. jurisdiction, are the main purpose of Japanese juridical branches to enforce the piercing scheme.⁶⁶

⁶²“A subjective test with which a court weighs competing interests, e.g. between an inmate's liberty interest and the government's interest in public safety, to decide which interest prevails.” See http://www.law.cornell.edu/wex/balancing_test.

⁶³Barber supra note 1. at 375.

⁶⁴西川 勝利 (Katsutoshi Nishikawa), 納 分における法人格否認の法理の適用 (Application of the Doctrine of Piercing the Corporate Veil in Disposition for Tax Delinquency), publication of Hiroshima Taxation Bureau Collection Division, at 353, available at <http://www.nta.go.jp/ntc/kenkyu/ronsou/30/224/ronsou.pdf>.

⁶⁵Id. at 363.

⁶⁶田村陽子(Yoko Tamura), 法人格否認の法理に する訴訟法的考察(The Case Studies of Piercing the Corporate Veil Doctrine), Ritsumeikan University Law Journal, at 141-145, available at <http://www.ritsumei.ac.jp/acd/cg/law/lex/07-4/tamura.pdf>.

Japanese courts also recognize the establishment of principles concerning piercing the corporate veil. An introduction of this legal doctrine to Japan was made by a Supreme Court decision of 27 February 1969⁶⁷, stating that "where the legal personality of [a company] is nothing more than a mere shell, or where it is misused in order to avoid the application of legislation...it will be necessary to pierce the corporate veil."⁶⁸

Two main factors for determining whether the corporate personality shall be disregarded can be extracted from Supreme Court of Japan's decision rendered on February 27, 1969. These factors are "(1) when there is intentional perversion of the corporate personality or (2) when the corporation is the mere adjunct or alter ego of a shareholder." Doctrine of perversion seems to be the fruits of old American case law or German law, and the alter ego doctrine shares similarity with to "instrumentality rule"⁶⁹ which has influenced the courts' discretion in U.S. for decades. As a consequence of this Supreme Court decision, an allowance is granted to many courts on disregarding the corporate entity under such circumstantial conditions.⁷⁰

⁶⁷http://www.tomeika.jur.kyushu-u.ac.jp/corporate/case/02_en.pdf.

"X, an owner of the shop in question, entered into a shop lease agreement for a 5 year lease period on February 1961 with Y joint-stock company (kabushiki kaisha). Y joint-stock company, which sold electrical equipment, etc., even though it was a joint-stock company, was a company organized only for tax advantages, and was actually an individually-owned company (kojinkigyo) by A as representative director, and therefore X entered into the agreement without recognizing whether its counterparty, an electrical shop, was a corporate organization or an individually-owned company and in the end, X entered into the agreement with A as an electrical shop.

Early in 1966, when X requested that A vacate the shop in question returning the shop to X, A delivered a signed promise to the effect that A would vacate the shop by August 19 of the same year. However, A had not vacated the shop by that date, and then X filed a lawsuit in court seeking to have A vacate the shop, with A as a defendant. During the continuance of this lawsuit, a settlement, to the effect that A should vacate and return the shop to X, was reached between X and A at the court's recommendation. However, A claimed that A would not vacate the part of the building used by Y joint-stock company because the only party to the settlement was A, and X had filed the lawsuit in question claiming to vacate the building in question etc., against Y joint-stock company as a defendant."

⁶⁸<http://www.tomeika.jur.kyushu-u.ac.jp/corporate/index.html>.

⁶⁹See note 50.

⁷⁰Aotake Shoichi, The Close Corporation in Japanese Law, Hokkaido University Law Journal, at 1886., available at [http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/16339/1/31\(3-4\)2_p508-493.pdf](http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/16339/1/31(3-4)2_p508-493.pdf).

Thai Law and the Settlement of Piercing the Corporate Veil Doctrine

Thailand began to adopt piercing the corporate veil, which had been enforced in foreign countries' law, since 1917 A.D. by prescribing it in various acts which are:-

1) Trading with the Enemy Act B.E. 2460 (1917 A.D.).

This act prohibits any Thai people and foreigners who live in Thailand from making any contract or any agreement or having any trading relationship with any alien enemy who are German, Austrian and Hungarian which are the war enemy against Thailand. This act prohibits any trading no matter direct or indirect trading. Any contract which is against this act will be void.⁷¹

The importance of this act is in section 8 which allows the minister to sequester and dissolve any business organizations that conduct business with an alien enemy. The notable point is that “alien enemy” does not include only natural persons, partnerships or corporations but also means members in limited partnerships and shareholders in corporations. Therefore, although the corporations is registered in Thailand (which means it is Thai corporation), but some or all of the shareholders hold an enemy nationality, that corporation are defined as an alien enemy. This rule shows that the act disregards the separation of corporate entity concept.⁷²

2) Act on Confinement and Business or Asset Control of the Enemy of United Nations B.E. 2488 (1945 A.D.).

The importance is in section 3 which states that if any person, without any permission from the government officer, have made any agreement with the person who is the enemy of United Nations, that agreement or contract will be void. This act defines “the person who is the enemy of the United Nations” as natural person, corporation, foundation, general partnership and other organizations with no regard to their registration. Moreover, although these organs are legal entities that are registered under Thai law in Thailand but if their business and purpose benefit any person who is the enemy of UN (such as some shareholders hold enemy nationality), that legal entity is also considered as the enemy of United Nations. Section 7 of this act grants power to the

⁷¹ChiRaMongkhonPhaNit, supra note 11 at 19.

⁷²Id.

government officer to take over such business and sequester all assets and dissolve such business.⁷³

3) Foreign Business Act B.E. 2542 (1999 A.D.)

This act involves the controlling of foreign business in order to maintain the balance of national trade and business power and to benefit the whole nation. This act limits foreigners' rights which affect the structure of shareholding or possessing of such business.

According to this act, section 4 states that "Foreigner" means:-

(1) Natural person not of Thai nationality.

(2) Juristic person not registered in Thailand.

(3) Juristic person registered in Thailand having the following characteristics.

(a) Having half or more of the juristic person's capital shares held by persons under (1) or (2) or a juristic person having the persons under (1) or (2) investing with a value of half or more of the total capital of the juristic person.

(b) Limited partnership or registered ordinary partnership having the person under (1) as the managing partner or manager.

(4) Juristic person registered in Thailand having half or more of its capital shares held by the person under (1), (2) or (3), or a juristic person having the persons under (1), (2) or (3) investing with the value of half or more of its total capital.

For the purpose of the definition, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of foreigners unless otherwise provided by ministerial regulations.

This rule shows that this act applies piercing the corporate veil doctrine by defining the legal entity, although registered under Thai law, as a foreigner if such legal entity contains majority of foreign shareholders because they can control the whole business which means they are the same entity as corporation or partnership.⁷⁴

4) Land Code

Land Code limits the title of land possession of foreign legal entity (natural and juristic person).

⁷³Id. at 20.

⁷⁴Id. at 21.

Section 97 states that the following juristic persons have the same title in land as a foreigner.:-

(1) Corporations that contains the amount of foreign capital more than 49% or contains foreign shareholders more than a half.

Additionally, if such corporation issue bearer bonds, that bonds it shall be deemed that foreigners hold that bonds.⁷⁵

Section 98 states that in case that the juristic persons in accordance with section 97 capitalized or become shareholders or partnerships in other juristic persons in the way of section 97, such juristic person shall be deemed as foreigners.

Section 86 states that for foreigners, in order to obtain any land for purpose of living, commerce, industry, agriculture, cemetery, donation or religion, it is under condition and rule regulated by ministerial regulation and minister permission.

From the aforementioned rule, foreigners have limited rights in possessing land which are different from natural or juristic persons with Thai nationality. Therefore, somebody may try to circumvent the law by establishing a corporation to possess the land instead of them. Consequently, piercing the veil doctrine will be applied in this situation. This doctrine will deem such corporation as a foreigner which is manipulated by foreign natural persons since they are major shareholders and control the majority of the business that make the corporation become the same entity as foreign shareholders.⁷⁶

5) Commercial Banking Act, B.E. 2505 (A.D. 1962).

This act has applied piercing the corporate veil doctrine in the following:-

Section 5 Bis states that no person shall hold more than five percent of the total amount of a commercial bank's share sold....

Shares of a commercial bank held by the following persons or partnerships shall be regarded as shares held by the person under the first paragraph:

- (1) the spouse of the person under the first paragraph;
- (2) a minor child of the person under the first paragraph;
- (3) an ordinary partnership in which the person under the first paragraph or the person under (1) or (2) is a partner;

⁷⁵Id.

⁷⁶Id.

- (4) a limited partnership in which the person under the first paragraph of the person under (1) or (2) is a partner with unlimited liability or in which one or more of such person is a partner or are partners with limited liability in a aggregate amount exceeding thirty percent of the total capital of such limited partnership;
- (5) a limited company in which the person under the paragraph or the person under (1) or (2) or the partnership under (3) or (4) holds shares, separately or in combination, in an aggregate amount exceeding thirty percent of the total amount of such limited company's shares sold; or
- (6) a limited company in which the person under the first paragraph or the person under (1) or (2) or the partnership under (3) or (4) or the limited company under (5) holds shares, separately or in combination, in an aggregate amount exceeding thirty percent of the total amount of such limited company's shares sold.⁷⁷

The above rules illustrate implication of piercing the corporate veil doctrine in the way that they deem the corporation which is settled by natural person in order to hold shares in a commercial bank with purpose to circumvent section 5 Bis by holding more than 30 percent of the shares in such corporation. Therefore, they have major control in the corporation. Consequently, the law defines the shares that are held by such corporation as the shares of natural person who is the shareholder of the commercial bank, then it is against the law to hold more than 5 percent of the commercial bank's shares.

Additionally, section 12 states that no commercial bank shall:

(2) in favor of its director, grant credits, guarantee any debts, or accept, gives aval to, or intervene for honor of any bills which the director is a drawer, a maker or an endorser,

Section 12 Bis states that the granting of credits or guaranteeing of any debt in favor of any of the following persons or partnerships, or the accepting of any bill, the giving of aval to or the intervening for honor of any bill which any of the following persons or partnerships is a drawer, maker or an endorser shall be deemed to be the

⁷⁷Id.

granting of credits or guaranteeing of any debt or the accepting, the giving of aval or the intervening for honor for the benefit of the director under Section 12 (2):

- (1) the spouse of the director;
- (2) a minor child of the director;
- (3) an ordinary partnership in which the director or the person under (1) or (2) is a partner;
- (4) a limited partnership in which the director or the person under (1) or (2) is a partner with unlimited liability or in which one or more of such persons in a partner or are partners with limited liability in an aggregate amount exceeding thirty percent of the total capital of such limited partnership;
- (5) a limited company in which the director or the person under (1) or (2) or the partnership under (3) or (4) holds shares, separately or in combination, in an aggregate amount exceeding thirty percent of the total amount of such limited company's share sold; or
- (6) a limited company in which the director or the person under (1) or (2) or the partnership under (3) or (4) or the limited company under (5) holds shares, separately or in combination, in an aggregate amount exceeding thirty percent of the total amount of such limited company's shares sold.

According to section 12, there is a feature of enforcing piercing the corporate veil doctrine to define the liability of shareholders or directors and/or family members of shareholders or directors of corporations who hold shares more than 30 percent (can control the corporation) by deeming that the granting of credit to the director of the corporation who is the major shareholder of such corporation is equal to granting the credits to the director of the commercial bank which are prohibited by law.⁷⁸

6) Thai Revenue Code

Thai revenue code have adopted the piercing the corporate veil doctrine to benefit the government in collecting tax, for example,:

Section 77 which was amended by 11th revenue code amendment act B.E. 2525 in order to fill the gap of the law to prevent abusive corporate veiling. It provides the definition of the word "produce" to mean "agriculture doing, natural resource mining,

⁷⁸Id. at 23.

good transforming,...no matter such businesses are committed by the tax payer himself or by others who have agreement with the tax payer to do such business.

The reason of the parliament on this enactment is that it wants to collect tax as much as it can. In the past, troubles occurred when some companies tried to evade the tax by making a contract with another company to produce the goods in their orders and sell it to the former one as they wanted. The latter company would be forced by the former one to stamp the emblem of trademark of the former company while the former company was the one who provide packaging, quality standard features, color and ingredients of all products to the latter. Moreover, there was an agreement between two of them that the latter company could not produce those goods to other companies.

The Thai Revenue Department then filed a law suit to that company to collect the tax as “producer” rate (which is higher than the “purchaser” rate). However, the court decided that the former company was the purchaser not the producer because it did not transform the goods it bought from the latter company into the new goods, therefore it was not defined as “producing” according to the definition given in Revenue Code section 77.⁷⁹

Accordingly, due to the amended law, any person or company cannot decrease tax burden by using the above method and have to be liable for the high tax rate as a producer.⁸⁰

Additionally, piercing the corporate veil is not applied only in the legislative acts; it is also applied in the court decision.

The Thai courts will use piercing the corporate veil doctrine by using section 5 of Civil and Commercial Code which states that “Everyone must, in the exercise of his rights and the performance of his obligations, act in good faith.”⁸¹ Often, courts use these two elements:

⁷⁹Id.

⁸⁰Id.

⁸¹Pramuan Kotmaiphaeng Lae Phanit [Civil and Commercial Code] § 5.

1. Alter ego

The situation when a corporation is just an instrument of shareholders. The assets of corporations are like the assets of shareholders and not enough to run a corporation's business.⁸²

Additionally, when the corporation is dominated by only some amount of shareholders, it can be said that such corporation is just a "sham" of the shareholders. In addition, in case that the parent corporation dominates and controls all of their subsidiaries which all of their shares are held by the parent corporation. These acts may leads to equitability of the courts to apply piercing the corporate veil doctrine.⁸³

2. Fraud or Bad Faith act shall be proven.

The courts may enforce piercing the corporate veil doctrine when there is an occurrence of unfaithful act, beside alter ego, for example:

1. Shareholders or directors of the corporation run the pierced corporate as a puppet.
2. Shareholders use their personal assets confound with those of the corporation.
3. Using the corporation to corruptly seek for their own personal benefit or transferring the corporation's asset to themselves.
4. Running the business of the corporation as a personal business or publicly show that the business of the corporation is not separated from personal business.
5. Fraudulent, dishonest or unlawful acts occur.
6. Using the corporation to evade the law, debts or liability.
7. The corporation has so low capital that is not enough for expected liability in future that can occur from running the business.

Therefore, when these circumstances occur, Thai courts may use piercing the corporate veil doctrine as much as they can to maintain equity in society.⁸⁴

⁸²ChiRaMongkhonPhaNit, supra note 11 at 28.

⁸³Id.

⁸⁴Id. at 28.

Epilogue

In sum, from all of the discussions above, it is quite obvious that piercing the corporate veil doctrine appears in many countries' law such as United States and Japan. Thailand adopted this doctrinal framework since B.E. 2460 (1917 A.D.) in Trading with the Enemy Act and in the court decisions. However, the codification of this doctrine has not been obvious yet in either Thai law, Japanese law or U.S. law.

Considering from the existed problems in Thailand, the court will hold the defendant to be liable with his corporation in the debts of the corporation if that person corruptly used the "separate legal entity concept". Moreover, that person used the corporate decisively as the veil to evade his contractual obligation.

Some scholars said that from the Thai Supreme Court decisions as a guideline,⁸⁵ the courts have applied section 5 of Civil and Commercial Code⁸⁶ as a vehicle leading to piercing the corporate veil doctrine as "Good Faith" doctrine⁸⁷ Therefore, there is no necessity to codify piercing the corporate veil doctrine.⁸⁸

However, law amendment and codification should be taken into account in order to decrease the amount of using the corporation as a veil from limited liability concept. The amendment should be aimed to define an exception of limited liability or separate legal entity of the corporation. This can lead to more effective ways to fix the problems, prevent and define the liability of the person who abusively uses the limited liability doctrine. For Thailand, arranging piercing the corporate veil doctrine in form of an exception in some specific law may not be the most optimized way to serve justice because in order to solve the problems regarding abusive application of limited liability rule, amendment of all of relevant specific laws is required, which consumes lots of time and budget.

Therefore, if amendment of the law which make piercing the corporate veil become more broadly used is plausible, it should be arranged in Civil and Commercial Code, Title 22: Partnership and Companies as an exception of limited liability doctrine in section 1015, 1096. This will solve the troubles arising from using the limited liability as a veil in every

⁸⁵Please note that in Civil Law system, cases are not the source of the law. However, the courts often use precedent cases as a guideline of the way to interpret the text in the code.

⁸⁶**TCCC Section 5:** "Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith."

⁸⁷ChiRaMongkhonPhaNit, supra note 11 at 29.

⁸⁸The sources of the law in Civil Law system are only codes, statutes and regulations.

circumstance and can be applied in every type of corporations. Moreover, codification of piercing the corporate veil doctrine will enhance clarity and righteousness for the judicial branch to untie the legal, instead of an arm-length enforcement from section 5 of TCCC.

The guideline of the amendment may state that “In case that a corporations is unfaithfully run; with an intention to fraud or deceive its creditors or innocent third party or try to evade the liability or law enforcement, shareholders, directors or officers who are the conspirers of such act, shall be unlimitedly liable for the all debts of the corporation together with the corporation.

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