

Anssi Kärki

Piercing the Corporate Veil in Finland

A Multijurisdictional Study Aimed at
Developing the Finnish Piercing Doctrine



ANSSI KÄRKI

**Piercing the Corporate Veil in Finland –
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the Finnish Piercing Doctrine**

Academic dissertation to be publicly defended
with the permission of the Faculty of Law at the University of Lapland
in LS2 on 13 March 2020 at 12 noon.



LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND

Rovaniemi 2020

University of Lapland
Faculty of Law

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Copyright: Anssi Kärki

Layout: Taittoto PrintOne

Cover: Communications and External Relations, University of Lapland

Acta electronica Universitatis Lapponiensis 276

ISBN 978-952-337-193-4

ISSN 1796-6310

URN: <http://urn.fi/URN:ISBN:978-952-337-193-4>

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Foreword

I will not put forward any deep philosophic metaphors for growth, inspiration or hard work as the essence of the years I spent writing this thesis. For the most part, the writing process involved cyclic alteration between excitement and an ever-increasing feeling of boredom with the subject. It was just work as usual and I was content with the nature of it. That said, I should clarify that by no means do I attempt to belittle the significance of all the effort spent on its creation, especially that of others than myself. I am extremely grateful for all the people around me who, despite my increasingly grumpy attitude, saw this project through with me. I cannot even recall how many times I heard the phrase “not much left” during the process. And I am glad I was lied to. It enabled me to finish the work.

Most of all, I want to thank my instructors, *Tuula Linna* and *Juha Karhu*. Tuula, you have been there for me from the beginning of my academic endeavors, and no other person has played a greater role in my development as an academic. You are the first person I think of when I realize I need some advice on my work. Juha, you always managed to surprise me with an insight, theory or a wild idea. I especially appreciate your attitude toward my ideas – although you may not have realized that it created many headaches which, nevertheless, I was glad to endure. When I began writing my thesis, someone made a joke that my instructors are a perfect combination of one representing discipline and the other inspiration. After all the years that elapsed, I know that the joke is unfounded. You both gave me inspiration and neither of you let me slack off. I am extremely grateful that you took the time to teach me, as I would be nowhere near the level I am today, had it not been for you.

The next persons I am indebted to are *Vesa Annola* and *Hanne Sondegaard-Birkmose*. Vesa and Hanne, you acted as the official pre-examiners of my thesis. Both of you provided tremendous insight into the strengths and weaknesses of my work. I am now much more aware of the positioning of my research and realize more profoundly what I have accomplished. I also thank you for your expert comments. Vesa, it was kind of you to assume the role of opponent in the public defense of my thesis. I appreciate the effort and I am certain the occasion will be a memorable one. I also extend my words of gratitude to the multitude of others who have commented on my research or parts of it during the past four years. Your names are too numerous to mention here, but know this: I will not forget the help you provided.

None of this would have been possible without the support of the Faculty of Law of the University of Lapland, where I was lucky enough to be employed throughout

my thesis research. The predictability and stability allowed me to finish the work with as little stress as possible. Beyond this, I received a number of grants from various organizations, which allowed me to travel and extend the scope of my research. In particular, I would like to thank Makarna och Granfelts stipendiefond for funding my research period in Gothenburg. I am also grateful to the University of Gothenburg and *Claes Martinson* for enabling my visit. The time I spent there was extremely enjoyable and useful in view of my research.

Life also exists outside thesis work, and I want to mention a few collaborators in this category as well. We have a tightknit group of researchers at our university, and peer support has always been readily available. A few of us have finished our theses now, but never shall we cease to be future doctors. Thank you for making it easy for me to vent. *Mikko Vuorenpää* has provided me with numerous useful contacts and multiple interesting opportunities to teach outside the university. This has shaped my understanding of the purpose of research and the methods of delivering the knowledge to practitioners. *Mikko Huttunen* and *Juhana Riekkinen*, you both have proved to be capable colleagues and generous with your aid. I am proud to call you my friends and I am looking forward to any and all future endeavors we will encounter.

My mother *Kristiina*, you have been there to support me. Thank you for your reassuring reminders that I could always quit law school and do something else. I always found humor in those remarks. *Osku*, wuff, harrrrr, wwwuff, wuf. My lovely spouse *Anne-Marie*, I am glad you were there to share the triumphs that perked up the process. Beyond that, you witnessed absolutely the worst moments of this project. Thank you for patiently listening to me and comforting me more often than I would care to admit. As I will likely continue to bother you with writer's stress, I want to remind you that I love you very much. Finally, my grandfather *Veikko*, ever since I was a young boy I have found it easy to relate to you. I remember the history stories, your large bookcase and the grammar lessons. You did an immense amount of good and I was vastly inspired and influenced by our conversations as well as the literature gifts over the years. You were and still are my role model. Thank you for guiding me to this path and showing me the model of a cultured and learned man. I dedicate this book to you.

Summary

In its simplest form, veil piercing means holding additional persons besides the formally liable parties liable for corporate obligations. Having said that, the concept is heavily and regularly contested in every aspect, and the simple form perhaps only exists in the minds of naïve scholars and optimistic attorneys. Before 2015, there had not been a clear consensus on whether veil piercing was even possible. With its KKO 2015:17 decision, the Supreme Court of Finland accepted veil piercing without the support of any statutory provision. The decision directly addressed veil piercing, shed some light on its requirements, and confirmed the relevance of some opinions found in legal literature.

Based on KKO 2015:17, the veil piercing requirements can be defined as follows:

1. The use of corporate group structure, intercorporate relationships or shareholder's control
2. in a way that is artificial and reprehensible
3. causing damage to the corporation's creditors or evasion of a legal duty.

These requirements are rather ambiguous and open to interpretation. In this research, I dubbed them the abstract test. The main research objective was to make the abstract test more concrete, which I set out to accomplish in two steps. First, I sought more accurate interpretations of the parts of the abstract test. Second, I identified relevant objective factors from the day-to-day reality of businesses operating under the corporate form. Ambiguities surrounding the test abound, but the central issues can be approached through the following questions:

1. When can the courts apply veil piercing?
2. How should the parts of the test be interpreted?
3. Who should be held liable?

I approached these questions through the legal-dogmatic method and through legal comparison. However, I used legal dogmatics in a form that differs slightly from the traditional one. The traditional view of legal dogmatics has emphasized authoritative legal sources, and legal decisions have involved matching the facts of a case with whatever was laid down in those sources. Veil piercing, however, would not exist if this view were adopted completely. In fact, there are few authoritative sources in instances of veil piercing, the piercing decisions are always *contra legem*

and two authoritative sources are often in conflict. Therefore, instead of applying the traditional view, I used an approach developed by *Juha Karhu*, because it suits veil piercing situations much better. His situational-sensitive legal dogmatics approaches a case from facts to norms. First, one needs to correctly assess the total situation and its legal implications. Only after this does one search for the norm or several norms that are relevant to the situation. The norms constitute a field of assessment, where each norm only serves as an argument and inspiration in the legal assessment. Further, the significance of each individual norm is not determined until the impact of all the norms has been considered.

As for the method, I used an approach referred to as practical legal comparison. The aim is not to compare the legal systems on the level of legal praxis or legal culture. Instead, I take a more modest approach and analyze sections of law and case law from foreign jurisdictions. According to *Jaakko Husa*, this sort of comparison aims to resolve interpretative problems in domestic law. Foreign material is not considered a legal source in this study, but along with its argumentative patterns and formulations, it is used in arguing the discussed decisions. The material can be used as support, but one should bear in mind that it originates from foreign legal systems. Sometimes the systems are so different that the material does not qualify for analysis. Even though practical comparison does not delve deep into the legal systems being compared, this research seeks to discover at least whether there is some prohibitive difference making it impossible or undesirable to utilize the material. I chose the compared legal systems based on their compatibility with the Finnish system, number of veil piercing decisions and global influence on company law. With these criteria, Sweden, the United Kingdom and the United States proved the most desirable targets for comparison.

Despite the practical focus of the research questions, it is imperative to assess and determine suitable theories that can explain veil piercing. For this purpose, I assessed two theories that have been discussed in the Finnish veil piercing literature. Of these theories, the earlier one concerns conflict of norms. According to it, piercing situations are viewed as conflicts where two norms of the legal system demand results that mutually exclude the application of the other norm, whereupon one of them must yield. When piercing the veil, one of the norms is limited liability or separate personality of a corporation. The other norm varies case by case. A more recent explanatory theory is to view veil piercing through prohibition of the abuse of rights. This principle currently holds no definitive formulation, which led me to derive one myself. In doing so, I first referred to the European convention on human rights, after which I went through Finnish case law and literature. I defined the prohibition of the abuse of rights principle as follows:

The effects of a legal action can be denied if either the action is taken with unacceptable motives or its consequences prove unacceptable. Additionally,

the denial requires that the use of the legal action does not match the intended purpose of the utilized legal norm, i.e., the use is artificial.

In the end, I noticed that these two theories can be unified and that there is no need to choose between them. In fact, they can even be viewed as a continuum: First, the conflict of norms means that two norms contradict each other and one must yield. Next, prohibition of the abuse of rights means that the effects of a legal action can be denied if the action is taken with unacceptable motives or if the consequences prove unacceptable. Finally, taking legal action that does not match the intended purpose of the utilized legal norm supports finding the motives or consequences unacceptable. To conclude, it seems that in a conflict of norms the issue at hand is recognized on an abstract level, whereas prohibition of the abuse of rights can be applied to actually resolve the conflict.

Veil piercing situations have previously been addressed in diverse and specific areas of legislation. The KKO 2015:17 decision cited artificial property arrangements, environmental damage liability and tax avoidance as examples and sources of analogy. Additionally, the Supreme Court cited pay security case law, using it to present an example of piercing the veil. I analyzed all the mentioned sources to discover their contribution to developing the piercing doctrine. These single provisions reflect the common criterion upon which the veil piercing doctrine can be built. They are accepted statutory provisions that target abuse and extend liability or allow setting aside the legal form and basing the decision on the facts of a case. I examined and analyzed several norms for comparison, after which I specified the ambiguous requirements of the abstract veil piercing test. I discovered multiple commonalities that can help interpret the veil piercing test more accurately. The common elements were intent, risk isolation, business reasons, artificiality, substance over form, control and deviation from standard patterns.

Additionally, I analyzed several legal norms that have functions similar to veil piercing. I discovered that the norms and veil piercing partially have shared objectives and even overlap in their application to some extent. The main difference between the two was that existing legal norms such as asset recovery and debtor's dishonesty focus on transactions, whereas veil piercing has no such limitations. I also performed a case-specific examination to further isolate the choice of remedies and specific application of veil piercing. The difference based on a transaction focus described earlier held up well and it turned out that the cases examined could not be resolved using transaction-based doctrines. On the other hand, this also revealed that the veil piercing doctrine is not meant to target transactions. It turned out that the primary issue is to make a choice between using tort law and veil piercing. In the end, the cases could not be resolved with tort law doctrines without unduly compromising and extending the most central principle of tort law: causality. Yet, veil piercing does seem to require some causality between establishing the arrangement and

the damage. Based on my analysis of the choice of remedies, I concluded that veil piercing requires a special kind of loose causality between corporate use and damage that is almost always present. Therefore, its significance should not be emphasized when deciding whether to pierce or not.

I then moved on to interpreting the veil piercing requirements. I first examined control and the use of the corporate form. It became clear that whether using the corporate group structure, intercorporate relations or shareholder control, they all point to the corporate form. In addition, they all require control over the corporation. Control turned out to be a key element in piercing decisions, even if the corporate group structure or intercorporate relations was used. The next step was to determine who holds control in a corporation, whether through share ownership, management positions, contracts or actual power even without a formal relationship with the corporation. If a formal control position disagrees with reality, then anyone with actual control is relevant in terms of veil piercing.

In veil piercing case law, a certain level of control has been deemed necessary for piercing to apply, and control has been defined based on a combination of share ownership and management positions. In KKO 1996:2, a straw man argument was found and the control requirement for piercing was fulfilled by *de facto* control combined with some contractual rights given to the controller. In KKO 1997:17, it was silently assumed that a 66.7% ownership would constitute control. Control in a corporation is elusive, however, and the multiple methods of dividing or allocating it makes the assessment case-specific. One thing is absolutely certain, though: control alone never justifies piercing.

The second requirement for veil piercing is artificiality, which I have defined based on the analogous doctrines of artificial property arrangements and tax avoidance. Artificiality means using a corporation in a manner that is not in line with honest business and trade. According to the Company Act, the purpose of a corporation is to generate profits to the shareholders. Thus, anything beneficial to that group would contribute to the business purpose, removing any grounds for artificiality. If the company has no business whatsoever, the use of such a corporation is always artificial. Similarly, if the business reason is founded solely on an unlawful model, then the use is artificial. In these two situations, should the corporation also have a business purpose, piercing becomes a balancing act as to whether the business purpose is significant enough compared to the artificial use. Alternatively, the situation could allow for piercing if the corporate use, to which the piercing claim pertains, has no connection to the business itself.

In the KKO 2015:17 decision, artificiality was paired with reprehensibility. I analyzed the concept of reprehensibility through unacceptable consequences and unacceptable motivation. The unacceptable consequences section consisted of two subcategories, the first of which involved excessive or undue damage. This was considered in relation to artificiality. The fewer genuine business operations a

corporation has, the more readily present the excessive or undue damage criteria are. The second category involved the unacceptable ramifications view, emphasizing the incentives that a judgment allowing some form of corporate use might give to business operators. If the judgment legitimizes a use obviously harmful to society, then the consequences are unacceptable in terms of the piercing test.

The unacceptable motivation part was divided into three subcategories. I first discussed corporate arrangement's creator's intent to do damage and to benefit at someone else's expense. This led to confusion with the core element of limited liability, which logically results in benefits if negative risks are realized. I solved this issue by emphasizing the difference between abstract motives to benefit and specific, known and predictable motives to benefit. The second subcategory is systematic and unconcerned operation for personal gain. I crystallized this criterion into a systematically construed disparity in the allocation of negative and positive risks resulting in personal benefit at the expense of others. The third issue discussed was fraudulent behavior and misrepresentation.

The next part of the research concerned possible situations resulting from a corporate arrangement. Veil piercing requires the use of the corporate form either to evade a legal provision or to cause damage to creditors. Evasion in this case covers situations where the corporate arrangement is aimed to either allow or prevent the application of some provision of law, thus creating a result that is legally either forbidden or impossible. Causing damage to creditors covers any detrimental result imposed upon creditors. This part of the piercing requirements is usually not disputed, as it is most often obvious. The nature of a creditor's position could also have an effect on whether a piercing claim should be accepted or not. This is based on the notion that if the creditor has been able to affect the terms of the relationship and to decide whether to become a creditor, she should not be allowed to alter the deal *ex post*. The creditor has had the opportunity and even the duty to research the arrangement before becoming a creditor. Based on this influence, creditors can be classified as voluntary and involuntary ones. These categories, however, should not be considered decisive, because within these categories, the level of each creditor's actual influence differs a great deal. For instance, a bank and an employee are both voluntary creditors, but their influence on the outcome of the contract creating their credit relationship is completely different. The more influence the creditor has had, the less likely it is that piercing is in favor of that creditor.

Next, I proceeded to examine the relevant, objective supporting factors in a veil piercing case. These are circumstances in corporate operations that manifest or at least hint toward the fulfillment of the more abstract piercing requirements. I began the investigation by assessing the way in which inadequate resourcing might evidence the unacceptable motives and artificiality of an arrangement. Inadequate resourcing referred to situations in which a corporation operates with capital that is clearly inadequate compared to the liabilities it is likely to face. The difficulty with

this criterion is that the required level of resources is hard to determine. I examined the decision of KKO 2017:94 and made a thorough comparative analysis of the possible methods of determining the correct level of resources. This resulted in a failure to deduce an objective standard. However, I managed to make a somewhat explicit subjective standard and concluded that the resources are inadequate if the corporation cannot operate sustainably in face of reasonably predictable liabilities. The assessment also needs to address the issue from the perspective of the controller. If the controller has assessed *bona fide* that the resources are adequate, they should be considered so. I also found that anything that can be used to satisfy the creditors should be considered a resource and that assets provided by shareholders typically, but not always, speak of *bona fide* intentions.

Thereafter, I addressed the disparity between benefits and negative risks. I defined this through the following elements: (1) systematic amassment of credit and/or negative risks on one entity; (2) placement of assets on another entity; (3) business operations practiced by two entities in symbiosis, e.g. when one cannot operate without the output of the other; and 4) having no valid business reason to justify the separation, which speaks to the unacceptable motives and artificiality of an arrangement.

After this, I examined the criteria for commingling and confusion. Commingling was defined as the commingling of assets and employees, where the controller uses or assigns assets, employees or their work arbitrarily between the entities involved, disregarding the entity to which they formally belong. This may suggest reprehensibility of the arrangement and control over the entities. As for confusion, I defined it as inability to determine the real operator. This criterion emphasizes the perception of the third parties and the impression they get. If they get the impression that an operation was not that of the formal operator, this would support piercing.

I then proceeded to discuss the artificiality of dividing an existing business. Although it is a new aspect of veil piercing in Finnish literature, it is backed by case law. I address the issue through situations in which a business was originally practiced in one entity and later in a part of it. In such a situation, an especially high risk for costs is transferred to a separate entity without actually changing the operation in any way. This supporting factor is especially vulnerable to the existence of legitimate business reasons, that is, the divided part of the business may develop into something more than what it was when it was part of the original. The artificial division of an existing business speaks to artificiality and unacceptable consequences or motives.

Finally, I inspected an extensively-discussed piercing factor originating from the United States. Neglecting corporate formalities is controversial in the US, and the issue has also been topical in Finland on a few occasions. Based on my analysis, this factor has little to do with piercing situations and would lead to a mountain of problems if adopted. Nevertheless, its significance could not be explained away

entirely. Thus, neglecting proper documentation on transactions and contracts, disregarding formal decision-making procedures, and overlooking issues in accounting could potentially play a role in support of piercing.

The final research question concerned the liable party. The potential liable parties traditionally include of the shareholder, the controller and the economic unit. Instead, I would strongly support using an approach involving the removal of advantages. This approach can result in the liability *in casu* of any of the other mentioned targets without compromising them in an arbitrary manner. I investigated four situations in which advantages appear in in various ways. Each of these situations was backed by case law. The analysis showed that locating the advantages leads to different results depending on the construed arrangement. Even the allocation of liability is based on overall assessment and *in casu* examination. While the traditionally liable parties appeared as candidates, they should not be viewed as the sole targets for liability, and liability definitively should not be based on the formal position of a party.

Tiivistelmä suomeksi

Yksinkertaisesti ilmaistuna samastaminen tarkoittaa jonkun muodollisesta vastuusta vapaan henkilön asettamista vastuuseen yhtiön velvoitteista. Näennäisestä yksinkertaisuudesta huolimatta samastaminen on sekava ja usein kiistanalainen oppirakennelma. Ennen vuotta 2015 Suomessa ei ollut selvää linjausta siitä, onko samastaminen edes mahdollista. Tuolloin korkein oikeus viimein hyväksyi samastamisen ilman kirjoitetun lain tukea ratkaisussa KKO 2015:17. Ratkaisussa samastamista käsiteltiin suoraan, sen edellytyksiä valotettiin ja siinä myös lausuttiin suoraan eräistä samastamisesta oikeuskirjallisuudessa esitetystä käsityksistä.

Ratkaisun oikeusohje voidaankin tiivistää siten, että yhtiön erillisen oikeushenkilöllisyyden periaate voidaan syrjäyttää, jos:

1. konsernirakennetta, yhtiöiden välisiä suhteita tai osakkeenomistajan määräämisvaltaa
2. on selvästi käytetty keinotekoisella ja moitittavalla tavalla siten, että
3. siitä on seurannut esimerkiksi yhtiön velkojien vahingoittaminen tai lakisääteisen vastuun kiertäminen.

Tämän oikeusohjeen elementtien tulkinta on varsin avonaista eikä niille voida määrittää yksiselitteistä sisältöä. Tässä tutkimuksessa kutsun tätä oikeusohjetta samastamisen abstraktiksi testiksi. Tutkimuksen pääasiallinen tavoite oli tehdä abstraktista testistä konkreettisempi. Aloitin tämän tehtävän etsimällä tarkempaa tulkintaa abstraktille testille. Seuraavaksi etsin käytännön yhtiötoiminnassa esiintyviä helposti todennettavissa olevia faktuaalisia järjestelyjä, joilla on relevanssia samastamisharkinnassa. Vaikka abstraktin testin epäselvyydet ovat lukuisat, niin keskeisiksi tutkimuskysymyksiksi muodostuivat:

1. Mikä on samastamisen edellytysten oikea tulkinta?
2. Milloin vastuu voidaan asettaa samastamalla?
3. Kenet tulisi asettaa vastuuseen samastamalla?

Lähestyin näitä kysymyksiä oikeusdogmaattisella ja oikeusvertailevalla tutkimusmetodilla. Käytin oikeusdogmatiikkaa hieman perinteisestä poikkeavalla tavalla. Perinteinen tapa painottaa oikeuslähdehierarkiaa ja ratkaisu tehdään sovittamalla tapauksen faktat oikeuslähteissä kuvattuihin normeihin. Tällainen perinteinen näkemys ei pysty selittämään samastamista. Samastettaessa vahvoja oikeuslähteitä on

vähän, ratkaisu on aina contra legem ja usein ne vähät oikeuslähteet ovat ristiriidassa keskenään. Perinteisen lähestymistavan sijaan sovellan Juha Karhun tilanneherkkää lainoppia. Ratkaistavaa tapausta lähestytään faktoista ja ratkaisussa edetään kohti normeja. Ensimmäinen pitää hahmottaa oikein kokonaistilanne ja sen oikeudelliset seuraukset. Vasta tämän jälkeen voidaan etsiä tilanteeseen relevantteja normeja. Relevantit normit otetaan ainoastaan argumentteina ja inspiraationa oikeudellisessa arvioinnissa. Kunkin merkitys ratkeaa vasta, kun kaikkien relevanttien normien vaikutus on määritelty.

Oikeusvertailevien osioiden metodina käytin niin sanottua käytännöllistä oikeusvertailua. Tavoitteena ei ole vertailla oikeusjärjestelmiä oikeudenkäytön tai oikeuskulttuurin tasoilla. Sen sijaan tavoite on vaatimattomampi. Analysoin osia lainsäädännöstä ja oikeuskäytännöstä muista oikeusjärjestelmistä. Jaakko Husan mukaan tällainen vertailu tähtää kotimaisessa oikeusjärjestyksessä ilmenevän tulkin- taongelman ratkaisuun. Ulkomaista materiaalia ei mielletä oikeuslähteeksi, mutta sitä käytetään argumentaatiomallien ja määrittelytapojen löytämiseksi. Tällaista argumentaatiotukea voidaan hyödyntää, mutta on muistettava, että se on lähtöisin vieraasta oikeusjärjestyksestä. Joskus materiaali on lähtöisin niin erilaisesta järjestelmästä, ettei sitä voida hyödyntää. Tässä tutkimuksessa ei mennä syvälle hyödynnet- tävyden arviointiin, joskin löydetyt argumentaatiotuen osalta pyritään arvioimaan vähintään hyödyntämisen selkeästi estävien erojen olemassaolo. Vertailtavat oikeus- järjestykset on valittu käyttäen kriteereinä yhteensopivuutta Suomen järjestelmän kanssa, samastamistapausten määrää ja valtion globaalia yhtiöoikeudellista merkit- tävyyttä. Näillä perusteilla vertailukohteiksi valikoitui Ruotsi, Yhdistynyt kuningas- kunta ja Yhdysvallat.

Vaikka tutkimuskysymykset ovat käytäntöorientoituneita, on silti tärkeää mää- rittää ja arvioida soveltuvia selittäviä teorioita samastamiselle. Tässä tutkimuksessa keskityttiin pääasiassa kahteen teoriaan, joista molemmat on tuotu jo aiemmin esiin kotimaisessa oikeuskirjallisuudessa. Ensimmäinen ja vanhempi selittävä teoria on normikonfliktiteoria. Sen mukaan samastaminen nähdään kahden normin välisenä konfliktina, missä kaksi oikeusjärjestyksen normia vaatii erilaisia lopputuloksia ja nämä lopputulokset sulkevat toisen normin soveltamisen pois kokonaisuudessaan. Toisen soveltamisesta on luovuttava. Samastettaessa toinen konfliktiin osallinen normi on aina joko osakeyhtiön osakkeenomistajien rajoitettu vastuu tai yhtiön erillinen oikeus- henkilöllisyys. Toinen konfliktiin osallinen normi vaihtelee tapauksittain. Tuorempi selittävä teoria on oikeuden väärinkäytön kieltäminen. Tällä periaatteen omaisella teoriolla ei ole vakiintunutta sanamuotoa. Tässä tutkimuksessa määrittelin periaatteen sana- muodon Euroopan ihmisoikeussopimuksen sekä suomalaisen ja oikeuskäytännön ja -kirjallisuuden kautta. Määrittelin oikeuden väärinkäytön kiellon seuraavasti:

Oikeustoimen vaikutukset voidaan kieltää, mikäli oikeustoimi on tehty epä- asiallisin tarkoituksin tai sen seuraukset osoittautuvat epäasiallisiksi. Lisäksi,

kieltäminen vaatii, että oikeustoimen käyttö ei vastaa sitä käyttötapaa, mitä oikeustoimesta säädettyä on tavoiteltu.

Huomasin tutkimuksen aikana, että nämä kaksi teoriaa on varsin pienellä vaivalla yhdistettävissä. Niitä voidaan kohdella jatkumona. Ensin normikonflikti määrittelee sovellettavat normit ja varmistuu niiden ristiriidasta. Tämän jälkeen oikeuden väärinkäytön kieltoa voidaan soveltaa konfliktin ratkaisemiseen.

Samastamista on aiemmin käsitelty kirjoitetussa laissa erityistapauksittain ja rajoitetun soveltamisalan puitteissa. Ratkaisussa KKO 2015:17 nimettiin ulosottokaaren mukaiset keinotekoiset järjestelyt, ympäristövahinkolain mukainen rinnastettavuus ja verotusmenettelylain veronkiertopykälä esimerkkeinä. Ratkaisussa todettiin nämä säädökset analogisiksi oikeuskäytännössä esiintyvän samastamisdoktriinin kanssa. Samoin korkein oikeus siteerasi ratkaisussa palkkaturvalain soveltamista koskevaa aiempaa samastamiskäytäntöä. Tutkimuksessani lähdin näistä analogialähteistä määrittämään tarkempaa sisältöä samastamisdoktriinille. Nämä lainkohdat edustavat niitä yleisiä periaatteita, millä väärinkäytöksiin on aiemmin puututtu. Tarkasteluni perusteella löysin näiden lainkohtien ja samastamiskäytännön väliltä lukuisia jaettuina elementtejä: motiivin korostaminen, negatiivisen riskin eristäminen, liiketoiminnalliset syyt, keinotekoisuus, oikeudellisen muodon sivuuttaminen tosiasiallisen luonteen perusteella, määräysvalta ja tavanomaisista muodoista poikkeaminen.

Näiden analogisten lainkohtien lisäksi tarkastelin samastamisen kanssa samanlaisia sääntelytarkoituksia toteuttavia lainkohtia. Huomasin näiden lainkohtien olevan osittain päällekkäisiä ja sääntelevän osittain samoja toimintamalleja kuin samastaminen. Pääasiallinen ero oli se, että nämä olemassa olevat lakisäätteiset instrumentit, kuten takaisinsaanti ja velallisen epärehellisyys, vaativat soveltuakseen varallisuuden siirron, kun taas samastamiselle ei vastaavaa edellytystä löytynyt. Seuraavaksi tarkastelin vielä vaihtoehtoisia vastuudoktriineja kahden samastamistapauksen faktoista lähtien. Tarkoitus oli tutkia, onko samastamiselle olemassa oma soveltamisalansa, missä muut vastuudoktriinit eivät toimi. Tällainen soveltamisala löytyi. Varallisuuden siirtoon perustuva rajausta voitiin tämän tarkastelun perusteella vahvistaa, sillä tapauksissa vastuuta ei olisi voitu perustaa varallisuuden siirtoihin. Pääasiallinen vastuumuodon valinta oli vahingonkorvauksen ja samastamisen välillä. Analyysin perusteella huomasin, ettei tapauksissa voitu perustaa vastuuta vahingonkorvaukseen, ilman että tingittäisiin mittavasti syy-yhteys vaatimuksen selkeydestä. Havaittiin, että myös samastaminen vaatii heikomman asteisen syy-yhteyden järjestelyn luomisen ja vahingon välillä. Tällainen syy-yhteys juontuu rajoitetun vastuun luonteesta ja on läsnä jokaisessa samastamistapauksessa. Siten syy-yhteydelle ei voitaisi antaa samastamista puoltavaa merkitystä.

Seuraavaksi siirryin samastamisen edellytysten tulkintaan. Ensimmäisenä niistä käsitelmin määräysvaltaa ja yhtiömuodon käyttöä. Päätelmin, että konsernirakenteen,

yhtiöiden välisten suhteiden tai osakkeenomistajan määräysvallan käyttö kaikki tarkoittavat yhtiömuodon käyttöä. Lisäksi, kaikki nämä käyttötavat edellyttävät määräysvaltaa osakeyhtiössä. Seuraava askel olikin sen määrittely, mihin määräysvalta yhtiössä perustuu. Se voidaan perustaa osakkeenomistukseen, hallituspositioihin, toimitusjohtaja asemaan, sopimukseen tai jopa tosiasialliseen määräysvalttaan ilman muodollista velvoittavuutta. Jos muodollinen asiointi ei vastaa todellisuutta, niin tosiasiallinen määräysvalta on merkityksellistä samastettaessa.

Toisena samastamisen edellytyksenä otin käsittelyyn keinotekoisuuden. Keinotekoisuuden määritelmä löytyi analogisia lainkohtia tarkastelemalla. Ymmärsin keinotekoisuuden yhtiömuodon käyttönä, mikä ei edistä osakeyhtiöinstituution taustalla olevia tavoitteita rehellisen liiketoiminnan ja vaihdannan edistämisestä. Siten keinotekoisuus vaatisi sen näyttämistä, ettei yhtiön toimintaa voida selittää järkeväksi liiketoiminnallisilla syillä. Jos liiketoimintaa ei ole, yhtiömuodon käyttö on aina keinotekoisia. Jos yhtiön liiketoiminta perustuu vain laittomaksi todettuun liiketoimintaratioon, yhtiömuodon käyttö on keinotekoisia. Päätös pitää perustaa punnintaan liiketoiminnallisten tarkoitusten ja muiden tarkoituserien välillä, mikäli yhtiöllä on liiketoimintaa.

Seuraava edellytys oli moitittavuus. Analyysini perusteella ymmärrän moitittavuuden joko epäoikeudenmukaisena lopputuloksena tai epäasiallisina motiiveina. Epäoikeudenmukaisena lopputuloksena voidaan pitää liiallista tai odottamatonta vahinkoa sekä sellaista tilannetta, missä järjestelyn hyväksyminen oikeudenkäynnissä johtaisi yhteiskunnan kannalta tuhoisan kannustimen luomiseen. Epäasiallisena motiivina voidaan pitää tarkoitusta toisen vahingoittamisesta tai hyötymisestä toisen kustannuksella. Samoin epäasiallisena voidaan pitää systemaattista ja piittaamatonta korkealla riskillä tapahtuvaa oman edun tavoittelua. Joissain tilanteissa myös erehdyttäminen tai väärän kuvan luominen sopimuskomppanille voivat tulla kyseeseen moitittavuuden edellytyksen täyttämiseksi.

Tutkimuksessa käsitteelin seuraavaksi testin viimeistä osaa. Samastaminen edellyttää, että yhtiömuodon käytöllä on aiheutettu lakisääteisen vastuun kiertäminen tai vahinkoa velkojille. Lakisääteisen vastuun kiertämisenä voidaan pitää mitä tahansa toimintaa, millä saadaan aikaan sellainen asiointi, mikä on laissa nimenomaan kielletty tai lakia sovellettaessa mahdoton. Velkojille aiheutettu vahinko taasen kattaa minkä tahansa velkojille epäedullisen muutoksen oikeustilassa. Velkojan vaikutusmahdollisuuksien olemassaolo vaikuttaa siihen, voidaanko samastamisvastuu asettaa. Jos velkoja on tuossa asemassaan täysin ilman omaa myötävaikutustaan, samastamiseen tulisi suhtautua suopeammin. Lähtökohtaisesti sopimusvelkojat voivat valita, haluavatko he sitoutua sopimukseen ja vaikuttaa siihen, millaisiksi sopimusehdot muodostuvat. Kaikki sopimusvelkojat eivät kuitenkaan voi vaikuttaa näihin asioihin samassa määrin. Siksi pitäisi samastettaessa tarkastella sitä, kuinka kattava vaikutusmahdollisuus näillä velkojilla on ollut. Mitä enemmän velkoja on voinut vaikuttaa sopimuksen sisältöön ja mitä todellisempi mahdollisuus hänellä

on ollut valita haluaako sitoutua vai ei sitä kielteisemmin samastamiseen tulisi suhtautua.

Seuraavaksi siirryin tarkastelemaan samastamisharkintaa tukevia apufaktoja. Nämä apufaktat ovat yhtiön toiminnassa havaittavia olosuhteita, jotka kertovat abstraktimman samastamedellytyksen olemassaolosta. Ensimmäinen käsiteltävä apufakta oli aliresursointi. Sen voidaan katsoa tukevan arviointia keinotekoisuudesta ja moitittavuudesta. Aliresursoitu yhtiö toimii resursseilla, jotka ovat selkeästi riittämättömiä toiminnan odotettavissa oleviin vastuisiin. Resursseina otetaan huomioon yhtiön varallisuus ja kaikki sellaiset erät ja instrumentit, mitkä tarjoavat velkojille suorituksen. Tällaiselle resursoinnin tasolle ei voida asettaa selkeää rajaa, vaan siihen tulisi suhtautua enemmänkin periaatteena. Tämän seurauksena pitäisi antaa merkitystä määräysvallan käyttäjän käsitykselle riittävästä resurssien määrästä. Jos hän vilpittömässä mielessä piti resursseja riittävinä, pitäisi niitä kohdella siten myös samastamisharkinnassa.

Seuraavana käsittelin järjestelystä saatavien etujen ja negatiivisen riskin eristämistä. Tällaisessa toiminnassa 1) negatiivinen liiketoiminta- tai muu riski eristetään tai kerrytetään yhteen oikeushenkilöön; 2) varallisuusarvoiset erät eristetään tai kerrytetään toiseen oikeushenkilöön; 3) liiketoimintaa harjoitetaan näiden kahden oikeushenkilön välillä symbioottisesti siten, ettei toisen toimintaa voitaisi harjoittaa ilman toisen myötävaikutusta; ja 4) eikä kahden oikeushenkilön järjestelyä tai sen ylläpitoa voida selittää järkeväksi liiketoiminnallisilla syillä. Tähän liittyy läheisesti myös liiketoiminnan keinotekoiseksi jakamiseksi nimeämäni apufakta. Jos kuvattu negatiivisen riskin eristäminen tehdään jakamalla olemassa oleva liiketoiminta, tämä puoltaa vahvemmin samastamista.

Tämän jälkeen käsittelin sekoittumista samastamista tukevana apufaktana. Sekoittumisella tarkoitan tilannetta, missä ulkoapäin ei voida enää tunnistaa, mikä tuotannon tekijä kuuluu millekin järjestelyyn osallistuneelle yhtiölle. Sekoittuminen voi liittyä esimerkiksi yhtiövarallisuuteen, työntekijöihin tai annettuun julkikuvaan. Sekoittumisen voidaan katsoa puoltavan keinotekoisuusharkintaa. Toisinaan sekoittuminen voi olla niin perusteellista, ettei yhtiön kanssa asioiva velkoja pysty erottamaan, minkä järjestelyyn osallisen yhtiön toiminnasta kulloinkin on kyse. Tällöin voidaan puhua todellisen toimijan hävittävästä sekoittumisesta ja tällainen tilanne voidaan tulkita sen vahingoksi, jonka olisi tullut pitää yllä yhtiöiden erillisyyttä. Viimeinen apufakta oli yhtiömuodon käyttöön liittyvien muodollisuuksien laiminlyönti. Sille ei voi antaa suurta merkitystä samastettaessa, sillä yleensä nämä muodollisuudet on säädetty muiden kuin velkojien oikeuksien turvaamiseksi.

Viimeinen tutkimuskysymykseni keskittyi samastamisvastuun kohdentamiseen. Kenet voidaan asettaa vastuuseen samastamisella. Perinteisesti vastuutahona on pidetty osakkeenomistajaa, mutta oikeuskäytännöstä tällaista rajoitusta ei voida perustellusti vetää. Potentiaalisia vastuutahoja ovat osakkeenomistajan lisäksi määräysvallan käyttäjä ja yritys taloudellisena yksikkönä. Oikeusvertailun tuloksena

päädyn suosittamaan joustavampaa lähestymistapaa, mikä perustuu järjestelyllä saavutettujen etujen kieltämiseen. Tämän lähestymistavan omaksumista tuki myös oikeuskäytännön analyysi. Samastamalla pitää päästä erilaisiin lopputuloksiin oikeudenkäynnin kohteena olevan järjestelyn luonteen mukaisesti. Tämä lähestymistapa myös sallii kaikkien edellä mainittujen tahojen vastuun, mutta ei rajoita samastamisen käyttöalaa vain yhteen niistä.

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I INTRODUCTION

1. Why This Research?

In its simplest form, veil piercing means holding additional persons liable for corporate obligations. Having said that, it is heavily and regularly contested in every aspect, and the simple form exists perhaps only in the minds of naïve scholars and optimistic attorneys. Every major veil piercing decision from the courts ends up under academic scrutiny and criticism. Depending on the author, the decision is either too broad in its use of the doctrine, not broad enough or should have used the liberal interpretation of some other legal doctrine. This has led to a surmounting wall of scholarship seeking to explain, re-explain and deny the existing doctrine. The book you are reading is but another brick in that wall.

One could easily question whether my addition to the scholarship is necessary or even beneficial. I would answer to such an objection: probably yes. The novelty in my research is the development of the relatively fresh Finnish piercing doctrine as well as its provision of access to Finnish and Swedish piercing doctrines for the international discussion on the subject. The contribution might be humble, but it is worth the effort.

2. The Landmark Decision KKO 2015:17

The central theme of this research is the Finnish veil piercing doctrine as it is during its final stages of writing in the fall of 2019. Before 2015, there had not been a clear consensus on whether veil piercing was even possible.¹ It had appeared in few Supreme Court cases since 1929, though many claimed these cases had either lost their significance or that only indirect piercing had been accepted. The KKO 1997:17 decision was interpreted so as to allow the possibility of piercing and some significant factors were identified from it.² So the possibility was there, but no one could predict the lightning bolt.

With the KKO 2015:17 decision, the Supreme Court of Finland accepted veil piercing without the support of a statutory provision.³ The decision directly

1 However, many in the legal literature interpreted prior case law to imply the courts' intention not to deny the possibility of veil piercing. See *Mähönen – Villa* 2015 at 303, *Toivainen* 2002 at 109–110, *Huhtamäki* 1999 at 143–146 and *Leppänen* 1991 at 295–299. The KKO 1997:17 decision is most commonly mentioned, along with some appellate court cases.

Cf. *Huttunen* 1996 at 5–7 and *Mäntysaari* 2002 at 49. *Mäntysaari* denies any possibility of piercing, whereas *Huttunen* claims it has not occurred ever.

2 See *Mähönen – Villa* 2015 at 301–302 and 407–408.

3 See also the commentaries on the case *Pihlajarinne – Havu – Vesala* 2015 and *Villa* 2015. Piercing was accepted earlier in KKO 1996:2, though that case did not give out general requirements of veil piercing. Also, that case is 21 years old at the time of writing, so using the more recent case is necessary. The decision is still valid, though the legal context around it has evolved.

addressed piercing the veil, shed some light on the requirements of piercing, and confirmed the relevance of some opinions from legal literature.⁴ In addition, it serves as a prime example of how the general principle prohibiting the abuse of rights works in corporate law.⁵ This decision and the legal opinions referred to therein form the basis of the veil piercing test construed here. Other decisions and opinions are noted for support or criticism. The main points for criticism are the ambiguity of the construed piercing test and the uncertainty of liability questions that ambiguity results in. This should be ignored for now, as this research seeks to eliminate much of that criticism by seeking objective criteria to show the more abstract and ambiguous requirements of veil piercing.

Due to the major importance of this decision, I will provide a rather thorough description of it. The case was about a Finnish corporation named Verkkokauppa and its Estonian subsidiary, Arctecho.⁶ The court found that Verkkokauppa had practiced part of its business through Arctecho and thus had avoided paying remuneration for private copying. The court reviewed the ownership and control structure of the corporations and deduced that the central interest in the division of business was avoiding the said legal obligation. Verkkokauppa was held liable for the neglected remunerations along with Arctecho.

Arctecho had sold storage devices exclusively to Finnish consumers via verkkokauppa.com. On this website, the user selected a product category called “direct deliveries.” Selecting this category transferred the user to a page that informed that she could order products directly from the warehouse of verkkokauppa.ee from Estonia without having to pay the remunerations. After making a purchase, the client received a confirmation email from an employee of Verkkokauppa, and the contact information given was that of the Verkkokauppa. The confirmation email made no mention whatsoever of Arctecho or verkkokauppa.ee.

Of the of Arctecho stock, 51% was owned by S, 29% by Verkkokauppa, and the rest by two board members of Verkkokauppa until 30 June 2009. After said date, the entire stock was owned by Verkkokauppa. S also held the positions of CEO and chairman of the board of directors in Verkkokauppa. At the same time, S was a member of Arctechos’ board of directors, which only had two positions.

Teosto, the Finnish agency for the collection of remunerations for copyright usage, argued that Arctecho had been founded only to avoid the legal obligation of paying remunerations and that Verkkokauppa should be held liable for the neglected remunerations as the real operator of the business. Verkkokauppa denied liability

4 Namely those presented by *Airaksinen – Pulkkinen – Rasinaho* 2010 at 18–19, *Tammi-Salminen* 2001 at 290–294 and *Mähönen – Villa* 2006 at 140–143.

5 *Villa* 2015 at 535.

6 The fact that the subsidiary was foreign holds no meaning for the future interpretation of the veil piercing requirements. See *Savela* 2015 at 409 and 412.

and claimed that Arctecho was an independent limited liability company situated in Estonia and, as such, its liabilities could not belong to a Finnish corporation.

In its defense, Verkkokauppa had claimed various other reasons for situating Arctecho in Estonia, such as taxation and general level of costs. However, Arctecho was shut down right after the remunerations were demanded, despite the fact that it could have continued the business and just added the remuneration to the selling price of the products, as is customary. The Supreme Court found that the sole or primary purpose of the corporation was to avoid the remunerations.

The fact that Arctecho had itself acquired the products it was selling from manufacturers and contracted the product logistics was not enough to prove that Arctecho was an independent actor. In addition, from the customers' viewpoint, Arctecho's operations appeared as Verkkokauppa's business. The Supreme Court found Arctecho to be completely dependent on Verkkokauppa. Verkkokauppa had, in fact, conducted a part of its core business via Arctecho in order to achieve an advantage by avoiding legal obligations. Considering ownership and control relationships, the Supreme Court reasoned via elimination that the key objective for founding a limited liability company in Estonia and operating the business from there was, in fact, avoiding the legal obligations. The conduct of Verkkokauppa was found reprehensible enough to set aside Arctecho's position as a corporation separate from its owners, and Verkkokauppa was held liable for the neglected remunerations.

3. The Test for Veil Piercing

3.1. The Abstract Test

The Supreme Court took a strong stand in regards to veil piercing in the KKO 2015:17 decision. It named specific but abstract requirements under which the veil can be pierced and the separate personality of a corporation ignored, although only in exceptional cases.⁷ These requirements can be defined as follows:

1. The use of corporate group structure, intercorporate relationships or shareholder's control
2. in a way that is artificial and reprehensible
3. causing damage to the corporation's creditors or evasion of a legal duty.⁸

⁷ See KKO 2015:17 at 29.

⁸ The Supreme Court described the result part of the test (part 3) as examples of the result, meaning other results could be relevant also. Through extensive review of domestic and international literature, I have arrived at the understanding that these two examples are comprehensive. I cannot name any other situation, at least if evasion of legal duty is understood broadly.

In the strictest sense, this test is an obiter⁹ statement of the Supreme Court, but it did utilize the test in this decision, and it has referred to the test in several following decisions. The test has thus garnered legitimacy, although it is still not a formally binding argument within the legal source hierarchy. Its compelling nature comes from the analogical extension to similar cases.¹⁰ This research is largely about discovering the correct situations where this extension can be made.

This new construction needs to be compared with some of the older ones to determine their relation to each other and whether prior literature and case law can be used in veil piercing interpretation henceforth. Fortunately, the Supreme Court did comment on a few opinions from the legal literature and created its formulation of the piercing doctrine based on them.¹¹ There is thus an unbroken connection between earlier literature and the constructed test. The piercing case law after the landmark decision has cited the KKO 2015:17 decision every time. The body of case law and literature thus forms a continuum.

This construction does not allow the judge to reach a decision about whether to pierce the veil. It is too ambiguous for this. Every aspect of this test needs further elaboration. The use of corporate form itself is self-explanatory. It means simply that a corporation is involved. The traditional requirements of control and dependence are likewise rather simple to place. Corporate form simply cannot be used without controlling the corporation to at least some degree. Controlling a specific part of the corporate operation can enable abuse just the same as total domination, though in a more limited situation. Dependence, as understood in this work, entails situations in which another entity controls some vital resources needed to operate, and through this control, it can dictate how the dependent entity acts. Dependence, use and control are thus intertwined.

Artificiality and reprehensibility are to be kept separate. Reprehensibility is the moral condemnation of an act and artificiality is the use of something for which it was not intended. Combined, these two could be called *improper use*—a term borrowed from the US veil piercing doctrines. They are, however, separate issues and are presented as such in this work.

Both evading a provision and causing damage to a creditor mean evading an obligation. Provisions place restrictions and create duties. The actor is under an obligation to honor them. A debt must be paid whether it is based on a contract or legislation.¹² This work will occasionally refer to evading an obligation, and it should be understood as meaning both or either of these.

9 About the role of obiter statements in the Finnish precedents, see *Launiala* 2018 at 2 and 8. An obiter statement in Finland is an allowed argument in the legal hierarchy but is not binding.

10 The precedent's binding effect comes from its role as a model rule or a paradigm case, which is then analogically extended to future cases. See *Siltala* 1998 at 149–150.

11 Namely *Tammi-Salminen* 2001, *Airaksinen – Pulkkinen – Rasinaho* 2010 and *Mähönen – Villa* 2006.

12 Similarly *Pönkä* 2012 at 233.

3.2. Objective Supporting Factors

I am placing many of the factors seen by earlier case law and legal literature as justification for veil piercing under the new test as supporting factors.¹³ They are objective facts detectable from the corporate records, other written material, through witness statements, etc. They are real-world phenomena. Naming reprehensibility as an evidence theme seems hard, but through these objective facts, one can show it in court. They are often enough to fulfill the more general requirements by themselves, but sometimes a combination of many is needed.

The division between supporting factors and the actual veil piercing test also abides by the Supreme Court's standing in the Verkkokauppa decision. In the decision, the Supreme Court first formulated a general test for piercing and then proceeded to assess the facts of the case with that test.¹⁴ Earlier legal literature has formed two schools of thought regarding the justification of veil piercing: those emphasizing objective circumstances and those basing it on abuse of corporate form and improper conduct.¹⁵ The model suggested in this work applies both methods in a two-tier structure. The abuse/impropriety model is the general test and objective circumstances form the supporting factors used to prove the fulfillment of the requirements of the general test.¹⁶

It is important to further stress how veil piercing always emphasizes the significance of the facts of the case and their overall assessment. The decisions are case by case, and the unique facts are always decisive. Although more general wording is attempted in this work, further elaboration on the subject will prove that the matter is deeply fact-specific and *in casu*. The doctrine should be carefully considered case by case and applied only in exceptional situations.¹⁷ One key objective of this work is to determine the relevant elements of these exceptional situations where piercing should apply. For this purpose, *I seek to detect patterns of objective criteria that can allow for veil piercing.*

13 The supporting factor structure is copied from the structure of the Enforcement Code 4:14. See *Linna – Leppänen* 2015 at 152.

See also *af Schultén* 1984 at 96–97. He states that level of integration and inadequate capital are not grounds for liability, per se, but significant factors that should be taken into account in the assessment.

14 See KKO 2015:17 at 30–34.

15 See *Leppänen* 1991 at 302 and those cited therein.

16 The model is similar to the one formulated by Linna and Leppänen concerning the artificial property arrangements. See *Linna – Leppänen* 2015 at 152.

Putting the matter into Per Ekelöf's terminology helps understand it better. The general test consists of three complex facts, which are formed by many factual circumstances. See *Ekelöf* 1945 at 247.

17 See KKO 2015:17 and *Savela* 2015 at 404.

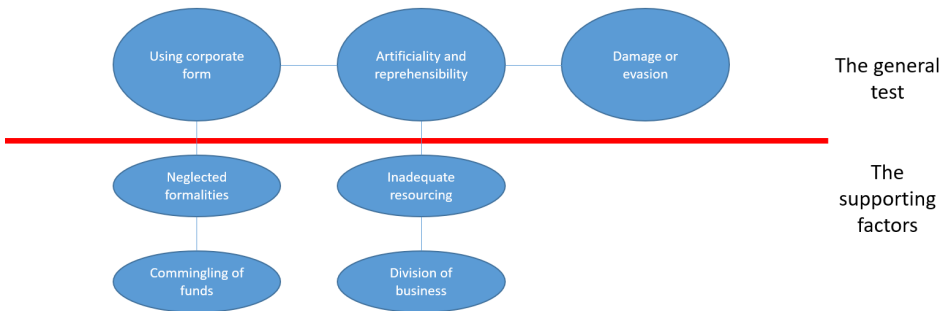


Figure 1. The piercing doctrine and supporting factors

4. On the Concept of Piercing the Veil

4.1. Defining Veil Piercing

Many different definitions for piercing the veil could be presented. At this point, the distinction should be made between veil piercing as the result of an action and veil piercing as a doctrine. The *doctrine of piercing the veil* refers to the set of rules and requirements that enable the *result of veil piercing*: assimilating attributes of a corporation and a formally separate person, for example, holding the shareholders liable. As a term, veil piercing refers to the doctrine and the remedy. Usually, these two uses are not easily confused and one can easily deduce which is meant from the context. If used in verb form, to pierce the veil, it means the result. For clarity, I will do my best to always refer to veil piercing doctrine when talking about the legal test. This, in turn, means that other expressions of veil piercing refer to the result.

In the US, piercing the veil means disregarding the corporation's separate legal personality or the shareholder's limited liability. The disregard can be utilized to reach various results depending on the case. It has been used to establish jurisdiction,¹⁸ prevent evasion of a statute¹⁹ and of course the most recognized use of holding a shareholder liable for corporate obligations. Here, the term veil piercing refers to the remedy, the disregard. Alternatively, the veil piercing doctrines are such that they result in veil piercing as a remedy and only that. The remedy of veil piercing is available through multiple different doctrines, but there are specific doctrines solely for piercing the veil.

The main interest in previous research has been with the shareholders' liability in corporations that have few shareholders or with parents' liability in corporate

18 See, e.g., *Cannon Manufacturing Co. v. Cudaby Packing Co.* (1925), *Empire Steel Corporation of Texas, Inc. v. Superior Court of LA County* (1961) and *Pauley Petroleum, Inc. v. Continental Oil Co.* (1968).

19 *State v. Swift & Co.* (1945).

groups.²⁰ Veil piercing has been viewed as a doctrine that allows holding the shareholders liable over obligations of the corporation.²¹ Especially the parent in a corporate group has been named the target of piercing liability. Opinions sometimes seek the liability of “*the economic unit*.”²² Alternatively, identification or tort law principles have been cited to define piercing, placing liability on the controllers or actors causally affecting the damaging result. A definition of veil piercing is imperative to understand the following text, however, and the potentially liable party can affect the definition greatly.

Compared to these traditional views, I adopt a wider view of things in this work. Anyone who uses the corporate form to damage creditors or evades a provision can be the target of veil piercing liability. The capability of using the corporation rather strictly follows the one with control, though it is entirely possible that some party other than the controller can gain advantage from the separate personality of the corporation.²³ This was explicitly stated in the KKO 2017:94 decision in which, another corporation was held liable. Onenatural person owned all the shares and controlled both of them.²⁴ Similarly, the test laid out in KKO 2015:17 does not limit the view into any predetermined person or position. Instead, it views the use of the corporate form. The full discussion on the liable party would not fit well in this section before introducing the comparative methodology. Therefore, I will refer the reader to section V.7. It should be noted, however, that the liable party and the definition of veil piercing are highly interrelated issues, and they are separated in this work only because of technical reasons.

This work will not confine the view on veil piercing on shareholders’ liability alone. In its decision in KKO 2015:17, the Supreme Court named piercing as a disregarding the separate personality of the corporation without a provision of law enabling the disregard.²⁵ However, it did not specify which entity should be liable. Separate personality no doubt protects the shareholders, but its effects are not limited to them, even if the Company Act 1:2 explicitly states that the company is a separate legal person from the shareholders. This statement needs to be interpreted as a necessity to emphasize this separation, which would surely be challenged otherwise. A personality separate from all other persons in the world

20 KM 1992:32 at 355.

21 See *Huttunen* 1963.

See also *af Schultén* 1984 at 77–122, *Huhtamäki* 1999 at 142–152, *Vandekerckhove* 2007 at 528–532, *Mähönen – Villa* 2015 at 298–303 and 405–409 and *Sandström* 2015.

22 See, for example, *Leppänen* 1991.

23 See also THO 5.1.2016 15/948, where the employee of the corporation benefitted from the separate personality as he contracted with the corporation. Moderating contracts section of law does not allow accounting for the circumstances of the owner. The veil was pierced and the circumstances were taken into account. See chapter III.5.1. for further analysis on the decision.

24 Similarly in KKO 1996:2.

25 See KKO 2015:17 at 29.

in itself is obvious and needs not be explicitly mentioned. Every person is an entity separate from the corporation. In this sense, the corporate veil can be found between any entity and the corporation. There is a veil of limited liability even between all natural persons. Even in case law, the veil between two separate entities other than the shareholder and the corporation has been pierced.²⁶

The Supreme Court in KKO 2015:17 also deemed the disregard possible with either piercing or a legal exception to the rule of separate personality.²⁷ This is a clear separation of the law-based instruments and piercing. Thus, piercing is applicable only when there is no provision of law allowing for the disregard of separate personality.

It is from these observations that the definition of piercing stems. Veil piercing could be defined as holding another person liable for the liabilities of the corporation without a provision of law allowing for such liability. This definition is wide enough to include the piercing situations that originate from neglecting monetary liabilities. It is, however, incapable of including situations in which a norm was evaded by using a separate entity, for example, if the company was divided to avoid co-operation duties based on the number of employees. In these cases, the general identification would be capable of explaining these situations.²⁸ With this in mind, piercing is understood in this work as *holding another person liable for the circumstances, attributes or obligations of the corporation without a provision of law allowing for such treatment*.²⁹

This is a rather wide interpretation of veil piercing, but in its reach, it matches the formulation of the doctrine laid out in the KKO 2015:17 decision. Additional support could be derived from Sweden. The Swedish legal literature is obsessed with resolving a similar issue. The argument is over whether veil piercing is a norm that should be systemized only under company law, tort law or as a general principle of the legal system.³⁰ *Wiktor Brandell* sees many benefits in the broad definition of piercing as a general principle. It allows combatting corporate abuses in areas of law besides company law, it generates a larger body of case law, and it therefore leads to a better-developed doctrine, which in turn makes the legal state more certain. The formulation under a broad principle does not prevent creating more specific rules when necessary.³¹

Another key concept in this work is risk. Risk is understood here to cover both the positive chance for profits (*positive risk*) and the negative chance for losses (*negative*

26 See KKO 1996:2 and KKO 2017:94

27 See KKO 2015:17 at 29.

28 See *Rudanko* 1982 at 99. Similarly, see *Lindfors* 2008 at 315.

29 See also *Brandell* 2018 at 15–17 and *Atlas Maritime v. Avalon Maritime* (1991) at 779.

30 For a description of this debate, see *Brandell* 2018 at 14–17.

31 *Brandell* 2018 at 14–17.

risk).³² Typically, the word is used to cover only the negative aspect. Even though using the dual meaning of the word risk could potentially alienate some readers, the vehement pursuit of objectivity and accurate language demand these to be separate. From this follows the term *risk separation*, which means separating the positive and negative aspects of risk. *Risk isolation*, on the other hand, would mean isolating negative risk from positive, giving it essentially the same content as risk separation.

Following this definition, the target arrangements for veil piercing are those where someone uses the corporate form to select which attributes to place in entities in a manner that separates the benefits and liabilities and leads to unacceptable results or undue harm to others. This is a very general description, and as the length of this research shows, a lot of further elaboration is needed to distinguish when the veil can be pierced from legitimate limitations of business risk for which the corporate form is designed.

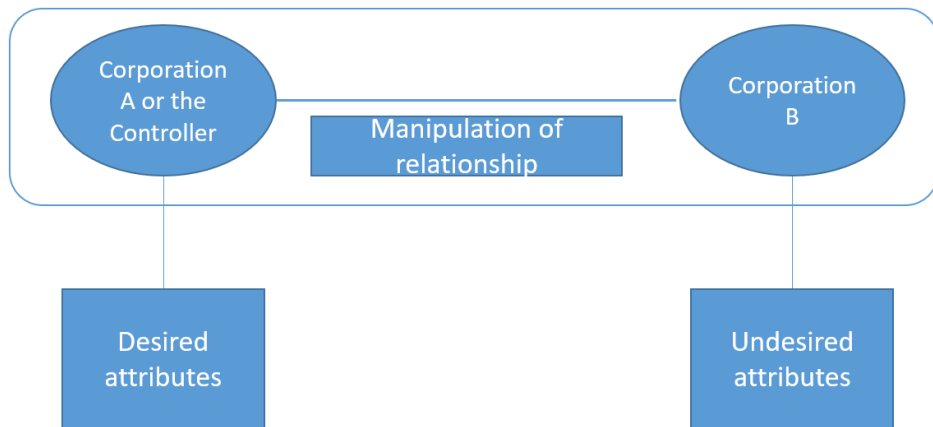


Figure 2. The simplified arrangement piercing remedies

4.2. Direct and Indirect Veil Piercing

In Finnish legal literature, veil piercing has sometimes been split into two categories: *direct* and *indirect veil piercing*.³³ Direct veil piercing occurs when the controller or another person is held liable for the obligation of the corporation. Indirect veil piercing occurs when one entity is not allowed to enforce its debt from the other

³² See Pöyhönen 2000 at 177–184.

³³ See *af Schultén* 1984 at 81, *Leppänen* 1991 at 285–286, *Huhtamäki* 1999 at 142–144. Cf. *Huttunen* 2007 at 127.

entity.³⁴ The same division exists in the United States,³⁵ where the indirect piercing is called *equitable subordination*. The United States has adopted slightly different piercing tests in each situation.³⁶ In Finland, though, the division does not affect the analysis when determining whether the veil can be pierced. It is only about choosing the form of remedy for the situation: personal liability or subordination of debt claim.

Indirect piercing has expressly been accepted in the Finnish case law as early as 1929 in three separate decisions.³⁷ In these decisions, the parent company was denied the status as a creditor because the subsidiary had been a separate corporation only in appearance, and it was in fact owned by the parent and operated to fulfill the business purposes of the parent. The parent was not allowed to demand payment on the debt it held from the subsidiary.

In this study, I do not follow this division, as it only affects the solution adopted and not the analysis on whether the veil should be pierced or not. The veil piercing assessment is the same. The only difference is on the result adopted. Direct veil piercing as a solution means that the corporate veil can be pierced and the controller will be held liable for the obligations of the corporation. Indirect piercing as a solution means that the corporate veil can be pierced and the controller should not be allowed to claim debt. These are only different solutions to remedy the wrongs of the cases. Direct and indirect veil piercing are just ways to categorize these solutions from an *ex post* perspective—after the veil has been pierced.³⁸

The whole dichotomy is about the inter-entity relation in which the legal effects occur.³⁹ In direct veil piercing, the liability occurs in the relationship between the controller and the creditor. In indirect veil piercing, it occurs in the relationship between the corporation and the controller. Veil piercing assessment is not tied to these relations. It is the totality of the arrangement that is determinative.⁴⁰ The

34 The debt needs to be borrowed capital. If the debt is in essence, albeit not in form, equity capital, veil piercing is not necessary as the payment can be denied without it. See *Leppänen* 1991 at 310.

35 See I.6.1. of this work.

36 See *Taylor v. Standard Gas & Electric Co.* (1939).

37 See KKO 1929 II 638, KKO 1929 II 639, KKO 1929 II 640 and *Tammi-Salminen* 2001 at 292–293.

38 For a somewhat supporting opinion, see *Mähönen – Villa* 2015 at 408–409. They are of the opinion that direct veil piercing is possible within the doctrine created in the KKO 1929 II 638–640 decisions. The doctrine they find from the case is that the parent cannot have a real receivable from the subsidiary if the subsidiary is, in fact, owned by the parent and operates as branches of the parents' business for economic purposes of the parent. From this, they derive that, in a similar situation, the subsidiary cannot have obligations separate from the parent, and thus, the obligations of the subsidiary are *de facto* obligations of the parent.

39 See *Leppänen* 1991 at 285–286 and 315–316.

40 KKO 2015:17.

totality includes all the relationships around the corporation and how they affect each other. The change in one relationship affects other relationships around it. Piercing creates the creditor a right to make a claim directly with an additional party or alters the relations among the controller, the corporation and the creditors.⁴¹ This process accounts for elements that appear in every relation among the complex. Only *ex post* can this alteration be reasonably thought to occur in a single relation. *Ex ante*, they all affect the outcome, and *ex post* consequences are discernable as relation-specific. The totality of the arrangement provides the justification for piercing, after which the effects appear in an isolated relation. The plausibility of these effects also acts as the necessary interest that allows for making a piercing claim in the first place.

The categorization reflects the tradition of analytical jurisprudence and is ultimately traceable back to *Wesley N. Hohfeld's* fundamental legal conceptions.⁴² These conceptions, by nature, are useful when assessing the justification of a decision and the legal relationships it has created after the decision has been made. They are meant to assess the existing relations, not how those relations are formed. Veil piercing involves the creation of a subjective right in one relation based on a justification that exists in another. The framework is unable to process this transition. On the other hand, it can be argued that the controller based on the duty of loyalty is already related to the creditor, and the liability is only a sanction for violating the right that the creditor possesses. This would lead to a circle since the existence of the controller's duty of loyalty itself necessitates extending the contents of one legal relation to another. The corporation-controller relationship creates the duty of loyalty on conditions resembling veil piercing. The controller, by definition, exercises power in the corporation-controller relation.⁴³ This power enables her to control how the corporation exercises its power when forming the corporation-creditor relation. The controller does possess power over the corporation-creditor relation as she can determine the use of the corporation's power. The power of the controller in the corporation-controller relation makes it possible to sabotage the realization of rights within the corporation-creditor relation. The power utilized in this manner possibly gives the creditor the power to demand sanction. The whole question with veil piercing is whether this use of power can justify liability. This question cannot be answered by Hohfeld's conceptions or its derivatives.

41 See *Leppänen* 1991 at 285–286, *Huhtamäki* 1999 at 144 and *Tammi-Salminen* 2001 at 291.

42 See *Hohfeld* 1913, *Hohfeld* 1917, *Ross* 1934 at 185–203 (as cited by *Zitting* 1951 at 2), *Zitting* 1951 at 2–5, *Wikström* 1980 at 250–251 and *Kurki* 2015 at 445–447. See also *Niemi* 1996 at 19 and 66.

43 About power over another relation see *Kurki* 2015 at 442.

Legal literature has accepted this division thus far, but little attention has been devoted to the choice between them. Indirect veil piercing does not usually occur outside bankruptcy, so this conflict does not usually exist outside of bankruptcy. Nothing prevents applying direct veil piercing in bankruptcy, though. So how should the choice be made between the two?

Tatu Leppänen gives a detailed explanation of the results of each choice but makes little effort to give recommendations on which is preferable. Direct piercing would mean adding another liable person, who would be just as liable for the debts as the debtor. This would add assets to satisfy the bankruptcy creditors' claims. Indirect piercing would mean that one creditor is denied the status of a creditor or is at least allowed payment only after other claims are fully satisfied. This does not add assets but decreases the claims, thus increasing the share other creditors receive from the bankruptcy estate. Leppänen does favor indirect piercing over direct piercing because its benefits are collectively divided between the creditors.⁴⁴

From this, it is clear that indirect piercing is less intrusive toward the one held liable. The liability is limited to the sum of the debt denied, whereas direct piercing would potentially place all assets at risk. As later discussed in this work, piercing claims are creditor-specific, and collective claims in the name of the bankruptcy estate should not occur outside specific situations.⁴⁵ Direct piercing would thus only mean placing all the assets responsible only against the receivables of the creditors demanding piercing. It is therefore not clear which form of piercing is less intrusive. Case by case, this is easily discernible, and the amount of the potential liability seems higher in direct piercing as multiple creditors could claim piercing. With indirect piercing, the amount of the potentially subordinated debt is also usually entirely controlled by the holder of that debt. Control and liability amounts suggest that indirect piercing is a less intrusive remedy. It should thus be favored when both are available.

5. Research Method and Research Questions

5.1. Setting a Research Question

The motivation for this research comes from the unclarities and lack of interpretative certainty the formulation in KKO 2015:17 left us with. My attempt in this research is to make the rather ambiguous veil piercing doctrine more concrete and predictable. This is not a clear cut research question though. This goal should thus be divided into simpler questions as follows:

⁴⁴ *Leppänen* 1991 at 278 and 285–286.

⁴⁵ See V.8.3.2. of this work.

1. When can the courts apply veil piercing?
2. How should the parts of the test be interpreted?
3. Who should be held liable?

The work does focus on these issues, though the analysis does show, that none of them can be provided with an explicit answer. Much of the findings in this work are negative in the sense that it is easier to detect situations and interpretations that are not applicable in a piercing case. Still, eliminating these false situations does make piercing doctrine more clear, even if the central essence and purpose of the doctrine are not entirely revealed. . It could even be questioned, whether the ambiguities can be eliminated at all. The nature of veil piercing as a general norm or a standard created in case law is, arguably, inherently open for interpretation.⁴⁶

The first question relates to issues about wording the piercing test. I have accepted the KKO 2015:17 wording as the basis for this with minor modifications based on legal literature. The second question is an attempt to deduce a typical piercing situation, or a real world arrangement which veil piercing could potentially remedy. The third question is about the concrete aspects of veil piercing test. This section of the work requires me to first define what is meant with each abstract part of the test. Second, it requires a thorough explanation of what are the concrete real life actions and facts one could cite in a piercing case. Finally the fourth question sets us forth to determine who could and who should be held liable.

5.2. Research method

5.2.1. Exclusions

I use legal dogmatics and legal comparison in a very specific way as the methods of this research. In the next chapter, I will explain how I use them in detail. Before that, I find it necessary to exclude a few methodological choices. These exclusions are valid—even popular—methods where piercing is concerned. For several reasons, though, I found them lacking and decided against them. These rejected ideas mostly center around law and economics and considerations of efficiency.

The first idea I explicitly reject in this research is the argument that the cheapest cost avoider should hold the liability. Although in most cases the cheapest cost avoider is likely the corporate controller facilitating an arrangement, this sort of examination is still often derailed. I have taken the view that veil piercing targets arrangements in which someone deliberately creates a situation using a corporate form in which they are able to separate assets and liabilities, or negative risks. The

⁴⁶ I thank the inspector of my thesis, Hanne Søndegaard-Birkmose, for pointing out this possibility to me. I whole heartedly agree with this statement.

argument goes that veil piercing decisions condemn these intentions to be of benefit at the expense of someone else. The cheapest cost avoider argumentation bypasses the intention altogether in an attempt to arrive at the most efficient conclusion. I resent the idea that malicious intentions are legitimized in this manner by simply referring to efficiency. Efficient does not mean just.

Another rejected idea is that veil piercing decisions should be balancing act between benefits of limited liability and the injustices it has created in the current case at hand. This is the approach much of the United States legal literature has adopted.⁴⁷ Limited liability is the rule, and the economic analysis of it reveals that the rule has many beneficial effects.⁴⁸ It does create several—often severe—externalities too. This sort of argumentation would also result in a solution based on extra-legal considerations of efficiency. If the benefits of the limited liability in the case exceed the externalities, then should the veil not be pierced? The benefits for society as a whole created by limited liability are irrelevant in individual piercing cases.⁴⁹ The decisions should be made by considering the purposes behind each of the applicable norms to detect abuse.

5.2.2. Legal dogmatics

5.2.2.1. Generally About Legal Dogmatics in this Work

Legal dogmatics is the backbone of any legal research. It provides answers to questions of interpretation and content of the law. I seek to clarify the interpretation of the veil piercing doctrine as it was laid out in KKO 2015:17. As I am sure most readers of this work are quite familiar with this method, I will only provide a quick description of its basic structure. Instead, I will focus more on how the subject of veil piercing forcefully and specifically emphasizes legal dogmatics. The traditional view of legal dogmatics has emphasized the authoritative legal sources, and decisions were about matching the facts of the case to whatever was described in those sources.⁵⁰ Veil piercing would not exist if this view were adopted completely. There are few authoritative sources, the piercing decisions are always *contra legem*⁵¹ and two authoritative sources are often in conflict.

Instead of the traditional view, the approach developed by *Juha Karhu* suits veil piercing situations much better. His situational sensitive legal dogmatics approaches the case from the facts toward the norms. First, one needs to correctly assess the

47 About the discussion, see, for example, *Bainbridge* 2000, *Millon* 2007 and *Cheng* 2014.

48 *Easterbrook – Fischel* 1991 at 41–62.

49 Similarly *Ob* 2013 at 93–94. He argues that from a positive and normative standpoint, there is no basis to presume that efficiency-based rationales for limited liability necessarily govern veil piercing. He goes further and notes that until this conceptual path linking veil-piercing and limited liability can be extirpated, the prospect of a cogent remedy will remain illusory.

50 *Karhu* 2003 at 803.

51 See also *Pöyhönen* 2000 at 175.

total situation and its legal implications. Only after this, one searches for norms that are relevant for the situation, of which there can be several. The norms create a field of assessment, where each norm is only an argument and inspiration in the legal assessment. The significance of each norm is determined only after considering the impact of each norm.⁵² I will take this approach throughout this work, though it is especially discussed in the theoretical chapters II.2 and II.3. In these chapters, I make a specific analysis of veil piercing, on which norms are parts of the assessment and what sorts of arguments they bring in the assessment.

I would summarize the differences in approach between the more traditional legal dogmatics and situational sensitive legal dogmatics through the following characterizations. *The traditional view* begins by defining the relevant description of events and recognizing the potential norms that could be applied to the situation. Next, a choice is made on which norm shall be applied. Principally, selecting one excludes the others. Then the an attempt is made to resolve the issue by applying that norm and no relevance *per se* is given to the excluded norms and the interests and purposes behind them. The emphasis is on the clarity of each norm and its application in the hierarchical structure of norms. The view is more hierarchical.

The situational sensitive view begins by recognizing the totality of the situation, what are the practical consequences of the situation and what norms, law and other legal substance is related to the situation. Next, the relevant norms are inspected to refine the central arguments that norm provides. This argument is then used when balancing the interests of the parties and the strength of the argument is determined only after its consequences on the parties rights have been determined. Determining the consequences on the parties rights also determines the effects the norm has on the other relevant norms in the assessment. Decision making is about combining and coordinating these interests and consequences. The emphasis is on coordination and not having to compromise excessively on any of the core interests or purposes behind each relevant legal norm.

These differences become more explicit through examples from veil piercing context. If the traditional view is applied, veil piercing becomes more strongly about conflict of norms. The core interests and purposes have relevance in resolving the conflict. Interpretation then attempts at a choice between the two conflicting norms. This is done by describing the relevant arrangement in question and comparing it to the arrangements each of the norms in the conflict are meant to represent and regulate. The better match is chosen and the other is discarded. In piercing context, the question could be for example, should the two companies in the arrangement be considered separate in relation to employees even though both of them have acted like an employer would. The resolution is reached by

52 *Karhu* 2003 at 803–804.

selecting between the legal norm determining employer and company laws separate personality norm.

In the *situational sensitive view*, veil piercing is understood more strongly through the prohibition of abuse of rights. The interpretation is about coordinating different views on appropriate behavior from the relevant norms, the consequences their application would have and what interests are those norms based on. For example, the Company Act 1:5 does not determine the purpose of the company exhaustively or the Company Act 1:2 limited liability is not conclusive. Instead, they are just representations of different interests in the assessment. The assessment also implements the consequences the application of the relevant norms would bring and the control each interested party has on those consequences. All of these interests are but arguments and they can be discarded in the assessment, if the control capabilities are not used in accordance with the interests the norms are based on.

As for the legal source hierarchy,⁵³ veil piercing is a rather problematic topic. There is no written law, and even preparatory works have very little on the subject. Written law and preparatory works have significance mostly through the analogous norms and their interpretations. The creation of the piercing doctrine comes from case law and seems to involve some form of moral condemnation and ramification views. Legal literature also played an unusually large role in the creation of the piercing doctrine in KKO 2015:17. The analysis is thus reliant on weaker sources of law since the compelling sources remain silent.

Much of this work is dedicated to formulating the veil piercing doctrine. The main tools of this research are analogy and interpretation. Legal dogmatics utilizes grammatical interpretation—choosing from different possible meanings for the expression.⁵⁴ *Aulis Aarnio* defines four rules for it: a) no part of the law should be interpreted as to leave it unnecessary or meaningless; b) the expressions used in law must be given the same meaning in different contexts unless there is sufficient reason to differ; c) the interpreted expression should not be given a meaning that differs from the general usage of the expression; and d) if the terminology used in law differs from the general usage, the legal terminology is given preference.⁵⁵

The subject of veil piercing places an emphasis on the second part of these interpretative rules: the expressions used in law must be given the same meaning in different contexts unless there is sufficient reason to differ. The veil piercing test introduced in KKO 2015:17 uses several expressions that have no immediately apparent meaning. These terms are such that they have been used somewhere else in the legal order. Interpreting the meaning of these terms would then fall under this rule. For example, in this research, I will take the terms control, artificiality, and

53 See *Aarnio* 1982 at 87–96 and *Aarnio* 2006 at 287–338.

54 See *Aarnio* 2006 at 246–248.

55 *Aarnio* 1982 at 103.

reprehensible manner and inspect their usage in law and determine whether there is a reason to interpret them differently in the veil piercing context. Section V of this work is largely based on this sort of inspection and analogy.

Analogy, the comparison for relevant similarity, is a useful tool in the doctrinal tool bag. It purports that similar articles of law or court cases offer interpretative support for one another.⁵⁶ The problem with analogy lies in discovering relevant similarity. This requires the interpreter to divide the facts into elements small enough and then recognize the similar relevant elements in the compared items.⁵⁷ Similar phenomena need to be treated the same, whereas different phenomena need to be treated differently.⁵⁸ With veil piercing, analogy receives an especially heightened significance. One could even argue that the Supreme Court built the entire test based on analogy on artificial property arrangements, tax avoidance and comparable party considerations on environmental damage liability. These are the primary situations where the existing written law allows for disregarding separate personality or limited liability in the corporate context. They no doubt prove to be a key influence when clarifying the meaning of different parts of piercing doctrine based on general case law that allow the same result. Sections III and IV of this work are dedicated to discovering better sources of analogy and excluding the potential but inferior sources.

5.2.2.2. Making the *In Casu* Overall Assessment

The nature of the piercing doctrine does seem to give its own characteristics to the methodology used to examine it. Yet one more characteristic should still be mentioned. The veil piercing decision is always made *in casu* and is based on the overall assessment⁵⁹ of all the relevant facts of the case. As there is no written law norm limiting the facts, the assessment can become rather messy. There are certain repeating patterns and commonalities in case law, though. Certain patterns of fact have been confirmed to support piercing and certain others to oppose it.

Answering this *in casu* overall assessment and detecting subtle variations require precision tools. My approach here is heavily inspired by the four criteria used by *Juha Pöyhönen* to assess co-operation in civil law matters. These are the 1) operational environment, 2) overall arrangement, 3) interest holder and 4) risk position.⁶⁰ These criteria can be used to detect more subtle variations in legally relevant situations. If the traditional view looks at complete rights, this approach allows us to view the formations of those rights as a process and attach relevance to different stages.

56 *Aarnio* 1982 at 104.

57 *Aarnio* 1982 at 104.

58 As *Juha Karhu* has emphasized about equal treatment in several lectures.

59 KKO 2015:17 at 28–29.

60 *Pöyhönen* 2000 at 162–184.

Operational environment means the ordinary and typical way in which some norm or institution is used. The determination of ordinary could also look into the future and at what practices will become ordinary and typical. If done this way, one needs to determine how these practices should be to distribute negative risks fairly.⁶¹ In a corporate context, this would mean the operation of a legitimate business. There is a clear pattern emerging in piercing case law where the existence of a legitimate business prevents veil piercing.⁶² Deviation from this brings us to the territory where we need to assess the distribution of negative risks.

In short, the overall arrangement means that the view on legally relevant factors is not limited to a single legal relation. Instead, one can account for all the entities that are interconnected and affected somehow by whatever happens in one relation.⁶³ For example, a parent corporation's commands to the subsidiary in a parent-subsidiary relation can easily affect the subsidiary-contractor relation. The decision is made based on the plurality of connections instead of isolating its effects into one.

The interest holder is a deviation from the traditional view of the rights holder. Instead of the formal legal right, an interest holder is determined through practical aspects. Whoever has an economic interest in the overall operation is an interest holder. The stronger the connection, the easier it should be to disregard the formal outlook. Instead of the formal legal label, one needs to look at what happens in reality.⁶⁴ If we combine this factor with the overall arrangement criterion, we find one key disparity in law: the economic effects of an operation materialize through the combined efforts of the interest holders instead of subject-specific accumulation.

The risk position seeks to emphasize how the parties in the arrangement have determined their negative risks as well as the chance for benefits from the operation they pursue together. This determination should not be unilaterally altered. Pöyhönen sees the norms that allow for assessing proportionality or moderation as tools to match liability to the risk positions of the parties.⁶⁵ I argue that veil piercing has a similar function.

I have not used these terms systematically in this work, hence their position is noted as inspiration. These criteria offer a capable framework through which the detection and overall assessment of relevant facts can be made. Certainly, veil

61 See Pöyhönen 2000 at 162–167.

62 See III.4.2.2. of this work.

63 See Pöyhönen 2000 at 169–172. He even uses veil piercing as one example of a situation where this sort of interconnectedness is especially relevant.

64 See Pöyhönen 2000 at 173–174.

65 See Pöyhönen 2000 at 177–180.

piercing does seem to require the use of several of these perspective changes that Pöyhönen's model makes in comparison to the traditional views. It demands viewing the totality of legal relations instead of a single one, looks into the economic reality behind the legal form, assesses the allocation of benefits and liabilities and even gives relevance to the ordinary and typical use of the corporation's form. The discussed model seems highly compatible with the existing case law.

I have made it my mission in this work to detect patterns of fact, of corporate conduct and of real-world actions. This gives the analysis here a distinct tint. These patterns do not necessarily have legal relevance as such, but rather they speak of the motives and purposes behind the arrangement. They form relevant legal material for the overall assessment and allow going beyond the singular legal relation. For example, siphoning assets and practicing corporate operation benefitting only another corporation under the ownership of the same shareholder have no legal relevance in themselves. They can be relevant in asset distribution norms or competition law, but not usually in liability issues. When these actions are examined as part of a pattern of conduct, they could be interpreted to reveal the intention of the person forming the arrangement or how these actions affected even those outside the immediate persons involved in an unacceptable manner. This is then given relevance in the piercing assessment. As such, the research almost resembles the evaluation of evidence instead of legal dogmatics. It examines real arguments as well as the causality in the rational decision-making process. It goes under the surface of legally accepted conduct to examine the reasons and rationales behind it, seeks significant patterns and proceeds to give these patterns meaning within the piercing test. The analysis is very much about discovering, on a practical level, what conduct veil piercing is meant to deter.

5.2.3. About the Legal Comparison Method

I have chosen to do a legal comparison. Thus, a comparative method needs to be adopted. The basis of the compared veil piercing doctrines is deeply embedded in case law and opinions in legal literature. The doctrine is often guided by principles, moral judgments and deducing intentions from certain facts. These qualities naturally guide us toward certain methods of legal comparison.

When planning the comparison, I considered three comparative methods. First, I thought about using the legal transplant method.⁶⁶ In short, legal transplant means taking some specified legal rule or system from one legal system and hypothetically placing it in another. Then the research would assess potential incompatibilities, problems and other issues this new material would cause. With veil piercing, this approach would prove problematic. The veil piercing doctrines in foreign

⁶⁶ About legal transplants, see *Watson* 1974, *Linna* 1987 at 183–187, *Linna* 2010 and *Husa* 2014 at 924–927.

jurisdictions are not precise. It would be moot to implant some vague formulation from a foreign jurisdiction and assess how it would fare in the Finnish legal system. Even if the transplant is only about the core concept or idea of the legal rule,⁶⁷ with veil piercing, even that core is debatable. The answers the legal transplant method would have provided would amount to claims based on assumptions of these foreign doctrines, solidifying the forms of these doctrines beyond that which has been achieved in their home jurisdictions. Legal transplant will not work as a comparative method in the case of veil piercing.

The second option would have been to adopt the functional comparison method, as it is traditionally understood.⁶⁸ This would have allowed me to name a socio-legal problem and view other legal systems' answers to that problem. This would probably have led me to inspect quistclose or constructive trusts in England or some other liability doctrines. I most likely would have encountered the veil piercing doctrines also. This method would have confined my research to a single problem or a set of them. This would have been a plausible approach, though it would have required me to first answer the socio-legal problem answered by veil piercing within the Finnish legal system. It is only through thorough research that I can answer this elementary question—in any legal system. As it turns out, that question itself is such that analyzing it would benefit from comparative material. The lack of legislation combined with the ambiguous wording in the Supreme Court decision in KKO 2015:17 make veil piercing a doctrine that, in wording alone, could apply to any situation where a corporation's creditor did not receive full payment. The compared socio-legal problem is not yet identified clearly enough—or there are multiple—to allow a functional comparison.

This has left me with a more light approach to legal comparison. Instead of answers and example solutions, I am simply looking into the foreign legal systems for inspiration, case examples and additional arguments. The approach is that of *practical legal comparison*.⁶⁹ The aim is not to compare the legal system on the level of legal praxis or legal culture. Instead, I take a more modest approach and analyze sections of law and case law from other jurisdictions. According to *Jaakko Husa*, this sort of comparison aims to resolve some interpretative problem in domestic law. Foreign material is not considered a legal source but is used to argue the decision with support from the argumentative patterns or formulations from that foreign material.⁷⁰ However, the bare citation of such judgments outside the comparative

67 *Husa* 2017 at 924.

68 About the functional comparative method, see *Husa* 2013b and *Husa* 2013a at 10–13. About the rejected modern view, see *Zweigert – Kötz* 1998 and *Husa* 2013a at 13–16.

69 *Husa* 2013b at 5 and 7. Alternatively, the approach is a so-called first-degree comparison, the lightest form of comparison usually utilized in preparing legislation. See *Husa* 2010 at 715.

70 See *Husa* 2013b at 5 and 7 as well as. Also *Husa* 2010 at 709 and 713.

context is overly simplified and therefore misleading.⁷¹ The material can be used as support, but one must not forget the fact that they originate from a foreign legal system. Sometimes the systems are too different and the material should be rejected. Even though practical comparison does not delve deep into the legal systems being compared, this research still seeks to discover at least whether there is some prohibitive difference making it impossible or undesirable to utilize the material.

I have placed this sort of interpretative problem as the research question in this work. What are the requirements of veil piercing in Finland? How should the test introduced in KKO 2015:17 be interpreted? Thus, the comparative method that fits the research questions is a practical legal comparison. The validity of this choice is further strengthened with a glimpse at *Lord Neuberger's* argumentation in a landmark veil piercing case from the United Kingdom. He discusses foreign veil piercing literature to support his own remarks.⁷² The ambiguous formulation of piercing doctrine makes all piercing cases hard cases that have no easy answer. And in such cases, comparative arguments are the most useful.⁷³

Much of the material I will inspect when performing the legal comparison is not legal norms or veil piercing rules. Instead, the comparison often focuses on questions of the relevance of facts, e.g., when a corporation is inadequately capitalized or what facts show that the assets have commingled. Naturally, the legal systems individually formulate the norms that determine how they understand these terms and thresholds, e.g., how much capital is adequate.

The Finnish legislation gives the courts relatively free reign to assess the reliability and meaning of the evidence. There are only a few rules as to the assessment of the evidence. This makes the veil piercing comparison even more fertile. These sorts of factors are based on logic and reason, which of course are universal and independent of any legal system. It would thus seem especially useful to look into the types of reasoning courts abroad have utilized when piercing. An example of this would be to question when corporate affairs and funds have been commingled so thoroughly that it supports piercing.

I have decided to call my study multijurisdictional. I refer to multijurisdictional as an inter-jurisdiction connection. The analysis does not only seek to address the significance of foreign material for the purposes of Finnish doctrine, but also seeks the development of the internal doctrine of the foreign system. Merits of my research in this regard would be especially significant for Sweden. The word multijurisdictional in the title could easily be replaced with legal comparative and it would still be representative of the research here. The idea behind the term is about

71 *Fabér v. Hungary* ECHR 24.7.2012 dissenting opinion of *Helen Keller* at 17. See also *Husa* 2013b at 9–10.

72 See *Prest v. Petrodel Resources Ltd* at 75–78.

73 See *Husa* 2013b at 16.

a research connecting several legal systems or jurisdictions, detecting similarities and seeking inspiration – for both the author’s home jurisdiction and the foreign system.

Now that the method has been chosen, the next step is to select the legal systems utilized. Although I have considered several others, mainly from Europe, in the end, I chose the Nordic countries. The United Kingdom and the United States seemed to offer the most material and the Nordic countries more useful material for the Finnish system. In addition, the practical aspect of language skill was a factor in choosing these.

The United States and the United Kingdom are more distant than the Nordic region, though their abundance of material makes them more relevant.⁷⁴ They are both also very significant countries in global economics. Additionally, in corporate law matters, they are often the example others seek to emulate. This does not seem to matter that much since veil piercing is most concerned with the two global corporate law norms. They are the very basic tenets of corporate existence that appear in most corporate legislations: limited liability and separate personality. The rest of the corporate law is of lesser importance, although the norms on creditor protection and asset transfer often serve to limit the need for veil piercing.⁷⁵ They do not affect the requirements of piercing, however.

Going further, Russia and China have both adopted a piercing section into their company legislation. Researching those jurisdictions is unfortunately beyond my means, as I do not speak either language. Fortunately, *Kirill Tervo*⁷⁶ is currently conducting research in the Russian system. Next, I will introduce the piercing doctrines in the United States, United Kingdom, Sweden, Norway and Denmark as well as provide the arguments for their inclusion in this research.

6. Contextual Information on the Selected Legal Systems of Comparison

6.1. United States

6.1.1. Single or Multiple Piercing Doctrine(s)?

The United States is perhaps the most prominent veil piercing jurisdiction. The doctrine has had plenty of time to develop since its inception in 1809.⁷⁷ Generally,

⁷⁴ Although they are not as foreign as the Finnish Company Act of 2006, they did heed the UK as a point of influence. See HE 109/2005 at 14–15. See also *Airaksinen* 2013 at 449–450 for a description of the criticism sparked by adopting common law elements into Finnish Company Act. He also provides a good answer to that criticism – mainly that not that many elements were adopted.

⁷⁵ See, for example, *Alting* 1994 and *Miller* 1998.

⁷⁶ Attorney at law, Ad Astra Asianajotoimisto Oy and an LL.D. Candidate, University of Helsinki.

⁷⁷ *Bank of Deveaux v. United States* (1809).

a jurisdiction does not have too many piercing cases and even fewer landmark cases. In the United States, however, around 3000 relevant piercing cases have emerged.⁷⁸ It should be noted that the United States is a large country and a leader in the global economy. Both of these factors dictate that many cases should arise there, as many companies were established. In addition, at least by reputation, US culture has a low threshold for litigation. Veil piercing doctrine has had both the time and quantity to develop. Arguably, the US version of veil piercing is the most advanced in the world.

A distinction needs to be made between different states within the US. Each state has its own veil piercing doctrine, case law and judicial context,⁷⁹ which makes a meaningful comparison to “the US doctrine of piercing the veil” impossible. Instead of one doctrine, there are 50–60 of them, counting one for each state, one for the federal level and several limited context doctrines allowing veil piercing.⁸⁰ This multitude forces some choices on the comparison. I could choose one or even several doctrines and focus my analysis on these. Undoubtedly, some of the US doctrines are more prominent than others. New York State utilizes a well versed and highly developed agency variation of veil piercing and houses a lot of business, thus generating a lot of cases. Delaware has more companies registered there than any other jurisdiction in the world but is notoriously lax in its regulation over the corporations and has no significant case law on piercing.⁸¹ California⁸² and Texas are large jurisdictions and have some case law on piercing, even though Texas later excluded the application of veil piercing in its Business Corporation Act.⁸³ Illinois seems to have an especially well-argued veil piercing doctrine.⁸⁴

Although it would be plausible to choose any of these jurisdictions for comparison, I have chosen a different route. Most comparative essays between the US and other jurisdictions make no distinction by state. They analyze the US veil piercing doctrine without much discussion on whether such a single doctrine even exists. It does not, but the comparison is still valid. The doctrines adopted by the States are remarkably similar.⁸⁵ *Sam Halabi* has even argued that the variance between different states can

78 *Ob* 2010 at 89.

79 Statutory law, especially procedural rules.

80 For example, the Deep Rock doctrine in bankruptcy. See *Taylor v. Standard Gas & Electric Co.* (1939).

81 About the applicable piercing doctrine in Delaware, see *Geyer v. Ingersoll Publications Co.* (1992) at 793–794. See also *Bendemer* 2005 at 389–391 and *Ob* 2010 at 116–117 stating the Delaware approach to piercing as restrictive.

82 See the vague Californian standard for piercing from *Mesler v. Bragg Management Co.* (1985) at 300–306. See also *Ob* 2010 at 118–119.

83 At 2.21, though it is debatable whether this exclusion has prevented veil piercing entirely. *SSP Partners v. Gladstrong Investments (USA) Corporation* (2008), *Egan* 2015 at 81–82 and *Sparkman* 2016 at 369–371.

84 See *Sea-land Services, Inc. v. Pepper Source* (1991) and the cases cited there.

85 On the similarity, see *Marcantel* 2011 at 195–196.

be explained by procedural rules, and the veil piercing norm itself is identical.⁸⁶ While I cannot verify his observations, as analysis on these rules would constitute extensive research on its own, the similarities between the doctrines are still striking. Even those researching veil piercing in the United States seem to treat the doctrine as singular.⁸⁷

Lately, though, the scholarship around veil piercing has changed. The US literature seems to have shifted from a purely legal discussion about the relevance of certain factors in piercing to quantitative analysis on the prevalence of certain factors according to statistics.⁸⁸ This sort of research has scarce practical utility in determining when the courts pierce the veil, as it only measures the cited factors in reasoning and not their weight or content.⁸⁹ The other prong of the literature assesses the economic and social justifications of limited liability and analyzes whether veil piercing should be accepted as a limitation to limited liability.⁹⁰ Treating the US doctrines as a single body is no doubt practical and fits the comparative methodology I have adopted in this research. The aim is not to make a deep analysis of the systems compared but rather to take a short look into how things are done in other jurisdictions to spark inspiration and discussion in Finland.

Another problem with comparing to the United States is that the piercing doctrines there are vague, unprincipled and hard to interpret. There is no clear norm to compare to, and variance of relevant factors in court opinions is vast. This is explained at least in part by the fact that veil piercing is an equitable remedy.⁹¹ Equity, in a broad sense, is the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules. It is “individualized justice,” or the power to adapt the relief to the circumstances of the particular case. Equitable relief has always been subject to the discretion of the court, as opposed to a matter of right.⁹²

This leads to a situation where almost all aspects of the Finnish veil piercing doctrine have come up in some case in the US—and are often interpreted in multiple manners. With this sort of result, the comparison does not look into how things are in the US, but rather recognizes the relevance of that factor and initiates a discussion as to how it should be relevant for piercing. This is like taking a shortcut in the development of the Finnish doctrine. We see the considerations and the possible

86 See *Halabi* 2015 and Philip Morris Companies Inc. Litigation Manual on Intercorporate Liability (1989).

87 For example, *Bainbridge* (2000), *Millon* (2007) and *Cheng* (2011).

88 The shift began with *Robert B. Thompson* in 1991 and much of the modern discussion seems to utilize some statistics methodology. See *Thompson* 1991, *Thompson* 1999, *Swain – Aguilar* 2004, *Georgakopoulos* 2007, *Boyd – Hoffman* 2010, *Georgakopoulos* 2010 *Matheson* 2010 and *Oh* 2010. At the least, current discussion cites some of these studies and seeks to explain their results. Discussing this approaches utility in legal reasoning; see *Millon* 2010.

89 Similarly *Millon* 2010 at 18–19.

90 See *Millon* 2007, *Bainbridge* 2000,

91 *All Star, Inc. v. Fellows* (2009) at 813.

92 See *Peterson* 2017 at 68 and those cited therein. See also *Oh* 2013.

results as well as the arguments around them. It is also important to note that the United States generally has less strict rules on creditor protection.⁹³ Thus, many of its issues resolved by piercing could have been resolved with creditor protection instruments existing in law here.

Many a writer has noted the creditor-friendly environment in the European continent when compared to the US.⁹⁴ The legal tools available for creditors' protection are numerous. Corporate management enjoys less freedom when using the corporate funds, asset recovery has a wider range of application, tort liability is more comprehensive and liability cannot be further restricted in the bylaws.⁹⁵ Many of the veil piercing decisions made in the US could probably have been resolved within statutory doctrines in Europe.

In this research, I have chosen to examine the veil piercing doctrines. The broader approach focusing on a veil piercing remedy would no doubt have also been plausible. Let me note that the distinction between these is not clear by any means. Many of these interact and commingle with one another, for example, these two previously mentioned doctrines: misrepresentation and fraud can be used as elements supporting piercing decisions when applying the instrumentality test, or alternatively, they can justify extending liability in the corporate context based on causal relation.

6.1.2. Doctrinal Archetypes

Even as I choose to approach the US veil piercing doctrine as singular, it is worth noting the few influential variations within this singular doctrine and offer some background information. The veil piercing doctrines adopted by the States can be divided into several archetypes. The unique abundance of cases makes it strange to choose a few to introduce here. There are simply too many possibilities and landmark cases. Thus, I have chosen to introduce three doctrine archetypes instead of landmark piercing cases.⁹⁶ The most popular archetypes are the instrumentality⁹⁷ test and agency test.⁹⁸ These could also be categorized as piercing rationales, e.g., explanatory models cited to allow veil piercing.⁹⁹

93 See for example, *Nerep* 2015 at 23.

94 See *Miller* 1998 at 144–148 and *Leppänen* 1991 at 299 and those cited therein.

95 In the US, many liability forms can be excluded with a notion in the bylaws. See, for example, Delaware Limited Liability Company Act Title 6 Subtitle II 18-1101.

96 For an introduction of other archetypes and systemizations of the piercing standards, see *Cohen* 1998 at 18 or *Figueroa* 2012 at 719–731.

97 Alternatively “mere instrumentality.” I have included the alter ego test in the instrumentality test, although it was deemed to be separate from other veil piercing tests in *Castleberry v. Branscum* (1986). My choice is based on the extensive similarities shared with the instrumentality test.

98 See *Oh* 2010 at 81–82.

99 See *Oh* 2010 at 133–134 and *Hamilton – Booth* 2006 at 400–410.

The instrumentality test is based on the work of *Frederick Powell*¹⁰⁰ and was established in *Lowendahl v. Baltimore & Ohio*:

Where a parent corporation, at the time of the transaction complained of, (1) exercises control over its subsidiary not in a manner normal and usual with stockholders, but to such extent and in such manner, in disregard of the subsidiary's corporate paraphernalia, directors and officers, that the subsidiary has become a mere instrumentality or department of the parent's own business and the parent, under the unreal form of the subsidiary, is the real actor in the transaction; or where the business and officers of the two corporations have become so inextricably confused that it is impossible or impracticable to identify the corporation that participated in the transaction attacked; and (2) where such control has been used by the parent to commit fraud¹⁰¹, or violate other legal duty, or has been used to do an act tainted by dishonesty or unjust conduct violating plaintiff's rights or under circumstances giving rise to an estoppel; and (except in estoppel cases) (3) where such fraud or wrong results in unjust loss and injury to plaintiff, — the court, in disregard of the corporate entity of the subsidiary, will hold the parent liable.

The alter ego test allows disregarding the corporation when “there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice.”¹⁰² The test is minimal in its wording, but incorporates mostly the same elements as instrumentality.¹⁰³

The agency test was crystalized by *Judge Cardozo* in *Berkey v. Third Avenue Railway Co.*¹⁰⁴ “Dominion may be so complete, interference so obtrusive, that by the general rule of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice. The logical consistency of a judicial conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is missing, where the attempted separation between parent and subsidiary will work a fraud upon the law.”

100 See *Powell* 1931 at §6. See also *Krendl – Krendl* 1978 at 11–14.

101 Not common law fraud but some broader category of fraudulent behavior usually involving misrepresentation or misleading. See *Krendl – Krendl* 1978 at 31 and *Cheng* 2011 at 28.

102 *Castleberry v. Branscum* (1986).

103 Similarly, see *Krendl – Krendl* 1978 at 14–15.

104 at 95.

The agency doctrine of veil piercing is easily confused with the doctrine of agency—a legal relationship where one party authorizes another to act on her behalf.¹⁰⁵ They should not be thought to be the same.

Other than these three, courts often use so-called laundry lists as veil piercing tests. These lists include numerous objective factors. If these factors match the reality of the case at hand, then some relevant aspect of piercing is proven. Usually, these laundry lists seek to establish dominance and control. *Frederick Powell*, the father of the instrumentality test, also presented one influential list like this.¹⁰⁶ The court in *Steven v. Roscoe Turner Aeronautical Corp.* (1963) later utilized that list, and other courts have followed the example.¹⁰⁷ Here is the list in its entirety:

- (a) The parent corporation owns all or most of the capital stock of the subsidiary.
- (b) The parent and subsidiary corporations have common directors or officers.
- (c) The parent corporation finances the subsidiary.
- (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
- (e) The subsidiary has grossly inadequate capital.
- (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
- (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
- (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
- (i) The parent corporation uses the property of the subsidiary as its own.
- (j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
- (k) The formal legal requirements of the subsidiary are not observed.

The problem with this sort of list is that items (a)–(d) are quite ordinary practices in corporate groups. Inadequate capital is extremely hard to determine, as we will find out later in this research.¹⁰⁸ Item (f) can also be interpreted as an attempt to

105 See also *Lowendahl v. Baltimore & Ohio Railroad Co.* (1936) and *Cheng* 2011 at 27.

106 See *Powell* 1991 at §6.

107 See for example *Bernadin, Inc v. Midland Oil Corp.* (1975), where eight of the eleven matched and the court pierced the veil. Several lists exist, for example, see *Barber* 1981 at 374–375 and *Krendl – Krendl* 1978 at 52–55.

108 See V.6.2. of this work.

save the business in distress.¹⁰⁹ Other than that, the list is functional. Perhaps the list should be divided into two categories where items (a)–(d) would be used to show the opportunity to abuse and the rest to show abuse. Still, there is no additional guidance as to weighing and balancing these factors.¹¹⁰ It should be noted that much more extensive lists exist,¹¹¹ and an author has even noted that these listed factors are virtually limitless.¹¹²

6.1.3. How Good a Comparison Target is the United States?

These tests do have many common elements with the Finnish veil piercing doctrine as established in KKO 2015:17. Their wordings are completely different, but after deeper analysis, the same decisive factors start to emerge. All require using a corporation, and all give meaning to the level of control one has over the corporation. Each requires some sort of moral condemnation or unjust result. The instrumentality test gives a more comprehensive list of objective elements, but the others, including the Finnish doctrine, give these elements relevance when piercing.

Some additional questions as to the nature of veil piercing exist in the US literature. Whether veil piercing is a doctrine in equity or a legal remedy has relevance on whether the proceedings utilize a jury.¹¹³ US literature holds the nexus of the contract's view of the corporation as dominant,¹¹⁴ whereas in the Nordic region, the entity theory prevails. The US legal literature seems hellbent on law and economics research and makes veil piercing an issue of limited liability and its externalities. The Nordic approach finds its basis more on the prohibition of abuse and upholding policies behind norms.

This introduction into the US veil piercing doctrines should be sufficient for the reader. It is against this background that the later comparative discussion takes place. Superficial similarities in the veil piercing tests seem obvious. Unfortunately, wording in all the tests as well as the Finnish veil piercing doctrine are vague and thus extremely open to interpretation.¹¹⁵ Analyzing just the wording of piercing doctrines would be an effort in vain, as none are capable of deciding a court case without a lot of material from outside the wording. In this regard, the laundry list presented provides a better grasp on what really justifies piercing. It offers objective factors instead of metaphors to be proven true by objective factors. As I proceed

109 For a horrible decision where the continual of the subsidiary's debt was held against the parent and in support of piercing, see *Ampex Corp. v. Office Electronics, Inc.* (1974). About the case, see also *Cheng* 2010 at 557.

110 *Bainbridge* 2000 at 42 discussing the 20-item laundry list from *Associated Vendors, Inc. v. Oakland Meat Co.* (1962). Even more critically, see *Millon* 2007 at 1327–1329.

111 See, for example, *Krendl – Krendl* 1978 at 52–55, introducing a 31-item list.

112 See *Cohen* 1998 at 35.

113 See *Bainbridge* 2000 at 2, especially footnote 4 and the cases cited there.

114 See *Bainbridge* 2000 at 10.

115 *Bainbridge* even calls all these piercing tests and their names irrelevant as none are able to provide a bright line standard. *Bainbridge* 2000 at 36–37.

further in this research, you will notice that most similarities emerge in the objective factors and in how they show the intentions or purpose behind the arrangement. That intention can be to perform an act tainted by dishonesty (as worded in the instrumentality test) or to use the corporation in an artificial and reprehensible manner (as laid out in the Finnish piercing doctrine). Ultimately, the veil piercing tests and the Finnish doctrine are all ambiguous and uncertain enough that the same interpretations easily fit the wording in any of them. Thus, it makes no sense to examine their wording and the differences between the doctrines.

6.2. United Kingdom

6.2.1. The Development of Veil Piercing in England

The United Kingdom's approach to veil piercing seems more reluctant to pierce than any of the others examined here. The law there relies heavily on the landmark case *Salomon v. Salomon & Co Ltd.*¹¹⁶ The case is famous, or notorious, in company law, so only the briefest elaboration on it is provided here. In the case, Aron Salomon had transferred his business to a company. He owned 20 001 of the 20 007 shares in the company, and the claimant argued that Salomon should be liable for the amount the company owed the claimant. The House of Lords adopted an extremely formal view of the incorporation: the company either is or is not a person. Since the proper formalities of incorporation were followed and no fraud was present, the claim was rejected. This established the formal approach to corporate legal personality and a hostile approach to veil piercing that continues to this very day.

Despite this background, veil piercing is not unheard of in the UK.¹¹⁷ Of the older cases, *Gilford Motor Co v. Horne* (1933)¹¹⁸ is worth mentioning.¹¹⁹ The second era of piercing started after World War II and culminated in the decisions of *Jones v. Lipman* from 1961 and *DHN Food Distributors Ltd. v. Tower Hamlets London Borough Council* in 1976. The DHN decision established the single economic unit

116 1897 AC 22. About piercing in the pre-Salomon era, see *Allan* 2015 at 564–568.

117 About the development of the doctrine, see *Allan* 2015 at 571–573.

118 The effects of a contract with a prohibition of competition clause were extended to a company owned by the one bound by the agreement.

119 Piercing in taxation exists even earlier. See *Apthorpe v. Peter Schoenhofen Brewing* (1899) at 245 and *St. Louis Breweries v. Apthorpe* (1898) at 112. Also, for successful piercing-related cases, see *In Re Darby, Brougham* (1911), *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co* (1921), *Smith, Stone & Knight Ltd. v. Birmingham* (1939) at 121.

Trebanog Working Men's Club and Institute, Ltd v. MacDonald (1940) is also of interest here, as in the decision, the court contemplated that the separation of legal entities was irrelevant as long as the final interest was with the members. The case was not a piercing case, though. It was about the interpretation of the statutory concept "sell" and its usefulness is doubtful. Technically, the decision did consider the club only as a collective of the members' interests.

theory of veil piercing.¹²⁰ Finally, in 1978, the decision in *Woolfson v. Strathclyde Regional Council* established some useful requirements for veil piercing. According to the decision, it is appropriate to pierce the corporate veil only where special circumstances exist, indicating that [the company] is a mere façade concealing the true facts. This wording is ambiguous, loose and open to a lot of interpretation. Still, it offers more than what existed before it.¹²¹ In *Adams v. Cape Industries plc* in 1989, the strict approach to piercing was once again upheld, but the court provided some more elaboration as to situations potentially allowing piercing.¹²² Three possibilities were named: fraud, agency and the single economic unit.¹²³ The Court in *Adams* explicitly rejected the single economic unit line of piercing.¹²⁴ Two major cases,¹²⁵ *Trustor AB v. Smallbone (No 2)* and *VTB Capital plc v. Nutritek International Corp.*, emerged after *Adams*, though they did not alter the law around piercing.

In 2013, the United Kingdom Supreme Court gave the decision in *Prest v. Petrodel Resources Ltd.* It was a divorce case in which the husband had placed property under the ownership of several companies he owned. The question in the case was whether the court could transfer the properties to the wife given that they legally belonged not to the husband but to his companies. The case was not resolved with piercing, but the obiter discussed the doctrine extensively. In it, *Lord Sumption* makes a strict distinction between veil piercing, which disregards the separate personality of the company and is thus a true exception to *Salomon v. Salomon & Co Ltd.*, and situations where some other established remedy compels the controller to exercise their control in a certain way.¹²⁶

In the obiter, Lord Sumption accepted the six principles of veil piercing from *Ben Hashem v. Al Shayif* (2009): (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must, as Sir Andrew Morritt had said in *Trustor*, be “linked to the use

120 The era did include the following cases too: *re FG (Films)* (1953), *Merchandise Transport v. British Transport Commission* (1962), and *Wallersteiner v. Moir* (1974), see especially at 1013. See also the tax case *Littlewoods Mail Order Stores v. Inland Revenue Commissioners* (1969), especially at 1254–1255 and *Gallagher – Ziegler* 1990 at 296–297.

121 Much like the KKO 2015:17 decision in Finland currently.

122 See also *Vandekerckhove* 2007 at 69–73.

123 The line was earlier established in *DHN Food Distributors v. Tower Hamlets London Borough Council* (1976).

124 See *Vandekerckhove* 2007 at 72.

125 Several less impactful also: *Creasey v. Breachwood Motors Ltd.* (1992) and *Ord & Anor v. Belhaven Pubs* (1998), *Beckett Investment Management Group v. Hall* (2007) and *Stone & Rolls v. Moore Stephens* (2009).

126 See also *Mujih* 2016 at 41.

of the company structure to avoid or conceal liability”; (v) to justify piercing the corporate veil, there must be “both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or facade to conceal their wrongdoing”; and (vi) the company may be a “facade” even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. When these are present, the court can pierce the veil to provide a remedy for the particular wrong done by those controlling the company. After accepting this, he goes on to review the case law in order to determine what could be a relevant wrongdoing. He deduces that there are two: *concealment and evasion*.¹²⁷

6.2.2. Concealment and Evasion

In a concealment case, the interposition of a company or several companies is used to conceal the identity of the real actors. The courts can then identify the real actors, assuming that their identity is legally relevant. According to Lord Sumption, concealment cases are not veil piercing at all, but the court merely looks behind the façade to discover the real facts concealed by the corporate structure. At this point, I assume Lord Sumption means that the court should check the legal relevance of those facts and decide the case based on them. I do not agree with him on the point that such a move would not constitute veil piercing.¹²⁸ The corporation is the formal actor, and the court’s decision essentially deems that someone else is the real actor. It holds the actions of one entity as those of another in a manner that disregards the separate personality.

In an evasion case, the court may disregard the corporate veil if there is a legal right against the controller that exists independently of the company’s involvement and if a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. These cases are veil piercing in Lord Sumption’s understanding. This would limit veil piercing to cases in which someone has an existing liability and uses the company so that the liability is not fulfilled. It is not an abuse¹²⁹ to cause a legal liability to be incurred by the company in the first place.¹³⁰

127 Before this new formulation, the UK veil piercing cases relied heavily on traditional common law doctrines such as agency, trusteeship and tort liability principles instead of a systematic approach specific to piercing cases. See *Cheng* 2011 at 3 and 7 as well as 41.

128 See *Allan* 2015 at 576–578 and 582 and, similarly, *Hannigan* 2013 at 21 and 30–35. Hannigan provides a much more comprehensive analysis on how the dichotomy is incapable of discerning between concealment and evasion cases. Similarly, three judges sitting the *Prest* case doubted the wisdom of such division. See *Prest v. Petrodel Resources Ltd* (2013) at 92, 100 and 103.

129 Note that the English legal system has no principle prohibiting the abuse of rights but does have a principle where the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. This often leads to the same result as prohibition of abuse (Lord Sumption in *Prest v. Petrodel Resources Ltd* (2013)). Thus, when talking about abuse in the context of the English system, there is no connection to the prohibition of the abuse of rights.

130 at 28 and 34. See also *Persad v. Singh* (2017) at 783–784 conforming to this view.

This sort of distinction is nothing new. Several jurisdictions make a clear distinction between identification and veil piercing.¹³¹ In identification, the courts give priority to the reality of the situation instead of strict adherence to entity law doctrine if a strict interpretation of a provision in a particular case would lead to injustice. Lord Sumption's concealment principle could be characterized as an identification doctrine, and the evasion principle seems like a severely restricted form of veil piercing doctrine. This division is not unheard of in Finland, and Swedish literature often makes this distinction.¹³² The division between identification and veil piercing is hard to make, and perhaps a final answer is unattainable. Some authors categorize identification and veil piercing strictly in separate categories, as Lord Sumption did. Some others, on the other hand, consider identification a subcategory of veil piercing. Finally, some characterize identification as a result attainable through veil piercing, as is done in this research.¹³³

Veil piercing doctrine is summarized in this way: "when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."¹³⁴ As I do not agree with Lord Sumption's dichotomy, I will add to this definition the concealment principle. Here, this is at least practical for research purposes, though it might not match the reality of law in the United Kingdom. This alteration is justified at the least in this work because the veil piercing doctrine in Finland does cover both concealment and evasion situations. Therefore, it would be counterproductive to exclude the other when trying to derive inspiration and examples for developing the Finnish doctrine. The piercing test could be crystalized into elements based on the *Prest* decision and the principles accepted in it:

1. Control over the corporation
2. Evading an existing liability or restriction. Alternatively, concealment of actors
3. Deliberately
4. By using a company
5. Allows for depriving the controllers of the advantage.

131 See *Vandekerckhove* 2007 at 13–14.

132 For a Finnish situation, see *Savela* 2015 at 402–403. For a Swedish discussion, see *Stattin* 2012 at 933, *Andersson* 2014 and *Sandström* 2015.

133 On these categorizations, see *Vandekerckhove* 2007 at 13–14.

134 *Prest v. Petrodel Resources Ltd* (2013) at 35.

6.2.3. How Good a Comparison Target is the United Kingdom?

If we compare the crystalized piercing test above to the Finnish construction of the doctrine, the similarities are striking. The biggest difference is the limitation to the existing liabilities. The Finnish doctrine undoubtedly includes these situations but is not limited to them. The United Kingdom's doctrine, as formulated here, also emphasizes intentionally doing the relevant wrong in the form of concealment or evasion. This is also similar to the Finnish doctrine, as I will later analyze in relation to the impropriety requirement in V.4. of this work. Again, the main difference is that the United Kingdom's doctrine offers a much more limited application. In the Finnish doctrine, the impropriety can at least potentially be shown through other means. Another thing that is slightly different in Finland is that the concealment of actors is not mentioned explicitly but seems to fit the broader terms adopted in the doctrine's formulation.

Now, having formulated my understanding of the United Kingdom's veil piercing doctrine, I would like to proceed by analyzing the relevant case law in order to discover the facts relevant to fulfilling this test. Unfortunately, the United Kingdom's case law is not very rich in this sense. The literature has adopted much the same attitude. Most of the decisions focus more on doctrine building on an abstract level. When these decisions cite previous case law, they usually only describe the arrangement and some relevant aspect to the theory they are building. Per the facts of the case, these decisions seem to cite only the relevant norm evaded and whether there was control. Only rarely do these decisions cite objectively determinable factors similar to those present in Finland or the United States. The discussion in case law is also mostly *obiter*, and the cases are decided based on different norms. This can also reflect which facts are reported as relevant to the decision. This is further supported by the fact that the only successful piercing decisions, *Gilford Motor Co Ltd v. Horne* (1933) and *Jones v. Lipmann* (1962) and *Wallersteiner v. Moir* (1974), are the cases that offer the most in terms of similar considerations of objective factors.

This lack of objective factors could easily be explained with the much more restricted, explicit and easier to show interpretation of relevant wrongdoing in the United Kingdom's piercing doctrine, the wrongdoing being shown with concealing relevant actors or avoiding an existing liability. Although this makes the piercing doctrine apply to a much more limited array of problems, it also makes it more predictable and causes it to require less supportive factors. This makes the United Kingdom's doctrine a rather cumbersome comparison target in this research, as the aim here is to detect the objective factors relevant to veil piercing. For these reasons, the United Kingdom's case law is scarcely on relevant comparison points and appears on a lesser frequency throughout this work.

6.3. Sweden

6.3.1. The Landmark Decision

As in all the jurisdictions discussed, the limited liability and separate personality are the strong default rules, exceptions to which rarely appear. Sweden is a peculiar country in relation to veil piercing. The doctrine's existence has consistently been in question,¹³⁵ while at the same time, the materials used to prepare government bills have explicitly recognized its existence.¹³⁶ Even after the Supreme Court directly addressed the issue, some opinions seek to question the relevance of piercing doctrine.¹³⁷ The Swedish doctrine of piercing the veil was accepted and somewhat formulated in the Swedish Supreme Court in NJA 2014 s. 877.¹³⁸ According to the decision, veil piercing is based on abusing the company form.¹³⁹ Later case law at lower courts shows that the precedent is followed.¹⁴⁰

The following is how the Supreme Court of Sweden construed the veil piercing test on a general level in NJA 2014 s. 877.

1. The business conducted has been a clear abuse of the company form for purposes other than those justifying the limited liability shield.
2. The abuse needs to be determined with an overall assessment, accounting for conditions such as capitalization, independence, shareholders' ability to influence the business and the nature of the creditors.¹⁴¹

The doctrine in Sweden is worded differently than in Finland, though they hold many similar elements. The Swedish doctrine names abuse¹⁴² directly, whereas in Finland, it is divided into artificial and reprehensibility.¹⁴³ In fact, the Swedish decision seems better able to recognize the nature of artificiality in abuse. It names the use of the corporate form for purposes other than those justifying a limited liability shield as a relevant aspect in abuse. This is extremely similar to how artificiality in

135 For example, see *Svensson* 2010 and *Karlström* 2014.

136 See SOU 1987:59, prop. 1990/91:198 at 43, SOU 2001:1 and SOU 2008:49.

137 See *Adestam* 2015 *Nerep* 2015 and *Brandell* 2018.

138 Crystalized but not exhausted, as piercing should be allowed in other sorts of arrangements also. The case should be viewed as an example, saying "at least in this sort of arrangement piercing is possible, it is possible in other situations also." *Andersson* 2014. See also Svea Hovrätt no. T 11882-13 and *Brandell* 2018 at 7.

Cf. *Sandström* 2015 at 11. He limits the precedent's effects limited to companies abusing procedural norms, i.e., *processbolage*.

139 See also *Lindskog* 2010 at 7.1, *Eklund – Stattin* 2016 at 82 and *Brandell* 2018 at 14–16.

140 See *Brandell* 2018 at 7–9.

141 NJA 2014 s. 877 at 12.

142 Missbruk in the original language.

143 Or, alternatively, abuse is only the background theory in Finland depending on whether you agree on the shortened definition of abuse as artificial and reprehensible use.

the Finnish KKO 2015:17 decision should be interpreted.¹⁴⁴ The overall assessment is the same in both countries, though the Finnish Supreme Court did not give a general list of factors. In short, the two countries' landmark decisions seem to have adopted very similar concepts.

6.3.2. Exceptional Circumstances

Another strange choice in the Swedish Supreme Court's formulation of piercing doctrine seems to be the possibility of placing liability in *särskilt kvalificerade fall*: exceptional circumstances. The meaning of this statement is never provided and leads to guessing in literature and practice. The answer could be derived from the understanding that the NJA 2014 s. 877 decision should not be thought to exhaust the veil piercing doctrine, though. In legal literature and other cases, different factors have been proven significant for piercing evaluation. Veil piercing requirements were characterized a bit differently before the landmark decision; they were construed to require disloyal use of the corporation, undercapitalization, dependence and seeking self-interest.¹⁴⁵ Brandell understands the exceptional circumstances criterion to mean all the traditional elements of veil piercing.¹⁴⁶

Through this background, veil piercing becomes an *in casu* weighing act of relevant criteria, of which some sort of list could be given as follows:

1. Determinative influence over corporate actions.¹⁴⁷
2. The corporation had inadequate resources in relation to the foreseeable operation.¹⁴⁸
3. The corporation sought especially risk-filled operations.
4. The corporation was not independent of the shareholders.¹⁴⁹
5. Who owns the corporation shares and how many shareholders are there, as well as who in reality holds control over the corporation.¹⁵⁰
6. The damage caused needs to be unreasonable, for example, caused by disloyal or reprehensible behavior.
7. The totality of the circumstances.¹⁵¹

144 See V.4.2. of this work.

145 About these characterizations, see *Moberg* 1998 at 68–70.

146 *Brandell* 2018 at 11 and 15.

147 Mentioned in NJA 2014 s. 877 and NJA 1947 s. 647.

148 But this criterion should not be given too high a significance, lest veil piercing becomes but a capital protection rule. See *Brandell* 2018 at 18. See also *Stattin* 2008 at 443–444, discussing viewpoints on making veil piercing a capital protection rule.

149 NJA 1947 s. 647 described this in a manner that the corporation, in reality, is nothing but an executing organ of the shareholders.

150 See also *Stattin* 2008 at 438–439.

151 A vague criteria established in NJA 1947 s. 647 and repeated in NJA 2014 s. 877.

8. Voluntary or involuntary creditor.¹⁵²
9. The creditors' awareness of the relevant circumstances in piercing assessment.¹⁵³
10. Disparity of risks and benefits.¹⁵⁴

The veil piercing doctrine in Sweden was uncertain until the 2014 decision, and previous case law was explainable through other legal doctrines as well.¹⁵⁵ In NJA 2014 s. 877, the Swedish Supreme Court expressly discussed *ansvarsgenombrott*, veil piercing, and the applied legal norm conforms to the piercing doctrine. Thus, it would be possible to discuss these other characterizations in a work focused on veil piercing. The decision mentioned surprisingly few older cases usually associated with veil piercing, however. Similarly, it only discussed a few opinions previously presented in legal literature. This could give the impression that the rest of the case law does not matter to the Supreme Court of Sweden and that the literature, in their opinion, can be ignored.¹⁵⁶ But there is no strong basis for this. It can hardly be thought that prejudicates or literature lose their meaning if a single case fails to mention them.

The conditions established in the decision of the Supreme Court of Sweden had already been addressed both in earlier case law and in legal literature. It can be submitted that conditions set out by the Swedish Supreme Court are more objective and well-founded in facts than the piercing requirements in Finland. In Sweden, particular attention is paid to the resources received by the company, i.e., whether a company is provided insufficient resources in comparison to the foreseeable operation costs.¹⁵⁷ Yet some discussion remains as to whether the capitalization structure is used only to demonstrate the dependence of the company.¹⁵⁸ It supports piercing if a company has no independent economic purpose but rather only furthers the shareholders' personal interests.¹⁵⁹ Shareholder's ability to influence the business translates into control rights. The nature of creditor relations means the different

152 Mentioned in NJA 2014 s. 877.

153 See NJA 1992 s. 375 and *Stattin* 2008 at 450–452.

154 See *Andersson* 2014 at 3.

155 For these characterizations, see *Moberg* 1998 at 60–68, *Lindskog* 2008 at 327, *Svensson* 2010, *Ades-tam* 2015, *Rönnheden* 2015 at 183 and *Sandström* 2015. Outside veil piercing, the situation in NJA 2014 s. 877 has been addressed in literature with interpretation of the trial cost compensation norms. They have been solved by establishing joint liability in such arrangements where the trial claim is pursued through an entity not capable of meeting the trial costs in case of loss while at the same time being entitled to the economic benefits in case of positive results.

156 See *Sandström* 2015 at 1.

157 See *Rodhe* 1984 at 487 and the juristiesekretar memo in NJA 2014 s. 877. See also *Rönnheden* 2015 at 179 and SOU 2008:49 at 55.

158 See *Andersson* 2014.

159 Similarly *Andersson* 2015.

treatment of voluntary and involuntary creditors. Involuntary creditors might be in need of additional legal protection, and thus, it is submitted that piercing should be awarded in their favor more easily than for voluntary creditors.

As for the liable party, the Swedish piercing doctrine is also traditionally tied to the shareholder,¹⁶⁰ although the NJA 2014 s. 877 decision names other parties potentially liable as well if the circumstances so require.¹⁶¹ Of the significant conditions mentioned in the decision, both independence and the shareholders' influence relate specifically to the shareholder rather than some other party. Earlier case law relating to piercing has mostly been about shareholder liability.¹⁶² Additionally, opinions in the legal literature both before and after the NJA 2014 s. 877 decision seem to support such a view.¹⁶³ The emphasis is on the shareholders' liability, but we cannot rule out other potential liability situations. The Swedish piercing doctrine certainly seems capable of accommodating them. Cases just have not appeared yet.

6.3.3. How Good a Comparison Target is Sweden?

The Swedish legal system is the closest equivalent to the Finnish legal system and is an extensive source of influence in any area of law in Finland. Thus, it is easy to justify using it as a comparative point. The shared history and similarities make it better suited to adopt direct interpretations and not only inspiration. Unfortunately, the Swedish piercing doctrine is not well developed—just like the Finnish doctrine. The central theme of this work is highly practical as I seek to establish as many known patterns of objective criteria as possible, which can allow for veil piercing. This focus creates a disparity with the Swedish literature, though. Much of the scholarship on piercing is dedicated to the question of whether veil piercing is company law, tort law or general principle. While interesting, this discussion does not serve the purposes of my research here. Perhaps the development of the more practical aspects of the Swedish piercing doctrine will also receive a boost from my research.

160 See *Moberg* 1998 at 49–51, *Nerep* 2015 at 22 and *Sandström* 2015.

161 Similarly *Andersson* 2002 at 122.

See also NJA 1942 s. 473, where liability was based on who was actually the *byggherr*, the person liable for a construction project, as described in law. The case is reminiscent of piercing, though liability can be based on the position as a constructor.

See also *Sandström* 2015 at 11. He cites the case RH 2011:24 and, based on it, he is of the opinion that the board members are potentially liable only if the shareholders cannot be identified.

162 See the cases mentioned in the NJA 2014 s. 877: owner liability in NJA 1935 s. 81 and shareholder liability in NJA 1947 s. 647.

163 See *Rodhe* 1984 at 486, SOU 1987:59 at 12, *Andersson – Johansson – Skog* 2010 at 1:9 and *Sandström* 2015.

See also *Andersson* 2014. But he speaks of the real persons behind the company and those who sought to benefit from the limited liability.

As for the underlying theory of abuse, *Andreas Rönnheden* sees a clear connection with veil piercing in NJA 2014 s. 877 and some earlier case law¹⁶⁴ where the specific uses of law were deemed abusive. Abuse in the cited case law meant using a legal norm for purposes that were clearly incompatible with the purposes of the norm. Through this examination, he concludes that the liability norm used in the NJA 2014 s. 877 decision is not exclusive to company law, but rather reflects a more general principle of civil law. Even so, he concedes that the principle is not yet concrete.¹⁶⁵ The opinion of Rönnheden is interesting because of the more concrete take on abuse. Through accepting abuse as the general principle behind piercing, the Finnish and Swedish legal statuses on piercing come yet one step closer to one another. It should be noted, though, that the Swedish literature does not discuss this issue to the extent that Finnish literature does. Thus, no clear consensus exists in Sweden.

Another issue is that this work adopts a different view of veil piercing, namely that it can place liability on controllers and beneficiaries, among others.¹⁶⁶ Much of the Swedish literature starts with the notion that piercing is only about shareholder liability and derives doctrinal limitation from this perspective. These pieces are hard to include in the discussion. As explained earlier, I think this limitation in Swedish literature is misplaced, and there is certainly room for other liable parties in the interpretation of piercing doctrine. The material and inspiration flow in this regard might be from Finland to Sweden.

The final key difference between the Finnish and Swedish piercing doctrines is the emphasis on subjective elements. In Finland, case law and analogous doctrines give significance and even decisive weight on the intent to evade or damage. Swedish doctrine, however, does not seem to require any subjective elements and is instead based on objectively discernible criteria. Subjective elements might have some relevance, but their significance is undeniably lesser than in Finland.

6.4. Norway and Denmark

6.4.1. Norway

Norway has adopted the most restrictive approach on veil piercing. There is no clear precedent setting out requirements for veil piercing. There are a few decisions from the 1990s that give some support for veil piercing.¹⁶⁷ Veil piercing is also recognized in legislative preparatory works for company legislation.¹⁶⁸ Nonetheless, the existence of the veil piercing doctrine is open to debate in Norway, as many legal scholars

164 Namely NJA 1996 s. 389 and NJA 2005 s. 608.

165 *Rönnheden* 2015 at 184.

166 See V.7.5. of this work.

167 Rt. 1991 at 119, Rt. 1996 at 672 and Rt. 1996 at 742.

168 See NOU 1992:29 at 43 and NOU 1996:3 at 190.

perceive the doctrine to be replaceable, at least in part, with tort law principles.¹⁶⁹ The 2010 *Hempel* decision did involve piercing considerations, though the case itself was resolved with the interpretation of section 51 of the Pollution Control Act.¹⁷⁰ This case remains the most prominent piercing example from Norway.

The state of veil piercing law in Norway is understood here as uncertain but potential. There are no clear instances of application, though the possibility of one emerging exists. Should piercing be considered, relevant conditions would be dependence of the company, inadequate capitalization, improper use and the nature of the creditor relation.¹⁷¹ When assessing the independence of a company, one needs to take into account whether it can be recognized as separate from the owner considering the company's reliance on the owner in regards to finance and management and whether assets are transferred between the company and the owner randomly, e.g., without formal distinction.¹⁷² Inadequate capitalization can be understood the same as in Sweden, i.e., when a company is provided with insufficient capital in relation to the operations the company engages in.¹⁷³ Improper use of the company simply means that the use constitutes an unfair practice toward creditors when accompanied by inadequate capitalization and commingling of the involved entities' assets.¹⁷⁴ The nature of the creditor relation again means that the involuntary creditor should be awarded piercing relief less stringently, whereas the voluntary creditor should not be awarded piercing relief.¹⁷⁵

The Norwegian doctrine of piercing the veil is thus founded mostly on opinions in the legal literature. From this standpoint, the Norwegian piercing doctrine does not inspire much optimism as to relevant comparative material regarding veil piercing. Most Norwegian cases are such that veil piercing was considered and thought possible but ultimately denied in the case. This does give some material as to factors relevant to piercing. Norway does not have a developed doctrine to compare with, however. This led to the conclusion of only including the major piercing cases from Norway.

6.4.2. Denmark

Two sources from Denmark are highly cited in Nordic jurisdictions. Leaving those two out would be an obvious flaw as they have helped shape the piercing doctrine in

169 See *Hagstrøm* 1993 at 279, *Sjåfjell* 2010 at 155 and *Woxholth* 2014 at 131.

170 13 Mar. 1981, No. 6.

171 *Hagstrøm* 1993.

172 See Ot.prp No. 23 (1996-1997) at 117. See also the creditor's basis for the claim in Rt. 1996 s. 672 at page 675. The claim was denied, though the Supreme Court did not address this issue. Similarly *Sjåfjell* 2010 at 155.

173 See HR-2016-1440-A, *Hagstrøm* 1993 at 257–262 and Ot.prp No. 23 (1996-1997) at 117.

174 See the creditor's basis for the claim Rt. 1996 p. 672 at 675–676, but in the decision, the inspected companies were not found to have commingled assets.

175 See Ot.prp no. 55 (2005-2006) at 125.

the Nordic region. The first source is *Erik Werlauff's* dissertation, "Selskabsmasken." In it, he argued that it could be possible to pierce the veil when a company is inadequately capitalized in relation to the company's operations. This holds true especially when the company engages in a dangerous activity with high chances of tort liability.¹⁷⁶ The second important source is the UfR 1997 s. 1642 decision where the veil was pierced. It shows three factors relevant to piercing: commingling of assets, risk transfer and relative undercapitalization.¹⁷⁷

Several important patterns of veil piercing can be drawn from these two sources. Commingling of assets means mixing finances and property, for example, so that one of the companies that controls the assets provides the other with funds when needed. Shifting risk and allocation of profits are also of importance. If one company gets a disproportionate share of the profits while the other holds the liabilities, veil piercing could apply.¹⁷⁸ Werlauff's thoughts on undercapitalization are also very comprehensive and are discussed in more detail later.¹⁷⁹ The Danish system is thus mostly utilized using the UfR 1997 s. 1642 case as an example of commingling and citing Werlauf's views on undercapitalization.

176 See *Werlauf* 1991 at 31.

177 The requirements of dependence and unfair practice should be added, though. See *Schwarz-Hansen* 2001 at 436–437.

178 See UfR 1997 p. 1642.

179 For a more thorough analysis on the subject of capitalization in Danish piercing doctrine, see *Werlauff* 1991 at 75–76 and 518–519.

II THEORIES

1. General Theoretical Considerations Regarding Veil Piercing

In legal literature, veil piercing has been justified, analyzed and construed through many theories. There are almost as many of these theories as there are authors on the subject of piercing.¹⁸⁰ Fortunately, the Finnish literature is largely in unison. The prominent view is that veil piercing reflects the prohibition of the abuse of rights. In older literature, it was construed as a conflict of two norms¹⁸¹ leading to different results.¹⁸² Upon closer inspection, I will reveal that the abuse and conflict of norms views are easily compatible with one another.

The prominent abuse of rights characterization is vague and uncertain in its application, as is the nature of legal principles. One should remember that it is not used here as the explanation for piercing decisions. It is the justifying theory behind the veil piercing doctrine itself. Piercing is a case law–created doctrine that reflects the prohibition of the abuse of rights principle. This does not mean that the principle does not affect the form taken by veil piercing. In my understanding, legal principles are formulated through their avatars in legislations. The specific norms reflect the principle, and when enough of these norms exist, the principle exists.¹⁸³ When the principle exists, then it will start affecting the interpretation of these legal norms. It is a symbiotic circle where changes in the understanding of the pieces affect one another. Such is the case with veil piercing. The prohibition of the abuse of rights principle affects the formulation of the veil piercing doctrine. When established, the veil piercing doctrine supports the existence of the principle and might help shape how that elusive principle is formulated in future instances.

In this section, I will endeavor into the abyss that is the prohibition of the abuse of rights doctrine and combine it with the older conflict of norms view of veil piercing and the judgment-proofing characterization. This view will affect how I formulate the veil piercing doctrine later in this work. I will briefly delve into a few other theories that are perhaps capable of complementing veil piercing doctrine in several specific situations but are not particularly useful as a general theory behind piercing. Finally, I will address the nature of veil piercing liability.

180 For example, *Cheng* (2010) construing it as unjust enrichment. *Bainbridge* (2000) using economic efficiency considerations, *Macey – Mitts* (2014) seeing it as an issue of public policy enforcement, *Brandell* (2018 at 14–17) describing the Swedish discussion on the nature of the doctrine.

181 Here, the term means conflict of two norms that would lead to different results. This should not be confused with conflict of laws in the sense that it is understood in private international law. See definition in the Merriam-Webster Law Dictionary at *conflict of laws*.

182 See *Huttunen* 1963 at 199.

183 See *Karhu* 2007 at 185.

2. The Conflict of Norms

2.1. Description of the Conflict

It is only fitting to discuss the older theory first to provide some insight into the historical developments in our understanding. Due to the absolute wording of OYL 1:2 providing for limited liability and separate corporate personality, veil piercing is always a *contra legem* decision. Accepting the *contra legem* result is justified by viewing veil piercing as a conflict of norms.¹⁸⁴ *Allan Huttunen* introduced this characterization into the Finnish piercing literature. Two norms of the legal system demand results that exclude the application of the other norm. One must yield. When piercing the veil, the other norm is a limited liability or separate corporate personality of the corporation. The other norm varies case by case.¹⁸⁵ It can be a provision of another law or an interest protected by the legal system. For example, in KKO 2015:17 it was the artist's right to remuneration for private copying of their work and, more specifically, the remuneration duty laid out in Copyright Act 26 a § Paragraph 1.

The company act clearly provides a person with the means of controlling a corporation and accepts the control as legal. The act has clear tort provisions covering the undesirable actions of the management, the shareholders and the corporation. If the corporate players follow the provisions of the company act, they should not face liability. This is a key element of the corporation. Yet the veil can be pierced even when all the provisions of the company act are followed. Veil piercing liability is liability without a specific statute to induce it.¹⁸⁶ The lack of statutory support mandates some justification from within the legal system. The conflict of norms characterization provides this support easily: the decision is *contra legem* no matter which norm is upheld. All that is left for the court is to determine which norm should be upheld.

Making this determination can easily spiral into a massively complex pro contra argument. Luckily, the legal literature provides some guidance. It seems natural to start with the original author's views of the conflict of norms characterization of

184 Please note that when two norms truly conflict, the normal rules of applying laws do not apply. When deciding the applicable law, for example with the *lex specialis* rule, the laws do not conflict. In conflict of norms, there are two applicable norms, and no formal rule exists in determining which norm should yield.

185 See *Huttunen* 1963. The conflict characterization is mentioned in Sweden and also in relation to whether a *särskilt kvalificerade fall*, an especially weighty reason, to pierce is present. See *Sandström* 2015 at 5.

186 There exists a consensus in the legal literature that the case is not veil piercing should the liability be based on a provision or general principles of property law. See, for example, *Huttunen* 1963 at 157–158, *Villa* 1997 at 375, *Huhtamäki* 1999 at 142 footnote 4, *Tammi-Salminen* 2001 at 290 and *Mähönen – Villa* 2015 at 298.

veil piercing. Huttunen sees the corporate law forming its own closed sphere of legislation. Conflicts regarding corporations are to be solved using legal tools from within this sphere, and outside considerations are not to distort or disturb the rules set within the sphere. When piercing the veil, he places the norms of limited liability and legal personality above other norms of the legal system. They are primary but can be put aside if the interest to pierce is high enough. Veil piercing is a process of weighing between two conflicting norms. Huttunen places the burden of proof of this interest on those wishing to pierce the veil. Limited liability is assumed to be the stronger norm, the frontrunner in the conflict of norms. It follows that veil piercing is to be an extremely rare remedy. Judges should remain cautious when piercing and should apply it only in extreme circumstances.¹⁸⁷

Building on this, *Seppo Villa* justifies piercing with the need to strengthen the creditors' protection when the corporation has caused damage or when shareholders have abused the corporate form to the detriment of the creditors. Limited liability is the explicit default rule, and veil piercing is the rare exception, possible only in exceptional circumstances. He, too, sees the situation as a conflict of norms, where norms supporting piercing are weighed against limited liability. The decision is made *in casu*, and the weaker norm must yield to the stronger one. Piercing applies when the facts of the case and other legal norms demand disregarding limited liability or separate personality. Veil piercing without a statutory norm justifying it is a conflict between elementary principles of our legal order.¹⁸⁸

These two researchers agree about the need to give separate personality and limited liability the priority. The Supreme Court of Finland also emphasized the exceptional nature of veil piercing.¹⁸⁹ It is easy to conclude that the default is not to pierce, and the party claiming veil piercing has a heavy burden of proof to overturn the default.

A similar characterization of veil piercing has been put forward more recently in Sweden. *Daniel Stattin* suggests viewing piercing as a weighing process between the reasons behind adopting the separate personality and the rules that demand its disregard by veil piercing.¹⁹⁰

187 See Huttunen 1963 at 199. Later, *Gerhard af Schultén* and *Seppo Villa* have accepted this weighing model. See *af Schultén* 1984 at 96, *Villa* 1997 at 377 and *Villa* 2015 at 535 and 540.

Similarly in Sweden, see *Brandell* 2018 at 15. See also *Adestam* 2015 at 16. He sees the composition of piercing situations through the purpose behind the norm that creates liability for the company. That purpose can create the need for heightened creditor protection, in which case the limited liability does not prevent holding the shareholders liable.

188 See *Villa* 1997 at 377, 382 and *Villa* 2015 at 533, 535 and 540. See also KM 1992:32 at 373 and *Mäbönen – Villa* 2015 at 299 and 405.

189 KKO 2015:17 at 29.

190 *Stattin* 2008 at 455. See also *Brandell* 2018 at 15–16. In tax law context, a similar view has been forwarded. See *Hjerner* 1983 at 282.

2.2. Resolving the Conflict

When two written norms conflict, the solution must be found from the lesser sources of the law. When both sides of the scale are stacked equally with written law, the solution needs to be derived from case law and real arguments.¹⁹¹ Since piercing is seen as a conflict of norms—written law norms to be exact—the real arguments and case law become extraordinarily important in determining the outcome, especially since the preparatory materials for legislation have little to say about piercing.¹⁹² All relevant facts need to be evaluated, and overall assessment determines the weaker norm that must yield.¹⁹³

When performing an overall assessment, all relevant elements and facts of the case are considered as a whole. The elements present in real life are considered important in showing the true nature of the case. The overall assessment is not confined to separate legal actions, either.¹⁹⁴ Related legal actions, whereas formally irrelevant circumstances for the inspected action, do still affect the outcome. Their relevance can be extended beyond their specific parties or circumstances. An action can be perfectly fair and valid when viewed narrowly as a single action. Another related but separate action can then erode this balance. When the veil is pierced, the formal outlook is disregarded, and the judicial evaluation focuses on the factual contents of the case.¹⁹⁵ Viewing legal actions as separate would serve to hide the factual content of the assessed arrangement and would instead serve to uphold the formal outlook, which is often the intention behind constructing these arrangements.

191 With real arguments, I refer to impact analysis, practical arguments and consequential arguments. This refers to an allowed legal source that complements written law and precedents when the interpretation is unclarified. These arguments are based on the assessment of the desirability of certain legal interpretations in light of the societal or economic effects it creates in that specific case or in the society as a whole. See *Mathis* 2011, especially at 5–7 and 20.

192 Mainly that no provision regarding piercing is needed in the OYL. See *Osakeyhtiölakitoimikunta* 1990:n mietintö at 374–375, although in the pay security context, there is a mention. See HE 104/1998 at 17 and HE 219/2009 at 6.

193 See *Mähönen – Villa* 2015 at 299. See also KM 1992:32 at 374 stating that no single factor can justify piercing.

194 See *Kolehmainen* 2009 at 605 and KKO 1983 II 12. He analyzes the mentioned case and derives that the separate legal relationships (contracts between separate entities) were examined as a whole in consideration to legitim. The decision was based on the fact that the overall result was that the children were in equal standing due to the donations initiated by the testator but performed by the testator and a third party. If interpreted formally and separately, the child receiving the donation directly from the testator would have received preinheritance and the other one not. The treatment of the children would not have been equal.

195 See *Havansi* 1979a at 41 and *Leppänen* 1991 at 284.

For example, the cluster of related contracts should be examined as a whole when assessing ownership over some property.¹⁹⁶ Different elements of ownership can be divided between persons by separate contracts, for example. Control rights can be formally allocated to a multitude of persons, but contractually, they can agree to vote according to the wishes of one. The totality of these legal actions is meaningful. If inspected individually, the actions are acceptable or not enough to trigger legal consequences.

In the United States, the situation is similar. A totality of the circumstances test assesses all known and relevant information and is an examination of an issue in light of all known and conceivable circumstances, excluding nothing and giving no one fact, action, or condition a controlling influence upon the assessment. In the context of veil piercing, a court must at least review the various factors enumerated in prior cases but also has the liberty of considering all other known and conceivable circumstances.¹⁹⁷ A careful review of the entire relationship between various corporate entities and their directors and officers is necessary.¹⁹⁸

The spirit and purpose of the norms is significant in resolving the conflict. If tension exists between how the norm is actually used and how it was meant to be used, it is easy to conclude that the norm is not serving its purpose; it is only formally applicable but does not abide by the real-life situation it aimed to address. If the other conflicting norm is used as it was meant to be used, then it should be allowed protection. It abides by the intention behind the legislation, whereas the other norm does not. Disregarding the other norm would not violate the principles the system law meant to create. The problem is determining the spirit and purpose of the law. This task must be performed with both conflicting norms. As the opposing norms do differ, the task is always *in casu*. Piercing always

196 See, for example, KKO 1997:146, where two formally separate contracts were so closely related that they could not be assessed independently. The same person controlled a constructor company and a housing co-op. First, he acted as the representative of the constructor and pledged the whole stock of the housing co-op as collateral to a bank. Then, as the representative of the co-op, he pledged the buildings the co-op owned as collateral to himself and his wife. The latter collateral was deemed inefficient versus the bank.

The Supreme Court argued that this kind of situation requires the court to assess the purpose of the first collateral and the comprehensiveness and value of the second collateral while keeping an eye on the first collateral. Despite the rather confusing wording in the decision (the translation aims to preserve the original), we can deduce that the decision is based on the purpose of the first pledge and the effects the second one has on the first.

197 See *Butler v. Adoption Media, LLC* (2007) at 1067. See also *Peterson* 2017 at 74 (citing Bouvier Law Dictionary 2012) and *Barnco International Inc. v. Arkla, Inc.* (1993). This approach is often criticized in literature. See for example, *Millon* 2007 at 1330.

198 *Jones & Trevor Marketing v. Lowry* (2012). See also *Krendl – Krendl* 1978 at 47.

involves limited liability and separate personality. I will analyze their spirit and purpose in the next chapter.

Though it is possible that two formal interpretations of norms are in conflict, another situation exists. The conflicting norm opposing limited liability or separate personality might be in conflict only because it is interpreted in view of its purpose. This should not alter the conflict situation though, as interpretation to uphold the purpose is a perfectly valid interpretation method.

2.3. Interpretation of Norms in the Conflict

When two norms collide, interpretation is one way to resolve the tension. One norm bends to eliminate the seeming conflict. If a decision can be reached with interpretative creativeness, the norms do not really conflict.¹⁹⁹ A true conflict of norms exists only when interpretation cannot resolve the tension. Nevertheless, there are certainly some similar elements to consider regardless of whether an actual conflict exists. An interpretative solution is needed when applying (or not applying) a statute is seen as necessary to achieve the materially correct resolution. It should be noted that interpretation is a less invasive tool compared to a *contra legem* decision from the conflict of norms model and should therefore be the primary tool.²⁰⁰

An interpretative solution means interpreting a seemingly inapplicable provision so that it becomes applicable. It stems from the argument that the statute should govern certain actions that it does not seem to govern when interpreted grammatically, or it should not govern certain actions it does seem to govern. For example, one could interpret the term operator to include the formal operator, the one running the day-to-day operations, or the one making the key decisions in the long-term operation. This would extend the legal liabilities of the operator to other parties who are not formally operators but who do, in fact, perform the operator's usual functions.

Traditionally, there are two schools of interpretation.²⁰¹ One is the formal school, and the other the realistic school. The formal school denies the possibility of going beyond the exact wording of a provision. It must be interpreted precisely, and no extensive interpretation is allowed. The realistic school allows interpretation even *contra* to the wording when it is necessary to achieve the results intended by the legislator. Both schools of interpretation have their strengths and weaknesses.

199 *Määttä* 2013 at 180. Only after the interpretative solutions have been exhausted can the norms be said to conflict.

200 See *Pihlajarinne – Havu – Vesala* 2015 at 600.

201 For a general overview of these schools, see, e.g., *Tikka* 1972 at 125–128 and *Aalto-Heimilä* 2018. These are more prominent concepts in tax law and are discussed more widely in that context. For an overview, see *Streng* 2019 at 52–53.

The formalistic interpretation is highly predictable and promotes legal certainty. The decisions may be unpractical, but at least they do not come as a surprise. The realistic interpretation achieves the materially correct answer better. It enables the decision-maker to look beyond the formal façade to the purposes behind the norm and base the decision on what is actually happening. As an externality, it can be rather unpredictable or even random in its application. Realistic interpretation is more casuistic and less general, which leads to a growing body of case law.

When piercing the veil, both formal and realistic interpretations are usually present. It falls almost naturally on the party demanding veil piercing to make an argument for realistic interpretation, upholding the purpose behind the norm and applying all the relevant facts. It is argued that the legislator did not intend for the corporation to be used in such a way, and thus, whichever norm conflicts with separate personality or limited liability must be extended by piercing in order to preserve the purposes behind that norm. The classic, albeit a bit naïve, defense against piercing is that Company Act provides for separate personality and limited liability, and the court cannot make a *contra legem* decision. This is an extremely formal interpretation of the law.

The arrangements targeted by piercing are designed to match the existing interpretation of the law. Often, this means the formal interpretation is challenged in a piercing decision. For example, creating a subsidiary to sell data storage devices means that the parent is not the seller in the sense that would create a remuneration duty. In a formal sense, the conflict does not exist. Only after we accept the realistic interpretation can we even see the conflict. The remuneration duty exists to create certain effects in reality, and those effects should be enforced regardless of the adopted wording. Adopting the realistic interpretation does not inevitably lead to veil piercing, but veil piercing situations often require utilizing the realistic interpretation.

Since a piercing situation forces us to adopt the realistic interpretation on one side of the argument, adopting the formal interpretation on the other side of the norm conflict becomes unacceptable. Formal interpretation of the separate personality or limited liability norms would mean rejecting the realistic interpretation altogether, as it gives priority to the formal interpretation. It would make no sense to state that “the purpose of this norm is to guarantee the artists’ remunerations for private copying and the concept of remuneration duty should be interpreted accordingly” if the issue is resolved with a shrug in the next sentence—the corporation is an entity separate from its shareholders. This would effectively mean denying the existence of a conflict or subordinating the realistic interpretation to the formal one rather arbitrarily.²⁰² It seems obvious that the situation described does not enable veil piercing. It is only a statement of whether the formal or realistic interpretation should prevail in the case.

202 As is done in the UK. See *Adams v. Cape Industries Plc* (1991).

Since veil piercing is known to be possible, we can effectively rule out formalism in its strongest form. If viewed as a conflict of norms, the courts cannot resolve a piercing claim by simply referring to the wording of the law and basing their interpretation solely on it. They need to make some sort of prioritization between the norms, and this would more easily be solved with some considerations for the purposes behind the conflicting norms. Basing the decision on the wording alone means making a statement on whether formal or realistic interpretation should prevail.²⁰³ This realization itself has some significance in the development of the veil piercing doctrine. It lends credibility to the view that uncharacteristic use of the corporate form is more prone to piercing and gives us tools to assess the artificiality of the corporate use. The view is also in harmony with the abuse of rights principle, which gives significance to whether the inspected use fulfilled the intended core purposes of the legal institution. Most importantly, it explains away the naïve defense against piercing, and the court can make a *contra legem* decision when the use of the corporate form does not match the purposes behind creating the corporation institution.

3. The Prohibition of Abuse of Rights

3.1. European Convention on Human Rights Article 17

3.1.1. Purpose and Interpretation

A functional starting point to the prohibition of the abuse of rights would be the European Convention on Human Rights Article 17. The exact text reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Limiting rights is possible only when there is a direct link between pleading a right and the illegitimate purpose—the aim to destroy the rights of others.²⁰⁴ For example, one can attempt to use freedom of speech to incite racism.²⁰⁵ The inciter can then have their right to free speech denied. Only the abused right is denied. Rights not directly used for the illegitimate purpose cannot be limited or denied.

203 The result could be turned upside down, though. What if the result of piercing test is a justification for which the model of interpretation should prevail in the case. This explanation is not plausible, as going through the test requires interpreting legal norms.

204 See *Pellonpää* 2012 at 26.

205 On the subject, see *Lobba* 2015.

The prohibition of the abuse of rights is not a concrete rule. It means that one cannot make a claim based on human rights if that claim unreasonably limits the human rights of someone else. The prohibition is also impossible to refine into a concrete rule. It is best understood as a principle or principle-like norm.²⁰⁶ It offers a juridical formulation for assessing moral values: a more objective assessing tool. It allows us to control the thought process used to reach moral condemnation. It is easy enough to find whether someone is claiming a right under the convention. Likewise, there is no trouble determining whether someone's actions harm someone else. In addition, those actions can be linked to the claimed right. Still, it fails to make the assessment totally objective; moral condemnation is still decided on the basis of a subjective opinion.

The court of human rights has emphasized that Article 17 can be applied only in exceptional situations in order to prevent someone from taking advantage of the provisions of the convention.²⁰⁷ In the case law of the court, prohibition of the abuse of rights is linked only to certain rights. The cases revolve around racism and freedom of speech, even though the article is, at least in theory and according to its wording, applicable to any right that allows a person to act in a certain way.²⁰⁸

The moral argument comes into consideration when assessing which right is deserving of protection. It links to the wording "destruction" and "limiting to a greater extent." Destruction is just a form of limitation, the most extreme being when the right is limited to the point that it no longer exists. When discussing the limitation, the article becomes a scale.²⁰⁹ On one side is the right from which the action derives its acceptability, and on the other side is the right limited. The juridical assessment basically stacks arguments on each side. Both rights are originally of the same weight, value and importance as they are rights given in the convention. It would seem obvious, though, that some rights take priority over others. It would be unacceptable if, for example, protection of property was given the same weight as the right to liberty.²¹⁰

206 Similarly *Lobba* 2015 at 250–251.

207 See *Paksas v. Lithuania* 2011 at 87. See also *Pellonpää et al.* 2012 at 851–853.

208 See *Linna* 2004 at 623–630. Similarly *Bezemek* 2016 at 10–11.

For different opinions, see *Lindfors* 2008 at 303–307. She denies the application of the prohibition of abuse of rights on transfers of property. Similarly, see *Kangas* 2005 at 158.

209 See *Linna* 2004 at 626. Sometimes the process is more of a guillotine that cuts one rights application to the case from the beginning and excludes weighing. See *Bezemek* 2016 at 16–19 and the case *Perincek v. Switzerland* 27510/08.

210 This becomes amusingly elaborate with an example from video games. In some games, the player is free to construct buildings anywhere within the confines of the terrain. It is possible that another player is sleeping somewhere in the map. One player could construct a wall around the other, preventing the other player from leaving the area after they wake up without destroying the wall. The wall builder could claim it his right to construct a wall and not to have it destroyed. The trapped person would then claim that the protection of property is used to destroy their right to liberty. It seems obvious that property is not protected in this situation.

The most vexing troubles stem from the concept of *abuse*. The classic dilemma is how something can be considered abuse when the law does not condemn it. The textbook meaning for abuse is improper or excessive use or treatment.²¹¹ This is not helpful at all. The concept of *improper* is just as hard to grasp as abuse. How can something be improper when the law allows it? Clearly, no legal scholar can be satisfied with moral condemnation as a basis for legal liability. The answer could be sought from the intended purpose of the institution. What did the legislator intend to achieve when the used legal institution was made? Juha Pöyhönen defines abuse of rights as an attempt to realize one's rights under conditions in which the core function of that right does not come to be, whereas the person in relation to who the right is claimed faces undue harm.²¹² I understand the core function through the legislators' intent. The European Court of Human Rights decisions in *Paksas v. Lithuania*²¹³ and *Garaudy v. France*²¹⁴ supports this definition. This view has something in common with the disparity of legal form and economic reality construction adopted in tax evasion and artificial property arrangements.

Two possible interpretative uses for the abuse clause have been identified. One is the guillotine effect. This effect allows the court to deny protection of an interpretation of the convention in its entirety.²¹⁵ For example, holocaust denial in any form is abusive and cannot be anything but seeking to destroy the rights of others, and thus, it does not enjoy protection of the freedom of speech clause.

Another possible interpretation of the abuse clause is to use it as an interpretative principle.²¹⁶ The prohibition of a certain action would be covered by the appropriate clause in the convention, and limiting the right given in that clause would be assessed according to the usual standards of limiting human rights added with considerations from the abuse clause, broadening the court's power to limit the rights. For example, writing a racially motivated book can be outside the protection of freedom of speech if the content of the book seeks to destroy the rights of an ethnic or religious group. We immediately notice that the abuse clause as an interpretative principle is much more sensitive to the facts and circumstances at hand. Unfortunately, this approach is currently not utilized by the European Court of Human Rights.²¹⁷

211 <http://www.merriam-webster.com/dictionary/abuse>.

212 Pöyhönen 2000 at 86–87.

213 *Paksas v. Lithuania*, 2011 at 87.

214 *Garaudy v. France*, 2003.

215 For a description of the guillotine effect, see *Lobba* 2015 at 239–243.

216 See *Lobba* 2015 240–241 and 250–251 and the cases cited therein.

217 See *Lobba* 2015 at 241–243 and 250–251, arguing that the guillotine approach prevails at the moment.

3.1.2. *The Convention's Usefulness in the Finnish Legal System*

If the Court of Human Rights does not abide by this characterization, could the domestic system still use it? *Tuula Linna* is of the opinion that the abuse clause is seldom applied because human rights have clearly defined requirements for their limitation. The abuse clause does not serve the limitation process in itself, but rather it is an evaluative tool for determining situations in which human rights are applicable. Discussing protection of property, she asserts the question: is the property arrangement that is done with the intent to damage the creditors at all protected by the protection of property clause? She seeks the answer from standard norms of interpretation and the doctrine from which the norms are to be interpreted according to their ratio. No norm can have the ratio of violating the rights of others. The abuse clause then appears as a guideline for this process.²¹⁸ This almost completely matches the characterization of the abuse clause as an interpretative principle, although *Linna* does not make a direct reference to it.

The question reverts to whether we can accept using the abuse clause in the convention as supportive arguments when forming the domestic principle on the abuse of rights.²¹⁹ The purpose behind the abuse clause was to safeguard the democratic society and its institutions from actions that rely on the convention's rights in an attempt to weaken or destroy them.²²⁰ *Heidi Lindfors* notes that this purpose is rather farfetched when the domestic manifestations of the abuse of rights prohibition such as asset recovery and artificial property arrangements are examined.²²¹ Still, protection of property could be construed as one institution of the democratic society. In fact, its inclusion in the convention supports this. It should also be noted that abuse situations appear similar despite the abused norm—an attempt to realize one's rights under conditions where the core function of that right does not come to be, whereas the person in relation to who the right is claimed faces undue harm.²²²

218 See *Linna* 2004 at 627–628.

219 For support, see *Linna* 2004 and *Pöyhönen* 2001. Cf. *Kangas* 2005 at 158 footnote 19.

See also *Lindfors* 2008 at 305. She is skeptical about using the abuse clause to support the domestic doctrine of the prohibition of abuse of rights.

220 See *Refah Partisi v. Turkey* 2003 at 99 and *Lobba* 2015 at 244–245.

221 *Lindfors* 2008 at 305. She cites Judge Jambrek in *Lehideux and Isorni v. France* 1998 in support of this opinion. The cited opinion, in my understanding, specifically lists a possible application of the abuse clause: the aim of the offending actions must be . . . or to pursue objectives that are racist or *likely to destroy the rights and freedoms of others*. As examples of the applicable situations, the opinion holds racism, undemocratic methods, hatred and violence. None of these accommodate the protection of property in their meanings. However, that final part of the citation that I have emphasized here leaves room for any action that is likely to destroy the rights and freedoms of others. So, even in this opinion, there is room to include the protection of property.

Similarly see *Kangas* 2005 at 158.

222 *Pöyhönen* 2000 at 86–87.

It is this more abstract doctrine that is utilizable as material even in the domestic system;²²³ they are analogous to one another. The purpose behind adopting the abuse clause in the convention would only serve to limit the application of that specific abuse clause, not to prevent its use as a source for analogy.

3.2. The Prohibition of Abuse of Rights in the Finnish Legal System

3.2.1. The Vague Legal Principle

Due to the prohibition of the abuse of rights nature as a legal principle, its application can be extended to rights given in the Finnish constitution and even written law norms. It is laid out in the convention of human rights and can be used within the confines of it as such. The effects of the convention “trickle down” into the national legislation.²²⁴ Although prohibition of abuse of rights has no mention in the constitution, it has resonance in a number of norms within the written law of Finland.²²⁵ Artificial property arrangement provision especially can be viewed as a manifestation of the prohibition of abuse.²²⁶ A growing number of such norms and case law suggest the adoption of the prohibition of abuse as a legal principle within national law.²²⁷ As such, even if the case considered is not a human rights matter, prohibition of abuse can apply. We do not need to base the claim on the convention of human rights.²²⁸ We can operate within the boundaries of the national law and still apply the principle and systematic model of the convention.

There is no actual need to make veil piercing a human rights matter, although it could easily be done.²²⁹ Usually, the only right from the convention involved in veil piercing is the protection of property. Article 15 of the Finnish Constitution provides the same right. Although not a right bestowed in the convention, Article 18 of the Finnish Constitution providing for freedom of

223 To be exact, the convention is binding even within the domestic system.

224 For weak support of this, see KKO 2011:72 at 6. The Supreme Court notes that the Finnish assessment of freedom of speech versus protection of private life matches the European Court of Human Rights’ practices. Similarly in KKO 2010:39 at 10.

225 See also *Linna* 2004 at 632–638. For example, Enforcement Code 4:14, Law on Certain Neighbor Relations Section 13, Contracts Act Section 36 and Act on Compensation for Environmental Damage Section 7.

226 See *Pöyhönen* 2001 at 314 and *Linna* 2004 at 635–637. Cf. *Lindfors* 2008 at 304 and *Kangas* 2005 at 158.

227 Confirming that the prohibition of abuse of rights exists in Finnish law; see, for example, *Linna* 2004 and *Pönkä* 2012 at 233–242.

228 In a similar tone, see *Tammi-Salminen* 2013 at 360.

229 Especially since the horizontal effect of constitutional or human rights is neither unanimously accepted nor unproblematic. See *Libera* -säätö at 42–43 and 46–47.

business is worth mentioning here.²³⁰ The right to use the corporate form falls within the scope of freedom of business. Everyone has the right to use the corporate form in pursuit of income.

Protection of property is defined in the Human Rights Conventions First Protocol Article 1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The key part of the wording is “peaceful enjoyment of his possessions.” The definition of possession has grown extensively, and it covers real property, chattel and intellectual property. The protection reaches every right bestowing economic benefits, licenses and economic interests.²³¹ The creditor’s right to payment no doubt falls within the definition. On the other hand, corporations enjoy the protection of property too and so does the corporate controller.

When an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure that property rights in its domestic legal system are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate their rights.²³² The State has an active duty to ensure that private individuals cannot exhaust the rights of others.

Other than the convention on human rights, abuse of rights is also prohibited in the domestic legal system of Finland. Abuse of rights means using formally acceptable legal actions to achieve unacceptable results, such as harming others or results clearly against the fundamental basis of the legal system.²³³ Prohibition of abuse is commonly mentioned but rarely analyzed.²³⁴ In the KKO 2011:68 decision, this sort of analysis is performed. Its existence derives support from several written law norms as well as case law. Prohibition of the abuse of rights is an existing general principle in domestic law.²³⁵

230 The translation, whereas inadequate in its capacity to explain the meaning, seems the best in common use. Freedom of business here means that everyone has the right to acquire income with a labor, profession or business of their choice.

231 *Gasus Dosier und Fördertechnik GmbH v. The Netherlands* 1995 at 53.

232 *Blumberga v. Latvia* 2008 at 67.

233 See KKO 2011:68 and HE 82/2001 at 86.

234 See, for example, HE 82/2001 at 86, KKO 2007:99, KKO 2011:72, KKO 2015:46, dissenting opinion in KKO 2018:9 and KKO 2018:78.

235 KKO 2011:68 at 12, KKO 1991:148 and KKO 2003:126. See also *Tammi-Salminen* 2001 at 242–287, *Pöyhönen* 2001 at 313, *Linna* 2004 at 622 and *Pönkä* 2008 at 67.

Perhaps the strongest source to derive the contents of the domestic prohibition of abuse principle is the Contracts Act section 33.²³⁶ It states:

A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honor and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances.

Application of the section is limited to contracting parties, although older case law has consistently allowed extending it to protect third parties from contracts that have been made with the intent to harm said third party.²³⁷

From case law, *Matti Rudanko* derives a principal statement that the Contracts Act section 33 can be extended to cover decisions of the company management and even the general meeting since they can limit the liability of the company actors. This prohibits a certain type of self-dealing, as the constructor is not allowed to free herself from liability for actions made in the co-op.²³⁸ This does not help with veil piercing, though. The significance is in principle at best, as the effects of a contract can be extended beyond the contract parties.

In the KKO 2011:68 decision, the Supreme Court examined the prohibition of abuse doctrine.²³⁹ According to the decision, the assessment on whether a legal action can have the effects it would have if its contents were upheld must account for the motives behind the legal action and its consequences. If the motives or consequences are not acceptable, the legal action can be abuse. The purpose is to deny effect from legal actions that would prevent third parties from realizing their rights or damaging them.²⁴⁰ The weakness in this reasoning comes from the motives or consequences being unacceptable. What is unacceptable seems determinable only case by case.

In legislation, several norms have adopted similar models. For example, the artificial property arrangements clause in Chapter 4, Section 14 of the Finland Enforcement Code recognizes the subjective intent to avoid enforcement. Similarly, the Tax Avoidance Clause in the Law on Taxation Procedure Section 28 requires the

236 KKO 2011:68. Prohibition of abuse of rights is also mentioned in Section 7 in the Legal Aid Act.

237 See KKO 1961 II 100, KKO 1962 II 80, KKO 1975 II 89 and KKO 1978 II 55. See also *Rudanko* 1982 at 32–41.

238 See *Rudanko* 1982 at 32–41.

239 About the decision, see *Tammi-Salminen* 2013 at 359–360.

240 See KKO 2011:68 at 12. See also *Pönkä* 2012 at 242.

intent to avoid taxation. The subjective part is only half of the coin, though, as both of these sections require objective criterion also. Namely, they require a disparity between the legal form giving the arrangement and the economic reality behind it. The disparity is largely based on whether the use of the legal form matches the normal use and intended purpose of that form.²⁴¹

3.2.2. More Accurate Interpretation and Formulation

If we return to the useful formulation of the prohibition of abuse of rights Pöyhönen has provided, we can see that the same disparity is present there also. The formulation was that a person seeks to realize her right under circumstances in which the essential purpose of said right does not realize, while at the same time the rights of some party affected by the realization would be excessively or unduly damaged.²⁴² The key thing to note here is what essential purpose does not realize, which includes two requirements: one, the right has some purpose for its existence, and two, that purpose does not come into reality in its current use. Taking this one step further, the legal form is meant to match the purpose of that form and the use of a right constitutes using a legal form. This disparity is called the artificiality requirement in this work. There is much more discussion on it in upcoming chapters.²⁴³

Pöyhönen's formulation holds similar elements to the KKO 2011:68 decision, though the formulation Pöyhönen suggests is more focused on the objective assessment of the artificiality and existence of damage. The same weakness as in the Supreme Court decision still persists, though. Excessive or undue are determinable only case by case. Still, the formulation brings an additional element to the assessment: the essential purpose of the supposedly abused right not being fulfilled. This criterion matches the argumentation in an older Supreme Court decision as well as the KKO 2015:17 piercing decision.

In KKO 1992:145, abuse of rights appeared in a situation where multiple contracts exist and they in part derive their content from one another. Then the court should not uphold the abstract separateness of each contract, but should consider the aims of the overall arrangement and the legal effects created by the totality of these contracts.

A Finnish bank had given an on-first-demand guarantee to counter a loan given to the Iranian Ministry of Housing and Urban Development from an Iranian bank. The contract Finnish bank had agreed that the guarantor had to pay the sum on demand without question. The Iranian bank then demanded

241 See V.4.2. of this work.

242 See *Pöyhönen 2000* at 86–87. For a similar definition, see *Pönkä 2012* at 233–234. See also KKO 2011:72 at 6 and KKO 2010:39 at 10.

243 See especially V.4.2. of this work.

payment. The Iranian bank had later been nationalized, and thus the close relationship between the Iranian bank and the ministry allowed the Finnish bank to invoke the same defense against the Iranian bank as the Iranian bank could have invoked against the ministry, despite the contract stating that no right existed. The primary guarantor could have claimed itself not liable since there were no unpaid receivables from the other party to the construction contract. The original debt, the payment of which this complicated financial scheme was devised to guarantee, had ceased to exist. Claiming payment from an on-first-demand guarantee in such a situation was seen as an abuse of rights.

The decision is easy to place into the formulation of Pöyhönen. The essential purpose of the contractual right was to secure the construction project. The Iranians' attempt to use the right did not match this purpose. At the same time, the Finnish bank would suffer excessively, making a payment without acquiring anything in return. Formally, the on-first-demand guarantee was completely independent of the original contract. It was to be paid if the Iranian bank had to pay the guarantee it had given to the ministry. In this situation, demanding payment from the Finnish bank was an abuse of rights.²⁴⁴ Facts and contracts from the overall arrangement were examined as a whole, and the decision was based on the totality of the arrangement. The case was determined through the purpose of the arrangement and damage. Arguably, the unacceptable motivation could also have been used in the decision. The Court did discuss the close relation of the Iranian parties and how that might have affected their willingness to go through with the demand.

Based on this inspection, the Finnish legal system prohibits the abuse of rights. A synthesis between the Supreme Court decision and the reflective sections of law combined with Pöyhönen's formulation seems easy to reach. *The effects of a legal action can be denied if those actions are taken with either unacceptable motives or the consequences prove unacceptable. Additionally, the denial requires that the use of the legal action does not match the intended purpose of the utilized legal norm, i.e., the use is artificial.*

The last question is whether the disparity between the intended purpose and the use is a necessary requirement or just supportive and optional. No distinction can be made from the current case law or sections of law reflective of the prohibition of abuse. They have all had the artificial use present. The sections of law require it. Even in the KKO 2011:68 case, the disparity was deducible from the case facts.²⁴⁵ The decision in its obiter statement of the prohibition of abuse did not seem to

244 About fraudulent behavior related to these on-first-demand guarantees, see *Kurkela* 2011 at 655.

245 Similarly, see the dissenting opinion in KKO 2000:91. In it, the use of formal legal status was seen not to match the reality of the case. In specific terms, the employee had received an announcement from the employer a week late, and the employment had formally ended although, in reality, the requirements for immediate termination were not present.

require it. Nor does the European Convention on Human Rights Article 17 require the disparity, although the presence of such would no doubt support the finding of abuse. At this stage, I would hold artificiality as a requirement. This decision is based mostly on the fact that it has been present in all the relevant domestic cases and is a requirement in the sections of law that are reflective of the principle.

This issue is of no consequence for veil piercing, though, as the formulation of the piercing test in KKO 2015:17 explicitly names artificiality as one requirement. In fact, the piercing test seems to merge the unacceptable motives or consequences with the artificiality requirement. This raises the idea of whether one can even exist without the other. Perhaps the unacceptable motives and results are achievable only through the artificial use of legal forms, rights and norms. Whichever way, the KKO 2015:17 would suggest holding artificiality as a requirement for applying the prohibition of abuse principle. Using the KKO 2015:17 decision to formulate the prohibition of abuse principle would constitute recursion within this study. Modern veil piercing case law is to be the theater on which the formulated background theory is tested. If the theory is created through them, the test becomes meaningless, as it will no doubt match the case law it was derived from.

3.3. The Prohibition of Abuse of Rights and Veil Piercing

In this section, I will discuss veil piercing and the Finnish abuse of rights principle.²⁴⁶ I intend to derive a form of the abuse of rights doctrine that is as precise as possible but that still explains Finnish case law around piercing. This work does not assume that abuse of rights is the best background theory or framework for understanding veil piercing. The intention is more about testing two commonly made claims: 1) that the veil piercing test reflects the prohibition of the abuse of rights principle;²⁴⁷ and 2) that veil piercing is the remedy for abuse of the corporate form,²⁴⁸ although

246 Veil piercing could be viewed as a human rights issue—a weighing between the creditor’s and the controller’s rights where both parties claim protection of property—though it is not necessary. It is sufficient to operate with the prohibition of abuse of rights principle and rights provided in the national legislation. For support, see *Hemmo* 2003 at 56 and *Tammi-Salminen* 2001 at 247–282.

247 *Villa* 2015 at 534. See also Pöyhönen 2001 at 314, *Linna* 2004 at 653–636, *Vähtera* 2018 at 265 and *Lindholm* 2018 at 33–34. Linna is of the opinion that piercing represents the abuse of rights doctrine at least if causing damage is the only other requirement for piercing. If using the corporation in a manner that does not fulfill the purpose of the corporate institution is required for piercing, she sees the abuse of rights doctrine alone as insufficient. It would need to be accompanied by other requirements. See also *Pönkä* 2012 on whether or not a connection between the prohibition of abuse of rights and veil piercing is accepted; in reality veil piercing remedies the abuse of limited liability.

248 See KKO 2015:17 at 29 *Leppänen* 1991 at 286, *Tammi-Salminen* 2001 at 289 and *Villa* 2015 at 534 and 542 and *Mähönen – Villa* 2015 at 407–412.

Cf. *Huttunen* 2007 at 142. He unconditionally denies using vague considerations of abuse as a basis for piercing the veil. See also *Huttunen* 1963 at 197–198, where his opinion was not as unconditional.

these questions are arguably one and the same. If the veil piercing test reflects the prohibition of abuse principle, then the conduct it is capable of targeting is indeed abuse.

To recap, I construed the prohibition of the abuse of rights principle in the Finnish legal system as follows: The effects of legal action can be denied if those actions are taken with either unacceptable motives or if the consequences prove unacceptable. Additionally, the denial requires that the use of legal action does not match the intended purpose of the utilized legal norm, i.e., the use is artificial.

If we look at the test laid out by the Supreme Court in KKO 2015:17, we notice extreme similarities. Its legal arrangement, or legal actions, were the use of group structure, intercorporate relationships or shareholders' control. All of these methods utilize the limited liability shield or separate personality if they are viewed in the more general stage. The next part of the test was literally artificiality, although it was not given a more specific explanation. Later in this work, I provide a more in-depth analysis on the meaning of artificiality and why it is indeed defined through the purpose of the corporate form. The unacceptable motives or consequences part is a bit harder to match between the two. The KKO 2015:17 decision required the corporate use to be reprehensible. In several successful piercing cases, this criterion has been fulfilled by determining the intention or motive behind the arrangement.²⁴⁹ Unacceptable consequences have not been cited in piercing case law at this point, although arguably, the results of legal actions made artificially and in bad faith are unacceptable.

The veil piercing situations could be inserted into the formulation of the prohibition of abuse principle. Abuse of the corporate form means

- using the corporate form, especially limited liability shield and separate personality, as a method (*legal action/legal arrangement*);
- allowing the controller to escape an obligation or to evade a legal norm (*unacceptable motives/consequences*); and
- if the arrangement does not satisfy the requirements of honest commerce, i.e., the basic purpose of the corporation as an institution, this supports the finding of abuse (*artificiality*).²⁵⁰

Although the definition of abuse of the corporate form could be constructed a bit differently, the overlapping criteria seem significant enough.²⁵¹ It seems that the prohibition of abuse of rights principle is capable of explaining the veil piercing doctrine as it was laid out in KKO 2015:17. The similarity is comprehensive enough

249 KKO 2017:94, KKO 2015:17 and KKO 1996:2.

250 Similarly *Villa* 2015 at 534.

251 Similarly in Sweden, *Håkan Andersson* (2014 at 3) recognizes the connection between veil piercing and abuse of law as well as the ambiguity it brings. Abuse of law was also mentioned in NJA 2014 s. 877. See more in V.4.3. of this work.

that the same ambiguities plaguing the prohibition of abuse principle seem to bother veil piercing also, though in a more specific context. What is artificiality? What is reprehensible use? How to discern the motive behind the arrangement? The veil piercing doctrine seems to be just a corporate-specific recreation of the principle.

The piercing decisions that have emerged after the KKO 2015:17 utilized this piercing test. Later in this work, I will explain in depth how the artificiality and reprehensibility should be assessed in veil piercing case law. It turns out that artificiality is indeed a disparity of the legal form and the reality of the case, i.e., the use does not match the purpose of the corporate institution.²⁵² Reprehensibility, in the current case law, is shown most strongly through the intent to achieve the described results of creditor damage or evasion of legal norms.²⁵³

In literature, the prohibition of the abuse of rights principle has been discussed alongside duty of loyalty. *Ville Pönkä* distinguishes between the contract law principle of duty of loyalty and the duty of loyalty created by the principle of the prohibition of abuse of rights. The main difference according to him is that the duty of loyalty in contract law creates duties to act, whereas in the prohibition of the abuse of rights, duty of loyalty only requires refraining from action. Based on this, it could be argued that the prohibition of the abuse of rights creates a duty of loyalty to the corporate controller, not to abuse that control in a manner that would prevent the creditor from receiving payment.²⁵⁴ I am basing this on the fact that the corporate form causes a special negative risk to the creditors as the controller is able to benefit from limited liability and separate personality to the creditor's detriment.²⁵⁵ There is a disparity of control over the circumstances. Disloyal use of rights is abuse of rights.

4. A Unified Theory

The prohibition of abuse of rights and conflict of norms are highly compatible in the end. They could even be viewed as a continuum. The conflict of norms states that two norms are in contradiction and one must yield. The prohibition of abuse states that the effects of a legal action can be denied if those actions are taken with unacceptable motives or if the consequences prove unacceptable. If the use of legal action does not match the intended purpose of the utilized legal norm, this supports

252 See V.4.2. of this work.

253 See V.4.3.3.1. of this work.

254 See *Pönkä* 2012 at 234–235. See also *Hemmo* 2003 at 56.

255 See also *Linna* 2004 at 626.

finding the motives or consequences unacceptable. It seems that the conflict of norms recognizes the issue at hand on an abstract level, so the prohibition of abuse can be used to determine an actual resolution for the conflict. The key difference is that the conflict of norms approach would better allow for considering the purposes behind the violated norm. At this point, it is useful to remember that the prohibition of abuse is also capable of taking that into account through artificiality. When assessing the unacceptable consequences, we can look into how thoroughly the purpose of the other conflicting norm is violated or whether the violation extends to the core content of the right.²⁵⁶

Based on this, I would conclude that both the conflict of norms and prohibition of abuse are useful as background theories for piercing. Both are capable of offering something unique that matches veil piercing situations, although both are separately capable of explaining piercing decisions. No synthesis or co-operative use is required, but the overlapping suggests that it could be useful to view them together. That is, if we do not explain away the conflict of norms altogether. By this, I mean that the prohibition of abuse could be understood to include the conflict of norms approach. If we look at the European Convention on Human Rights prohibition clause, we easily detect the conflict structure there. According to it, no right may be used just to destroy someone else's rights under the convention. Two rights are in conflict and one must yield. The prohibition of abuse clause acts as a tool to solve the conflict. The clause has a built-in justification for adopting a *contra legem* solution or resolving the conflict of norms in favor of the more valued purposes behind the conflicting norms.

The Finnish prohibition of abuse principle is less definite in this. The effects of some legal action can be denied if it is used with unacceptable motives or if it results in unacceptable consequences. There is no obvious conflict in this construction of the principle. However, no party has an interest in claiming abuse unless their interest is violated. The legal system accepts only valid interests as a basis for trials. That means that those interests need to be based on some norm. The same is true for the legal action: there is no need to resort to the prohibition of abuse principle if the legal action is not valid. Thus, whenever the prohibition of abuse principle is invoked in trial, there are two conflicting norms: the one depicting the violated interest and the one enabling the legal action.

This varies a little in the evasion of law situations. There is generally no interest other than the correct application of a norm of the law, and it is up to some government authority to enforce it. In these situations though, the conflict is even more apparent, the norm application of which conflicts with the norm granting separate personality or limited liability to a corporation.

²⁵⁶ Similarly, see Pöyhönen 2000 at 86–87.

5. Other Theories

5.1. Judgment Proofing

The aforementioned theories seem most prominent in the Finnish veil piercing doctrine. I would still discuss a few theory contenders that are perhaps not as comprehensive. Instead, they are capable of more accurately explaining a portion of piercing decisions. I will discuss judgment proofing theory, unjust enrichment and policy enforcement.

First up is the judgment proofing model. This explanatory model is especially attractive since it fits well with several key elements of piercing. In addition, it is capable of explaining the different treatment of involuntary creditors at the theory level instead of arguing at the level of application. At its core, this model is capable of explaining the piercing decisions that place liability on involuntary creditors. It falters somewhat with voluntary creditors and does not address situations in which no creditor suffers damages, i.e., the evasion of law situations. Both of these are included in the veil piercing test of KKO 2015:17. Still, the theory offers an explanation for an easily discernable part of piercing situations. Additionally, it explains the part of piercing that is viewed in the literature as the core target for piercing. Finally, it is capable of explaining the recent case law in Finland²⁵⁷ and Sweden²⁵⁸ perfectly. Some of the older cases do not match that well.

Lynn LoPucki argues that nearly all judgment proofing has a single essential structure, a symbiotic relationship between two or more entities, in which one of the entities generates disproportionately high risks of liability and another owns a disproportionately high level of assets. The business is divided into asset entity and operating entity. Through the contract that unites them, the two entities allocate the gains from the operation between themselves. Typically, the asset-owning entity guarantees payment of selected contract obligations of the liability-generating entity (the “operating entity”) necessary for the latter to continue in business.²⁵⁹ The contract uniting them can be lease agreement, secured lender contract, a sale, franchise agreement, licensing agreement, corporate group relation or any other arrangement capable of allocating value within the symbiotic relationship.²⁶⁰ Because the owning and operating entities divide the unified business between them, the two together have all the characteristics of a unified business.²⁶¹

257 KKO 2015:17, KKO 2017:94 and KKO 2018:20.

258 NJA 2014 s. 877.

259 See *LoPucki* 1998 at 149.

260 *LoPucki* 1998 at 152. Similarly, see *Ob* 2013 at 93, stating that everyone has apparently forgotten that veil piercing originated as an equitable procedure to remedy the problem of unenforceable judgments.

261 *LoPucki* 1998 at 153.

LoPucki recognizes three kinds of advantages from the symbiotic relationship. The first is the prospect for mutual gain that would have held all the constituents of the unified business together had the business not been split into owning and operating entities. That is, the constituents will want to contract with the entities of the judgment-proof business for the same reasons they would have wanted to contract with the entity of the unified business. The second advantage is the continuing savings from externalizing the tort liability that the unified business would have had. Working together, the entities of the judgment-proof business have the same earning power as the unified business but lower costs of liability. They can divide the savings between them by contract. The third advantage is saving the transaction costs that would have to be incurred to redeploy the assets and constituents of the business if the owning and operating entities severed their relations. To minimize the amount the operating entity could capture through opportunism, the owning company would retain the right to terminate the relationship to the maximum extent consistent with the business needs of the operating company.²⁶²

The key aspects of this theory are:

- symbiotic relationship between the entities
- one-sided selective treatment of debtors to the detriment of judgment creditors.

Judgment creditors are involuntary creditors that need a court decision to collect. LoPucki does discuss collapsing these entities into a single liable subject but remains skeptical about the viability of that strategy.²⁶³ The way I am utilizing his judgment-proofing concept here does deviate from the original. He used it as a description of arrangements in practice and argued that these arrangements should be disregarded; I use it in a sense that if an arrangement fits the description, that itself justifies the disregard. This jump needs to be justified, though. This verification is easy to derive from three major veil piercing cases: KKO 2015:17, KKO 2017:94 and NJA 2014, p. 877. All of the arrangements in these cases fit the model, and in all of them, the corporate veil was pierced. This shows that veil piercing and judgment proofing overlap and judgment proofing does enable piercing.

In KKO 2015:17, the parent corporation founded a subsidiary corporation to sell data storage devices. The subsidiary neglected the payments and Teosto needed a judgment to collect the remunerations. There was no discussion as to whether benefits were transferred from the subsidiary to the parent. The two corporations were in a symbiotic relationship in which the parent financed the subsidiary and the subsidiary operated through the parent corporation's website in a manner that did not allow the customer to discern

²⁶² *LoPucki* 1998 at 155.

²⁶³ *LoPucki* 1998 at 156–159.

which entity she did business with. The subsidiary did not have any assets when the judgment was to be collected. The two entities' businesses were not discernable.

In KKO 2017:94, one person owned two corporations. One owned the assets of a truck business. The other held the employees' contracts. The workforce was then rented to the asset corporation at a value that did not allow the employee rental corporation to meet its obligation sustainably. The employee rental corporation did not do business with any other entity than the asset corporation. The relationship was obviously symbiotic and benefits were transferred with the rental agreement. The two corporations together had the characteristics of a unified business, as neither could have operated alone and utilized only the services of the other corporation in the arrangement. Perhaps the decision would have been different had the corporations made business with others too.

NJA 2014 p. 877 differs a bit from the basic structure of judgment proofing. On one hand, the entire corporation was founded solely to obtain a judgment and avoid the risk of trial costs, which are awarded by judgment. The arrangement involved only one corporation, however, and no benefits were ever realized. There was thus no need to transfer those benefits via typical methods. The benefit was the chance of obtaining a judgment without the risk of trial costs. The symbiotic relationship existed through the financing method. The shareholders inserted funds into the company to pay select obligations, namely the attorney's fees necessary to continue the trial. This created a situation where the potential assets were freely available to the shareholders, whereas the potential losses were limited to the corporation.

This theory is capable of explaining piercing even when the corporation has actual business. The abuse of rights theory faces problems with the actual business, which resulted in a less than objective assessment of primary motives behind the arrangement and what portion of them were for legitimate business reasons. The judgment-proofing theory bypasses this with ease. It does not matter whether the disregarded entity has actual business if that business is practiced in a symbiotic relationship in which the assets and operations are divided between entities in a manner that realizes benefits in one and negative risks in the other. It is capable of discerning abuse even when the existence of a corporation does somewhat fulfill the intended purpose of the corporate institution.

5.2. Policy Enforcement

A relatively new theoretical approach to piercing, the *policy enforcement approach*, was introduced by *Jonathan Macey* and *Joshua Mitts*. In their opinion, all the piercing cases can be explained in an effort to accomplish one of three goals: (1) achieving the goals of a particular regulatory or statutory scheme; (2) avoiding fraud or misrepresentation by shareholders trying to obtain credit; and (3) promoting the bankruptcy value of eliminating favoritism among claimants to the cash flows of a firm.²⁶⁴ I will call this framework the policy enforcement approach. The following is borrowed from Macey and Mitts themselves.

First, courts pierce the corporate veil as a tool of statutory application in the sense that piercing the corporate veil is done in order to ensure that corporate actors behave in conformity with a particular statutory scheme, such as social security or state unemployment compensation schemes. For example, as explained in detail below, sometimes the court will ignore the corporate form in order to accomplish the specific legislative goal of a government benefit program that distinguishes between owners and employees. Failing to pierce the veil would undercut the goal of the statutory regime by effectively granting someone a partial exemption from the regulatory burdens imposed by the statute.

Second, courts also pierce to remedy what appears to be fraudulent conduct that does not satisfy the strict elements of common law fraud; specifically, they pierce for “constructive fraud” in the contractual context. Simply put, if a court becomes convinced that a shareholder or other equity investor has, by words or actions, led a contract counterparty to believe that an obligation is a personal liability rather than (or in addition to) a corporate debt, then they will sometimes use a piercing theory rather than a fraud theory to impose liability on the individual shareholder.

The third ground on which courts pierce the corporate veil is the promotion of what Macey and Mitts term accepted “bankruptcy values.” In particular, courts will disregard the corporate form in order to prevent fraudulent conveyances and preferential transfers.

Macey and Mitts have arrived at this view through machine learning analysis of United States case law. The approach might not cover other jurisdictions without further coordination and development. On the other hand, their framework is case law practice-oriented. The theory is also easy to place within the abuse of rights framework as further justification for resolving the conflict of norms. One key aspect of that theory was the policy goals behind the conflicting rules and whether those goals are achieved in the *in casu* use of the corporation. What the policy enforcement approach adds to this is recognition of the typical policy goals present in piercing situations. If we look at Finnish case law, we can easily detect

²⁶⁴ *Macey – Mitts* 2014.

all three of these. In KKO 2015:17, the decision could be explained as reaching the goals of a particular regulatory or statutory scheme.²⁶⁵ In that case, that scheme was the remunerations for private copying. In KKO 2017:94 and KKO 1996:2, the decisions had at least some elements of avoiding favoritism among bankruptcy claimants.²⁶⁶ Finland lacks case law in which piercing was attempted in a contractual context, but the older case KKO 1958 II 43 disregarded the separate personality of a corporation based on misrepresentation.²⁶⁷ The decision did not utilize the piercing doctrine, however.

6. A Hierarchical Theory

6.1. Multiple Explaining Theories Instead of One?

Another option worth considering is a hierarchical structure. This structure would separate the typical piercing situations into three categories, two of which are directly deductible from the KKO 2015:17 decision piercing test. The test allows piercing if a legal obligation has been evaded or if creditors were damaged. Thus, the first category is the evasion of a legal obligation. On the other hand the creditor damage situations need to be divided into two separate categories. Voluntary and involuntary creditors are in a much different position based on their capability to affect the credit relationship and its terms.²⁶⁸ This leaves us with three categories: 1) evasion of law, 2) damage to voluntary creditors, and 3) damage to involuntary creditors.

These distinct categories are derived from the piercing practice and depict the distinct veil piercing situations. If we have three distinct piercing situations, could we have three distinct theories to explain them? At first glance, the conflict of norms and prohibition of abuse seem to match the evasion of law situations well, and the judgment proofing seems to match involuntary creditors extremely well, but the prohibition of abuse principle also matches the involuntary creditors.

The problems arise with voluntary creditors, though, as neither theory is capable of explaining the freedom of contract arguments inherent in this category. At the same time, the conflict of norms theory and the abuse of rights theory are both capable of explaining all three categories, although they face minor difficulties with contract creditors. It appears that the freedom of contract arguments inherent in this category

265 Similarly, in the Norwegian decision, Hempel (2010) and *United States v. Bestfoods* (1998).

266 Similarly, the Swedish decision NJA 2014 s. 877.

267 The Danish decision UfR 1997 p. 1642 had some elements of this, as the non-contractual creditors were unable to discern the correct view of the entities' finances. The decision is hard to categorize as a piercing decision and remains rather unique.

268 See at V.5.2. of this work.

seem to exclude unacceptable consequences and at least somewhat legitimize any possible motive to benefit at the other's expense. I have not yet encountered a theory that could explain veil piercing in the case of voluntary creditors.

With these limitations in mind, the discussion of hierarchical theory becomes a theoretical curiosity and an attempt at development. I am under no illusion as to the incomplete nature of the hierarchical structure, the overlapping explaining theories within it or the lack of a good theory explaining the possibility of piercing within the voluntary creditors category. As such, the value of this discussion is not much other than the presentation of the idea that there could be multiple explaining theories of veil piercing depending on the typical situations in which they arise.

Why I decided to call this a hierarchical theory is because the prohibition of abuse principle and conflict of norms are capable of justifying all of these categories. The problem with them is that they are not very precise. Judgment proofing is capable of very precise explanation in the category of involuntary creditors. The conflict of norms theory becomes somewhat ambiguous when dealing with creditors. The evading legal norms category matches the situation much better. Still, the conflict of norms theory needs some support in reaching an answer to the conflict. This is why I have placed the prohibition of abuse as the general explaining theory and the others as supplemental theories in this model. The idea is that the supplemental theories are compatible with the prohibition of abuse principle but more precisely apply it in piercing situations.

At this point, though, one could question whether they are theories at all. They could arguably be characterized as descriptions of typical piercing situations or legal paradigms. Whatever they are called, they are useful in explaining and resolving veil piercing cases. At some point, however, one needs to ask whether these situations or paradigms are different enough to create three separate piercing doctrines instead of one general doctrine. This would allow for creating more delicate piercing decisions than the ambiguous general doctrine adopted in KKO 2015:17. Now, such an idea has not reached case law, and much further development would be necessary to make such a separation of piercing. The focus of this work is the current doctrine, and therefore, I leave the possible division into three piercing doctrines for the future.

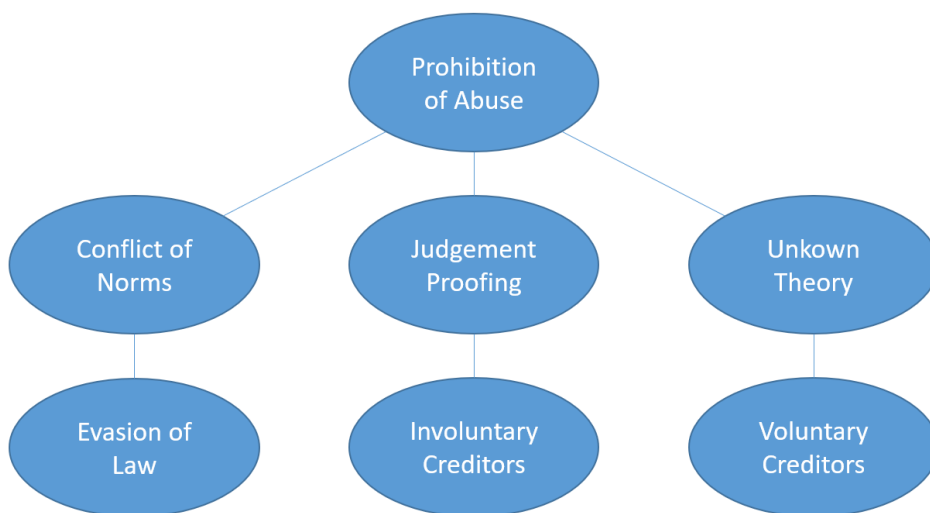


Figure 3. Hierarchical structure and the three categories

6.2. Paradigms or Supplementary Theories Applied

Each of the supplementary theories has its strengths and weaknesses. As I have demonstrated about judgment proofing, it matches a lot of piercing cases really well. I will not repeat the discussion here.²⁶⁹ On the other hand, if we encounter a situation in which a legal norm is evaded but not to the detriment of the creditors, the characterization falters. These situations are better explained through the conflict of norms characterization and are resolved through the realist interpretation of the norm. Through the use of a corporation, someone evades the application or applies a norm that should not apply. Then we either deny or apply the norm based on the realist interpretation of both the separate personality and whatever norm is being evaded.

The conflict of norms theory characterization falters a little when faced with the creditors. Especially with the contract creditors, one would have to explain the conflict of norms as a conflict between the *pacta sunt servanda* principle and separate personality or limited liability, although the argument goes that veil piercing should not be allowed for voluntary creditors at all.²⁷⁰ Perhaps the lack of a proper theoretical foundation supports this. Still, the conflict of norms theory could also apply to the abuse of some contractual rights if these rights are used outside the parameters they were agreed upon.²⁷¹ However, this would require a contract term entirely separate from the rest of the arrangement.

²⁶⁹ For the discussion, see II.5.1. of this work.

²⁷⁰ See V.5.2.2. of this work. I argue to abandon this opinion in V.5.2.4. of this work.

²⁷¹ See KKO 1992:145 and II.3.3.2. of this work.

Per the involuntary creditors, the conflict of norms theory is compatible. For example, in the Verkkokauppa case, the involuntary creditors' receivable was a direct consequence of neglecting a written law norm. This could easily be made a conflict of whether to uphold the remuneration norm or limited liability and separate personality. The debt created by the arrangement was rather unambiguous, and the subsidiary's liability was clear, but the liability of the parent was unclear. The choice was whether to uphold the policy behind the remuneration norm or the formal interpretation of separate personality and limited liability norms.²⁷² The same is true for the NJA 2014 p. 877 case, which was about limited liability and separate personality versus the purpose of the norm allocating the trial costs.

There are no difficulties even when the involuntary creditor's position is based on tort. The liability is based on some liability norm, for example, the Tort Liability Act Chapter 2, Section 1 providing a general liability for negligence. In these cases, though, we might not have as clear a conflict as the tort liability norms are heavily based on causation and do not traditionally trespass the separate personality line. Still, the conflict remains the same: whether to uphold separate personality and limited liability or the damaged party's right to compensation. Regardless of the situation, these conflicts are hard to resolve. At this point, we can utilize the help of judgment-proofing characterization.

The judgment-proofing paradigm does not match the voluntary creditors' situations well. This is apparent from the definition of the paradigm. It is simply construed to match involuntary creditors and assumes the beneficial treatment of choice creditors in the arrangements. The assumption is that voluntary creditors can find out about the judgment-proofing arrangement and modify their terms accordingly. The theory's application is more ambiguous when the initial relationship between the parties was a contract, but the position as a creditor is due to the neglect of contractual duties. Technically, these creditors are tort creditors and creditors through judgment. The KKO 2017:94 case also demonstrated undeniably that judgment-proofing arrangements can be used to the detriment of this type of creditor also. This issue of creditor type characterization is further discussed in V.5.2. of this work and will thus not be discussed here any further.

It would seem that both supplementary theories overlap. The more limited is the judgment-proofing one, which is capable of explaining only the involuntary creditors category, but some ambiguity remains as to what constitutes an involuntary creditor. The conflict of norms seems capable of explaining them all, but not perfectly. For

272 As pointed out by *Taina Pihlajarinne, Katri Havu and Juha Vesala*, the parent's liability could have made an issue of interpreting the legal norm, naming the ones responsible for paying the remuneration. *Pihlajarinne – Havu – Vesala* 2015 at 600. See also C724/17 and KKO 2019:90 where the competition law concept of enterprise was interpreted broadly to include corporation that received the business activities of a voluntarily dissolved corporation.

the time being, the hierarchical theory should be abandoned, as it is not capable of effectively discerning the situations. Perhaps later we will have better legal paradigms for piercing situations, and then we can return to this idea. Currently, it is too messy, as the different pieces overlap with one another too much. One useful finding from this examination could be derived, though. The judgment-proofing paradigm can supplement the more abstract theories justifying veil piercing to make it more capable of resolving issues. This will show up more thoroughly in V.6.4. of this work.

III ANALOGY

1. Introduction

In earlier literature, veil piercing has been secluded to different areas of the law. Piercing in enforcement, bankruptcy and taxation is based on general competence norms provided in their respective statutes. These norms have their limitations as they are designed to counter specific types of behavior. The most obvious limitation is of course the formal limitations of these norms to specific legal procedures such as taxation and enforcement. Additionally, as per design, they might emphasize different elements, for example elements of ownership and owner's rights in artificial property arrangements or wording of evaded tax laws. It is apparent that these specific elements can come up in a corporate arrangement, though corporate arrangements are by no means exhausted by these. The flexibility of corporate personhood allows for very large selection of abusive arrangements and the specific norm context of these arrangements is left to the arrangement's creator's choice. The analogous doctrines target abuses of specific predetermined norms. There is limited application for the more specific case law around the analogous doctrines and the utility as sources of analogy stems more from the general structure of these evasion norms targeting abuse. The evasion norms share commonalities in principle and sometimes they even address elements of corporate arrangements, making them especially useful. I will provide an analysis into these doctrines to detect the usable material.

A more general veil piercing doctrine can be found in case law, though, especially the KKO 2015:17 decision, but it does not suffer from the limitations of the secluded doctrines, as a price for that doctrine remains rather ambiguous. The examination in this chapter starts with the assumption that these specific veil piercing doctrines can be used as points of analogy for clarifying the general veil piercing doctrine. The Verkkokauppa decision did cite artificial property arrangements, environmental damage liability and tax avoidance as examples and sources of analogy. Additionally, the Supreme Court cited pay security case law, using it as an example of piercing the veil. I will examine all the mentioned sources here to discover what help they offer in developing the piercing doctrine. These secular provisions reflect the common criterion upon which veil piercing doctrine can be built.²⁷³ They are accepted statutory doctrines that target abuse and extend liability or allow setting aside the legal form and basing the decision on the facts of the case. Sometimes, the specifics of the legal environment in which the norms operate have their effects on veil piercing consideration, and these are discussed when they arise. For example, taxation emphasizes business reason, and artificial property arrangements highlight control inherent in ownership.

²⁷³ *Mähönen – Villa* 2015 at 302 and 410.

Veil piercing targets such acts that do not fall under other instruments provided by law.²⁷⁴ This makes it important to examine the other legal instruments addressing similar situations of corporate behavior. These legal instruments do not necessarily limit the application of veil piercing. Simply, when a liability doctrine based on law is applicable, there should be no need to rely on the controversial doctrine of piercing the veil.²⁷⁵ The legal doctrines have their uses, conditions and defined limitations. Often, veil piercing ends up targeting arrangements where the actions are measured with these limitations in mind. The aim is to abuse or circumvent the system — to escape the scope of liability-inducing provisions. They seek to absolve liability when the absolution is not possible by law. These provisions can target corporate arrangements similar to veil piercing, although their respective uses are not limited to that. In their respective scope of application, some of these liability forms can be used to disregard the corporate form, whereas the others act as alternatives to veil piercing.

It is entirely possible, though, that the arrangement is made so that it limits the liability to some extent by abuse. It is perfectly imaginable that the arrangement allows for some compensation with other liability doctrines and the remaining damage by piercing. Demanding the entirety of the damage by piercing would not be excluded either, though this would seem a poor strategic choice, as piercing is unlikely, ambiguous and loosely based on case law.²⁷⁶ The situation could be compared to the relationship between compensation for damages and condition. Both have different requirements for application and thus target different sorts of conduct, though the end result is similar. Correspondingly, piercing and the analogous doctrines target different sorts of conduct and have different requirements even if the end result is similar.

The opinion that veil piercing would not apply in situations where some other liability norm applies could be supported by resorting to the defined results of veil piercing. These are usually defined as personal liability from corporate obligations without a norm in legislation allowing for the liability.²⁷⁷ This definition was also adopted in KKO 2015:17. The Supreme Court stated that disregarding the separate personality of a corporation requires a liability norm in law or the situation referred to as veil piercing. This could be interpreted such that only the damage that cannot be compensated by the legislated norms could be claimed by piercing. Though it can also be interpreted to

274 This stems from the observation made by the Supreme Court in KKO 2015:17 at 29. Liability requires a liability norm in law or the situation referred to as veil piercing.

275 See *af Schultén* 1984 at 81.

276 Similarly see *Werlauf* 1991 at 276–277 and *Hagström* 1993 at 253.

277 See KKO 2015:17 at 29.

mean that veil piercing doctrine has no basis in law. This is a less expansive interpretation. This would also mean that the definition reveals nothing about the relationship between veil piercing doctrine and liability norms in legislation.

As veil piercing is a doctrine protecting creditors and satisfying their claim, some other creditor protection norms providing assets for their satisfaction are examined. The purpose is to determine how they serve to limit the need for veil piercing. A secondary purpose can also be given. The interpretation of certain terms should be consistent, at least within the same area of law. In the context of property law, company law and creditor protection, the concepts should be given the same content if possible. For these purposes, the study will examine the debtor's dishonesty, forfeiture, unlawful distribution of assets and asset recovery.

The significance of these doctrines is based on different laws on the developments of veil piercing via analogy or limitation is shortly examined here, whereas the proper development of piercing doctrine with the help of these doctrines is done in chapter III. The purpose of this section is not to develop the mentioned doctrines.

2. Veil Piercing and Various Legal Instruments Protecting Creditors – Limiting The Scope of Piercing the Veil

2.1. Artificial Property Arrangements

2.1.1. General

Artificial property arrangements refer to situations where the legal form does not match the factual contents of the arrangement. The actual owner in form has transferred the ownership to someone else but in fact still acts as the owner of the property. The ownership has been transferred to a person that is not liable for the debts, but this person does not represent an economic interest other than the debtor.²⁷⁸ The bailiff²⁷⁹ can then set aside the owner in form and attach the property to pay the debts of the debtor. Enforcement Code 4:14 and Bankruptcy Act 5:11 both allow the disregard of this sort of arrangements. The provision in the Bankruptcy Act is copied from that of the Enforcement Code, and the provisions are meant to be identical in their application.²⁸⁰

Artificial property arrangements utilize perfectly legal institutions. The ends they pursue with these devices are not acceptable, however. The devices are meant for

278 See HE 275/1998 vp. at 14.

279 Or estate administrator in bankruptcy.

280 See HE 26/2003 vp. at 79.

certain uses and should not be used to defeat the purposes of the law.²⁸¹ They are mostly meant to serve purposes of business and market economy and should not be used to evade obligations.²⁸² In essence, these purpose-defeating arrangements are inappropriate risk management.²⁸³

Enforcement Code 4:14 states that a plea that property belongs to a third party does not prevent the attachment of the property if

- 1) it is observed that the position of the third party is based on a financial or other arrangement that has been given a legal form that does not correspond to the actual nature or purpose of the matter, taking into consideration the powers available to the debtor comparable to the authority as owner, measures comparable to those of an owner, the benefits received by the debtor from the arrangement and the other corresponding factors, and
- 2) such a legal form is apparently being used to avoid enforcement or to retain the property beyond the reach of the creditors, and
- 3) the applicant's receivable shall probably not otherwise be collected from the debtor within a reasonable time.

The provision gives significance to both objective and subjective elements. Other than the actual requirements for ignoring the arrangements, the provision states that it should be used only if the receivable would not otherwise be collected. The provision is always secondary to less derogative methods.

2.1.2. Objective and Subjective Elements

Objective elements include control over the property. The debtor, being able to control the property as if still in ownership of it, supports finding the arrangement artificial. The arrangement aims to separate the elements of ownership so that a third party holds only the protection against creditors while the debtor still retains control and possession. The assessment is about determining when the ownership is real.²⁸⁴ It becomes imperative to examine whether the third party dispenses of the property without a will of her own and only according to the instructions of the debtor.²⁸⁵ Open and honest co-operation with the authorities creates an assumption of the proper nature of the arrangement.²⁸⁶ Using only the legal powers according to

281 See *Linna – Leppänen* 2015 at 147.

282 See *Marttila* 2006 at 770.

283 *Marttila* 2006 at 770.

284 See *Marttila* 2006 at 772 and KKO 2004:96 at 9–10.

285 See *Linna – Leppänen* 2015 at 153 and *Marttila* 2006 at 777. In addition, see KKO 2005:97 where, after selling a house, the debtor had continued to specify how it was used and what construction projects were undertaken. The Supreme Court deemed that the debtor had control as if he were the owner.

286 See KKO 2005:95, KKO 2005:98 and KKO 2011:49 and *Linna – Leppänen* 2015 at 155.

the provisions of the law is control as Enforcement Code 4:14 requires, though the control can also be factual.

Other than control, if the debtor performs actions that are usually within the interest of the owner alone, these actions support finding the arrangement as artificial. These include value-enhancing actions, insurance, repairs and so on.²⁸⁷ These actions are seen as secondary to control in case law: if the third party holds normal control over the property, actions that are normally in the interest of the owner alone are not enough to deem the arrangement artificial.²⁸⁸ If the debtor derives benefits from the property owned by a third party, the finding of artificiality is supported. Benefits include free use of a bank account and other property.²⁸⁹

Finally, other findings that are similar to those examined above can be taken into account when assessing artificiality. This includes all objectively detectable contradictions between the legal form and the actual nature or purpose of the arrangement, such as funding, bearing negative risk and the relationship between the debtor and the third party involved.²⁹⁰

The subjective requirement in the provision is that the legal form is apparently used to avoid enforcement or to retain the property beyond the reach of the creditors. For the arrangement to be artificial, it needs only to fulfill the objective requirements. The attachment also needs to be intended to achieve results that are detrimental to the creditors. As intentions are notoriously difficult to prove, some objective factors must be used to deduce the intentions. If the arrangement is created at a time when the debtor is likely to incur lots of debt or the debts already surpass the assets, it is likely that the arrangement was created to retain property.²⁹¹ Hiding the arrangement in the proceedings also supports the finding of such intention.²⁹² A lack of proper reasoning for the arrangement supports finding the subjective element; the arrangement cannot be reasonably explained with factors other than avoiding the enforcement or retaining property.²⁹³

287 See KKO 2005:97 where the debtor funded extensive construction projects on his spouse's summer house.

288 KKO 2011:49 where the debtor had rented an apartment, and after a falling out with the owner of the apartment, the debtor found a new owner for it. The debtor's influence was not seen as sufficient for finding the arrangement artificial, since the new owner was found to have normal control over the property.

289 See *Linna – Leppänen* 2015 at 153. Also KKO 2005:97.

290 See HE 275/1998 vp at 14 and KKO 2011:49 at 11.

291 HE 275/1998 vp at 14.

292 HE 275/1998 vp at 14.

293 See *Tikka* 1972 at 2. Also *Linna – Leppänen* 2015 at 157–160.

2.1.3. Artificial Property Arrangements and Veil Piercing

Artificial arrangements can include a corporation, and the section can be used to pierce the veil during the enforcement procedure.²⁹⁴ The corporation is either the third party or the debtor. The corporation as a third party is problematic for the secondary nature of collecting from the artificial property arrangement if the debtor owns the corporation. Then the shares can be attached, and other measures are available to prevent the debtor from destroying the share value should they hold a position within the company. Should those measures be obviously insufficient, ²⁹⁵ veil piercing is possible by applying Enforcement Code 4:14. Shares of a private company are hard to sell: there are few buyers, and this usually means a discount in price. Additionally, Enforcement Codes 4:38 and 4:37, which prohibit the debtor from using their control over the company in a manner detrimental to the creditors, do not limit the debtor's competence in doing so. This provides the debtor with a window of opportunity to make additional arrangements. It is thus often more effective to get direct access to the corporate property through the artificial property arrangements section, even if this potentially leads to time-consuming litigation.

The biggest difference between veil piercing and setting aside artificial arrangements is about the emphasis on the assessment of artificiality. Veil piercing aims to determine whether the use of the corporate form is artificial and can be set aside to hold the actual actor liable. Artificial property arrangements are about property and ownership. The aim is to assess whether the ownership arrangement is artificial and whether it can be set aside to have the property cover the liabilities

294 See also *Lindfors* 2008 at 318. She is of the opinion that the doctrines have the same moral justification, but the ambiguous nature of piercing prevents it from being used as a point of analogy in the development of the artificial property arrangements section. Two things have changed since Lindfors gave her opinion: The veil piercing doctrine has become less ambiguous as of KKO 2015:17. Second, the artificial arrangements section has become less ambiguous itself, allowing its use as a point of analogy.

295 However, one can claim that the measures are always insufficient. Even if the property of the corporation is deemed liable for the debt, or alternatively, if the shares are attached, the debtor can still hold a position within the corporation. Although the Enforcement Code 4:38 prohibits the debtor from dispensing, it does not limit the competence the debtor as the representative of the company. The debtor is still able to make legal actions, although they are not binding toward the creditors. Yet this does not matter for the debtor, as they are still able to hide the property. Items can be sold and the money can be made to disappear. This does lead to criminal liability, though, as property is lost to the detriment of the creditors. Excluding possible jail time or fines, the debtor's overall liability does not rise. The tort compensation is limited to the amount of the damage, and the damage is the sum of the original debt. The actions themselves, as the corporate representative, might be cause for tort liability and might act as an independent basis for liability, they cannot add up to the compensation amount. As soon as the original debt is paid, there is no damage. Consequently, the debtor must then be a customer at the enforcement proceedings for at least 15 years (possibly 25 if extended). Therefore, the cost of hiding the corporate property is high, including the original liability, criminal liability, possible jail time and having to pay most of the income to creditors for possibly even a quarter century (or hide them). If the corporation had significant enough funds and the debtor is able to utilize them in secrecy from the creditors and enforcement officials, hiding the funds could prove reasonable.

of the *de facto* owner—the person who, according to the facts of the case, holds the significant elements of ownership. Veil piercing means holding additional person(s) liable for an obligation of another. Artificial arrangements are about using one's property to satisfy an obligation of another. In one, the assessment of artificiality is about a person, and in the other, it is about property.²⁹⁶

This difference in the viewpoint is not that significant for the analogy. As I have argued before in this work, every veil piercing decision is made *in casu*, and the nature of the norms involved in the abuse of rights situation or the conflicting norms lend their attributes to the assessment. Artificial property arrangements nature centering around property is only necessary due to the enforcement procedure being about property. On another occasion, the assessment of whether to pierce the veil could reflect the personal actions and causality between them and damage. The end result is the same: one person is deprived of a benefit, whereas another retains it. It would thus seem that this sort of difference is only inherent in the doctrines reflecting the prohibition of the abuse of rights and serves not to diminish the analogic support they offer one another.

In the KKO 2004:52 decision, the Supreme Court discussed the relationship between veil piercing and artificial arrangements. The choice of the corporate form is protected by the freedom of business provided in the constitution. Formal validity of the choice does not exclude it being an artificial property arrangement, although ignoring it is possible only exceptionally. The use of the corporate form can be an artificial property arrangement if the choice to use the form cannot be explained with economic reasons, but only if the avoidance of enforcement makes it the reasonable choice.²⁹⁷ Oddly enough, case KKO 2006:45 was about piercing in an offshore company. The decision seems to dictate that attachment is possible only if the veil is pierced and the ownership is deemed artificial.²⁹⁸ The section's wording or preparatory works do not support this dual requirement. Attachment should be possible if either is present.²⁹⁹ Requiring both would lead to nonsense: the property can be attached if the formal owner is held liable for the obligations of the debtor and he is the actual owner of the property.

Veil piercing seems possible at least when there are no reasons for the corporation's existence other than avoiding attachment. This would mean setting aside the whole

296 See also *Lindfors* 2008 at 319 and *Laine* 2011 at 173.

297 See *Laine* 2011 at 173. This strong protection of the freedom of entrepreneurs to choose the form they operate under has been reasserted in later decisions in KKO 2004:96 and KKO 2006:45.

298 See KKO 2006:45 at 9.

299 For the same conclusion, see *Linna – Leppänen* 2015 at 163. The property of the corporation can be attached, but only the parts of it that are hidden by abusing the corporate form.

corporation—combining the property of the corporation and the debtor. This deviates from the wording of the section, which emphasizes the direct relationship between the property and the debtor. The total combination of properties differs from holding specific property liable for the debt. It should remain possible to repossess some property from a corporation with an actual business without piercing the veil if said property is hidden in the business and its possession has no connection to the business.³⁰⁰ That is, if the presence of the property in the corporation has no economic purpose for the business itself and corporate ownership can be reasonably explained only by the avoided enforcement. There should be no need to set aside the whole corporation.

According to Linna, the application of 4:14 of the Enforcement Code allows the courts to consider some less juridical material in addition to the traditionally significant legal criteria. The interests, received benefits and bearing of negative risks all become meaningful in a legal assessment of the arrangements. What is required of ownership for it to prevent attachment? Why was ownership arranged the way it was? The assessment must widen to cover all the relevant legal actions and facts instead of focusing on a single legal relationship. Contractual considerations affect the ownership consideration in an extraordinary fashion. The extraordinary elements come to show that the arrangement is artificial.³⁰¹

The inclusion of these non-traditional elements in the consideration is common for artificial arrangements and veil piercing. Both must consider the overall arrangement of the case and find the extraordinary material that separates the arrangement from ordinary trade or business. They must both utilize material facts to uncover the reasons behind the arrangement. The relationships between material facts and their interpretation eventually form legally significant evidence. Much of the argumentation around veil piercing presented in this work takes an isolated material fact and discuss its implications and eventually whether the fact supports or opposes veil piercing.

From this short examination, it is easy to see how artificial arrangements provide an excellent point for analogy with piercing. The KKO 2015:17 decision mentions it as one example of sections that allow piercing. The section enables piercing within the context of ownership, and the case law surrounding it has developed some criteria for the piercing doctrine. A more theoretical point of analogy is also available, as both doctrines focus on the disparity of form and substance and utilize overall assessment of the arrangement. Artificial property arrangements thus offer help in the interpretation of significant facts and forming the structure of the piercing assessment.

300 See Helsinki Appellate Court 22.9.2017 no. 1134 and *Linna – Leppänen* 2015 at 162–163.

301 See *Linna* 1999 at 342–347.

2.3. Environmental Damage Liability

2.3.1. Introduction

The Act on Compensation for Environmental Damage provides some tools for the veil piercing assessment. Section 7 Paragraph 1 Subparagraph 2 of the act directly addresses veil piercing. The scope of the application of the act is limited, however. It was created to ease the damaged parties' access to compensation in environmental damage cases.³⁰² Section 1 limits liability to environmental damage caused by activities carried out in a certain area and resulting from 1) pollution of the water, air or soil; 2) noise, vibration, radiation, light, heat or smell; or 3) another similar nuisance. It is further specified in the section that the keeper of a road, railway, airport or other comparable traffic area is also considered to be practicing the above activities. This is a significant limitation.

Section 6 of the act broadens the liability a bit. In some cases, the proper authorities or persons threatened by the damage take action to limit the damage or prevent it entirely. Alternatively, they may even remove the damage and restore the environment of the damaged site. If the expenses of those actions are reasonable compared to the threat of damage or the realized damage and the benefits those actions achieved for the operator, then the party causing the damage is liable for the expenses of these actions (section 6). The compensation liability also includes any and all investigation costs necessary to complete the aforementioned actions.

Even if the act allows for piercing, it can only be applied to a narrow selection of situations within the scope of the act, but this only limits the application of the act itself; it does not prevent deriving material for the development of a general piercing doctrine.³⁰³ Section 7 and the case law surrounding it serve as a point for analogy.

Section 7

Even when the loss has not been caused deliberately or negligently, liability for compensation shall lie with a person

- 1) whose activity has caused the environmental damage (*operator*³⁰⁴);
- 2) who is comparable to the person carrying out the activity, as referred to in Subparagraph 1; and
- 3) to whom the activity that caused the environmental damage has been

302 HE 165/1992 at 3.

303 See KKO 2015:17 at 21, referring to the Act on Compensation for Environmental Damage Section 7 as one of the applicable comparison points. See also *Sandvik* 2011 at 853.

304 Added by the author.

assigned, if the assignee knew or should have known, at the time of the assignment, about the loss or the nuisance referred to in Section 1 or the threat of the same.

In the assessment of the comparability referred to in Paragraph 1, Subparagraph 2, due consideration shall be given to the competence of the person concerned, the financial relationship with the person carrying out the activity and the profit sought from the activity.

For the sake of simplicity and scope of the study, the damage is assumed to be governed by the Act and causality is assumed to be established. With this assumption, it becomes moot whether the compensation is for the actual damage, preventive measures or reparative measures. The only question pondered is the liable person. The origin of the liability is not discussed. The assignee liability of Subparagraph 3 is not considered here. Subparagraph 1 places liability on the person who had formally undertaken the activity. This person's name appears on the permits, and those physically operating the activity work for this person. Separate personality should exclude the parent corporation's Subparagraph 1 liability for the subsidiary's operations.³⁰⁵

Subparagraph 2 describes the formally non-liable party held liable by piercing the veil.³⁰⁶ A party comparable to the operator examines the relationship between the operator and another entity to determine whether the operator is indeed an independent party acting in its own interest.³⁰⁷ If it is not, then the veil can be pierced to hold the comparable entity liable. The relationship-justifying liability needs to exist while the damaging actions occur.³⁰⁸

2.3.2. A Comparable Party

The section employs an interesting choice of words: *who is comparable*. This choice directs the interpreter to investigate whether the party takes on responsibilities or withholds rights that would normally lie with the operator of the activity.³⁰⁹ The examination focuses on the relationship between the activity and the formally non-liable party. However, Paragraph 2 of the section distracts from this and moves the focus toward facts about the relationship of the formal and actual operator of the activity. Mentioning competence and financial relationships makes them meaningful in the assessment. The wording allows examining the formally non-liable party's

305 See *Hollo – Vibervuori* 1995 at 239.

306 See *Sandvik* 2011 at 853 and *Nyström* 2015 at 9.

307 This division nicely matches the division of operational control and situational control introduced by *Pöyhönen*. The operator has the situational control, and the comparable party has the operational control. See *Pöyhönen* 1999 at 341 and 349–350 and *Mielityinen* 2006 at 466. See also chapter III.2.2.1. of this work at page 66.

308 See *Hollo* 2001 at 506–507.

309 The Finnish equivalent *rinnastettavissa* implies this even more strongly.

competence to influence the formal operator as well as the damaging operation – it allows considering two different relations: 1) *the non-liable party—practiced activity relation* and 2) *the non-liable party—formally liable party relation*. One or the other will suffice for liability.³¹⁰ Paragraph 2 mandates only that due consideration be given. This lets the interpreter assume that these factors are usually significant, but they are not compulsory requirements for liability. It is a list of examples meant to guide the court’s assessment of who is comparable to the operator.

In case law, decisions seem to be based on the relationship between the non-liable party and the activities. They focus on the interpretation of the Subparagraph 1.³¹¹ The examination in these decisions does address both relationships, but the one between the parties is most often summarily dismissed by deeming that the situation described in Subparagraph 2 is not present.³¹² Somehow, however, case law has divided these and seems to treat them exclusively, restricting the piercing consideration to facts found in the inter-party relationship, even though showing the connection to the actual operation could help prove that the non-formal operator is a comparable party.

A very similar liability issue has arisen regarding bankruptcy estates’ liability over polluted environment it possesses.³¹³ In a recent development, some environmental liabilities have been placed on entities who have not created the environmental damage but have only received the property on which the damage is situated in. In a particularly important decision, the receiving party was a bankruptcy estate.³¹⁴ This has created a conflict of norms. On one side, the clean-up or investigative costs can be placed on the party who possesses polluted property, and on the other side the separate personality of the predecessor and the estate. The estate has two kinds of obligations: debts of the estate and debts of the debtor-predecessor. Debts of the estate must be paid before the debts of the debtor-predecessor receive any contributions. Placing liability of the environmental damage on the bankruptcy estate essentially switches the legal nature of the obligation. The damage was caused by the debtor and is thus worse than the estate’s debt. However, the authorities can place the liability on the estate as it possesses the polluted property, making it the debt of the estate.³¹⁵

310 Similarly *Hollo – Vihervuori* 1995 at 239. They write that even a party that has shown no intention of participating in the operation could be held liable.

311 See KKO 1999:124, KKO 2001:61, KKO 2011:62 and KKO 2012:29.

312 The decision in KKO 2011:62 is a happy exception.

313 There was even a proposition for legislation that would have clarified the issue. The proposition failed, however. See HE 221/2018 vp and *Linna* 2019.

314 See KHO 2017:53. See also KHO 2016:44.

315 For a well-argued formulation of this view, see *Linna* 2016, especially at 395–400. See also *Karhu* 2017 at 137–139 and *Hupli* 2018.

This situation does resemble veil piercing as it deems a formally non-labile party liable. This liability is as direct as the operator liability in place by the Act on Compensation for Environmental Damage Paragraph 1 Subparagraph 2. Liability is placed based on the actual relationship the entity has with the damage-causing operation. All the legal prerequisites for the liability—possession, in this case—are with that one entity. Before bankruptcy, they are with the person not yet declared bankrupt. After bankruptcy, they are with the estate. The clean-up or investigation duty can be ordered whenever, and the prerequisites are examined at that time. When piercing the veil, the legal prerequisites have been manipulated to appear in another entity. Piercing is for situations in which the prerequisites are in reality with the entity, whereas formally, they were not. The liability of the possessor follows the holder of the legal prerequisites despite other limitations.

Piercing could apply, for example, when the parent company knows the risk of the operation causing pollution and founds a subsidiary to operate the plant. When the pollution risk is realized, the clean-up and investigation costs are ordered on the subsidiary, which then goes bankrupt, so the estate is ordered to clean up. This is not the only option, as the authorities could have opted to clean the pollution at their own expense and then claim liability in damages according to the Act on Compensation for Environmental Damage Section 6, and they could demand the subsidiary liable based on Section 7 Paragraph 1 Subparagraph 1. Then it could claim the parent liable based on veil piercing according to Subparagraph 2.

The preparatory work for Subparagraph 2 of Section 7 offers little guidance. It notes that there may be in practice situations in which the environmental damage is caused in an activity that is practiced for the benefit of another. Then the other party, in reality but not formally, is the operator of the activity as intended by the act.³¹⁶ Two observations can be made, though. First, the operation is practiced for the benefit of one besides the formal operating party. Thus, the need to perform the damage-causing operations arises from a separate entity, or the benefits of the actions likely to cause damage materialize in another entity. Second, the disparity between formal appearance and reality is significant. It is then meaningful to investigate whether the party takes on responsibilities or withholds rights that would normally lie with the operator of the activity. Departing from normally used and accepted practices supports liability, though should not suffice without additional factors.³¹⁷

316 HE 165/1992 at 26.

317 Similarly KKO 1999:124 where the Supreme Court further argued against liability by noting that the relationship of the parties was not even claimed to be anything more than a normal contract for repair work. This can be interpreted to mean that departing from normal and accepted practices supports liability.

A bit more is said about Paragraph 2 of Section 7. The preparatory works give significance to the ownership of the property where the damaging operations are performed, though financing operations alone is not enough of a basis for liability.³¹⁸ This forms an easy connection to veil piercing and straw men arrangements. Basic abuse of the corporate form provides one entity with liabilities and the other with everything that has economic value. Then the contracts and economic relationships between these corporations are manipulated. This abides by Paragraph 2's seeking of profit. If the profits and liabilities manifest in separate entities, this supports piercing. The preparatory works for the act note this and link the meaning of separating ownership from operations to other economic relations between the parties.³¹⁹ The preparatory works thus recognize the risk separation structure, which this study considers the main target of piercing. It mentions dependent entities that, in reality, act on behalf of each other.³²⁰ The economic arrangement needs to be assessed as a whole.³²¹ Ownership should not be given too great an emphasis. Even the directors of a corporation could be held liable based on Subparagraph 2.³²² In legal literature, it has been thought possible to place liability from environmental damage caused by one corporation on sibling corporations created by splitting the original corporation.³²³

The preparatory works hold the operator acting as an intermediary and its dependence on another entity as factors supporting liability.³²⁴ These are somewhat known concepts in law, though their content leads back to assessing economic relationships as well as the disparity of formal appearance and reality. Introducing these concepts and their examination would unlikely provide new tools for the piercing assessment.

318 HE 165/1992 at 27. Financier can retain some control rights given by the position's leverage. In some cases, these rights allow for holding liability. See *Hollo – Vibervuori* 1995 at 240. See also Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage art 2.6, which, in defining "operator," gives significance to "decisive economic power over the technical functioning" of the damaging activity.

319 HE 165/1992 at 26–27.

320 See HE 165/1992 at 27.

321 See KKO 2011:62 at 13–20, where the entirety of the contractual agreements and duties placed by contracts were vehemently examined to determine whether the formal party was independent and solely responsible for the damage.

322 See *Hollo – Vibervuori* 1995 at 238.

323 See *Lampi-Fagerholm* 2003 at 742.

324 See *Lampi-Fagerholm* 2003 at 742.

Unfortunately, in case law, only minimal discussion on economic arrangements is found. Subparagraph 2 is mentioned but usually arbitrarily dismissed in case law.³²⁵ In the KKO 2011:62 decision, it was discussed to some extent, but liability was eventually based on Subparagraph 1. Accounting for the comprehensive argument about the economic dependence of the operator and how the wording lends support to the piercing decision by the non-liable party's direct control over the damaging actions, the liability should have been based on Subparagraph 2.³²⁶ The decision included many considerations useful in veil piercing: dependence, outward appearance, economic whole arguments, ownership, benefit allocation and, most importantly, validating contractual control as sufficient to fulfill the control requirement in veil piercing.

The decision found it significant that the operator of a gas station (Rantahuolto) had a franchise contract with Neste Oil. Rantahuolto was obligated to sell only Neste products, use Neste identifiers in the marketing, and it was contractually restricted from any competing activity and had no option to transfer the contract to a third party. The profits and losses of the business befell Rantahuolto alone, as the contracts only limited the terms of the business. The terms were restrictive, which led the Supreme Court to deduce that the business of Rantahuolto was, in essence, the business of Neste.³²⁷ The business formed an operative whole, and the contracting parties were beneficiaries its parts. In addition, Neste has retained ownership of the gasoline pumps and some other equipment. Eventually, liability was found by determining which party oversaw the damage-causing parts of the equipment, i.e., controlled the operation. Neste was held liable.

In other cases, the Supreme Court of Finland has emphasized the nature of the actions and whether they correspond with the activities of the non-liable party. The decisions are primarily about public entities with certain responsibilities per law. It is then assessed whether these actions should be included in the legal responsibility. In case KKO 1999:124, a communal entity was responsible for arranging hospital services in an area. It then contracted to repair the buildings it owned. The contractor needed to use sand blowers in the repairs, which ended up causing damage. The

325 In one appellate court case (THO 15.2.2013 S 12/815 384), however, liability was based on comparability. The decision is apparently ill-based and goes against prior case law. An excellent commentary on the decision shows how the party held liable was in no way comparable to the contractor whose conduct caused the damage. Really, liability should have been based on Subparagraph 1, as the decision relies on whether the liable party held control over the damage-causing activity in a significant manner. See *Rikkilä* 2014 at 12.

326 For the same conclusion, see *Sandvik* 2011 at 855.

327 Neste was the franchise holder.

communal entity was not held liable since the repair work was not part of its own operations. Sand blowing had no connection to hospital work. The case would probably have been decided differently had the damage been caused by, for example, radiation or chemicals from hospital equipment.³²⁸ Further case law has accepted this view. A sufficient link between the operations of the formally liable and formally non-liable entities is required to deem the non-liable party the operator.³²⁹

2.3.3. Act on Compensation for Environmental Damage in Relation to Veil Piercing

The sufficient link norm should be linked to the interpretation of the first subparagraph. This does not make it useless for piercing, though. In the KKO 2015:17 decision, the Supreme Court adopted a rather similar view, attempting to determine whether Verkkokauppa had moved some functions of its core operations to a wholly-owned subsidiary, Arctecho. The similarity with the case law surrounding the Act on Compensation for Environmental Damage is apparent. Both seem to examine whether the non-liable entity has 1) isolated some function from its own operations by 2) transferring it to another entity. The first observation should be further elaborated, as in KKO 2015:17, the function was established through the regular practice of the business, whereas in the environmental damage precedent cases, it was derived from the legal duties of the entity. In appellate court cases and legal opinions, the function has not always been a legal duty, but commercial operations have sufficed.³³⁰ From this, it could be deduced that piercing is more readily accepted when one entity moves a part of its operations into another entity and retains control over it.

Three of the compared jurisdictions know about this sort of “environmental piercing.” The *Hempel* (2010) decision about the extension to the polluter pays principle by veil piercing in Norway. Finland has adopted it in legislation. In the United States, the interpretation of CERCLA has provided a rich case law in piercing for clean-up cost liability.³³¹ To a lesser extent, piercing has also been discussed in this context in Sweden, and some cases could have involved piercing claims but were instead resolved with the interpretation of the term operator.³³²

To summarize, the general veil piercing doctrine can adopt certain things from environmental damage compensation piercing. Case law on Section 7 of the act is

328 See KKO 2001:61 where the Supreme Court enforced the KKO 1999:124 decision but held that repairing a road was closely related to the municipality’s legal duty to operate roads.

329 See KKO 2001:61, KKO 2011:62 and KKO 2012:29. See also *Määttä* 2005 at 322.

330 See THO 12.4.2001 S 00/97 and *Kumpula* 2002 at 5.

331 See, for example, *Figueroa* 2012 at 732–734 and *United States v. Bestfoods* (1998).

332 See *Larsson* 1995 and MÖD 2013:28.

applicable. From case law and the wording of the section, it could be derived that 1) the court can examine the non-liable entity's control over both the formally liable party and the operation causing damage itself; 2) the economic arrangement needs to be assessed as a whole; 3) contractual control is sufficient to fulfill the control requirement in veil piercing; and 4) piercing is more readily accepted when one entity moves a part of its operations into another entity and retains control over it.

2.4. Tax Avoidance

2.4.1. Disparity of Substance and Form

In the KKO 2015:17 decision, the Supreme Court of Finland referred to the Law on Taxation Procedure Section 28 as an example of a norm allowing piercing.³³³ It was used as an example of a norm that allows disregarding the given legal form if it does not match the reality of the situation. Tax authorities have been given intrusive instruments to assess tax avoidance situations as they are guardians of significant public interests. It is important to note that the tax avoidance section can be applied to a situation other than the use of corporate entities, but abuse of the corporate form is definitively included. The tax avoidance norm allows piercing the veil and also enables a multitude of other results. Any legal action can be targeted by it. The tax avoidance norm will be examined here only in regards to piercing the veil.

The Law on Taxation Procedure Section 28 prohibits tax avoidance, which is defined as giving a judicial form to some circumstances or actions that, in reality, do not match the nature or purpose of the arrangement. If the tax authority does find this, then a tax is assigned as if the correct legal form were used. The taxpayer is given a chance to prove that the form does, in fact, match the reality of the case. Alternatively, they could prove that the arrangement was not undertaken to pay less tax but for a valid business reason. If the taxpayer succeeds, the given form is used to assign the tax, and the norm applies only to this assignment. The section requires disparity between substance and the given form as well as the intent to avoid paying taxes. The reality is understood as the economic nature of the arrangement.³³⁴

There is currently an ongoing tax reform in development based on the Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. The directive

333 KKO 2015:17 at 21.

334 See *Knuutinen* 2006 at 790.

leaves the national method's implementation to the Member States.³³⁵ The main tools of the directive target re-attributing income, hybrid mismatches, taxing asset relocations and interest deductions. In addition, the directive does have a general anti-abuse rule. This rule is to be applied to arrangements that are not genuine. When evaluating whether an arrangement should be regarded as non-genuine, it could be possible for Member States to consider all valid economic reasons, including financial activities.³³⁶ The evaluation needs to account for all the facts and circumstances of the arrangement. The arrangement shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons, which reflect economic reality. The wording of the directive matches the domestic general norm on tax avoidance, and it seems unlikely that the implementation of the directive would lead to changes in the domestic norm.

By default, the civil law characterization of the arrangement is used as the basis of taxation.³³⁷ From available legitimate options, the taxpayer has the right to choose the one with the least tax consequences. The tax avoidance norm allows the disregard for this chosen form in certain situations and substitutes it with a form that better matches the economic reality of the situation.³³⁸ Should the arrangement prove questionable even in relation to civil law norms, such questionability can support the disregard for the arrangement in taxation.³³⁹ The civil law characterization of the arrangement is not deemed invalid, though. The effects of the disregard are limited to taxation only.³⁴⁰ This is a common feature in reparative legal instruments, especially in those that reflect the prohibition of the abuse of rights.³⁴¹

Tax benefits are an essential part of business arrangements. If the accrued benefits are such that the legal system was not intended to create them, then the arrangement can be deemed tax avoidance.³⁴² The tax avoidance norm should not be used to build a taxation system that is tighter or more comprehensive than the one the legislator intended, nor can its scope of application be increased at the tax

335 See (EU) 2016/1164 at (3). But the directive sets a common minimum level of protection.

336 See (EU) 2016/1164 at (11).

337 For a more accurate description, see *Myrsky – Rabinä* 2015 s. 343. See also *Tikka* 1972 at 215–216.

338 *Tikka* 1972 at 216–218. See also *Knuutinen* 2009 at 204. The economic reality is only an indicator pointing out the correct legal form. The tax decision is not made based directly on the economic situation.

339 See KHO 2014:66 and *Lindgren* 2016 at 138–140 and 146.

340 See *Tikka* 1972 at 215–216.

Similarly, the effects of disregarding the artificial property arrangements are limited to enforcement proceedings only. No effects on the civil law arrangement have occurred. See also *Artificial Property Arrangements* 12.10.2016 no. 1015 S 15/1470, HE 275/1998 at 7 and *Linna – Leppänen* 2015 at 147–148.

341 See also *Myrsky – Rabinä* 2015 s. 364 and KHO 2013:194. The abuse of rights doctrine partially overlaps with tax evasion norms.

342 *Myrsky – Rabinä* 2015 s. 349. See also *Knuutinen* 2009 at 192–193 and those discussed therein.

authority's discretion.³⁴³ The norm can thus be used to enforce the legislative intent. This excludes applying the norm to arrangements that the legislator has accepted either expressly or silently.³⁴⁴

The avoidance provision should not limit the taxpayer's right to choose the legal form to achieve desired results should they be achievable in multiple ways, even if the chosen form leads to less taxation than other available forms. Lately, though, the tax authority has sought to limit the right to choose a less tax-heavy form.³⁴⁵ However, the most aggressive expansive interpretation of the section has been stopped by the Supreme Administrative Court of Finland.³⁴⁶

2.4.2. Legitimate Business Reason

These unintended tax benefits unintended by the legal system can be justified by showing that the arrangement had acceptable purposes besides said benefits. Legitimate benefits to running the business would constitute such a justification. Then, the application of the tax avoidance section becomes a balancing act, where the tax benefits and legitimate business reasons are weighed against each other. The tax authority needs to show the unusual nature of the arrangement and the tax benefits it creates to indicate tax avoidance, whereas the taxpayer can then counter by showing the legitimate business reasons.³⁴⁷ Should the tax benefits outweigh the business reasons, the arrangement becomes tax avoidance.³⁴⁸ The existence of business reasons does not prevent application if they are minor compared to the tax benefits.³⁴⁹ Especially if the practiced business undergoes no real changes while accruing tax benefits, the arrangement is easily tax avoidance.³⁵⁰ In other words,

343 KHO 2008:6, *Knuutinen* 2012 at 132–133, *Juusela* 2014 and *Myrsky – Råbinä* 2015 s. 349. See also *Tikka* 1972 at 208, recognizing the connection of preventing tax avoidance and the issue of how much freedom the tax authority should have when interpreting the general tax avoidance norm.

See also *Raitasuo* 2018 at 372–373 and 377–380. He makes a compelling argument that the avoidance norm is in fact under a lot of ideological pressure from lobbyist groups seeking to affect the interpretation.

344 KHO 2008:6, *Knuutinen* 2012 at 132–133, *Juusela* 2014 and *Myrsky – Råbinä* 2015 s. 349.

345 See *Shumskaya – Tuominen* 2017 at 89 and *Juusela* 2014 at 57–61.

346 See *Shumskaya – Tuominen* 2017 at 104–105 and KHO 2008:6.

347 See *Mehtonen* 2005 at 147–148. But see the value added tax cases C-138/86 and C-139/86 *Direct Cosmetics Ltd and Laughtons Photographs Ltd.*, suggesting that even if business reasons are present, the arrangements can be tax avoidance. This could mean that the avoidance of value added tax does not necessarily require a subjective intent to avoid the tax. See *Streng* 2019 at 43–44.

348 It is possible, but not necessary, to use numeric values derived from accounting in this weighing. They should not be given decisive meaning, though.

349 See KHO 2014:66 and *Myrsky – Råbinä* 2015 s. 351. See also *Tikka* 1972 at 217, who is of the opinion that tax avoidance norms mainly cover those cases where no purpose other than tax avoidance can be shown.

350 See *Ryynänen* 2000 at 117–118. See also KHO 1982 B II 571, where tax avoidance was found since the CEO's position had not really changed after arrangements in the methods of compensation. See also *Knuutinen* 2009 at 197.

if the business arrangement is operated just the same as before the arrangement was undertaken, the only change being the tax treatment, the arrangement is tax avoidance. This is a clear similarity with the Environmental Damage Liability Act. This would provide even more support to piercing when an existing business is divided into new entities without changing the operation in any real manner, i.e., only in form.

An interesting disparity arises, as both veil piercing doctrine and the tax avoidance section examine legitimate business reasons. Taxation reasons can constitute a legitimate business reason for a corporation arrangement targeted by veil piercing. The question is whether the valid business reason remains even if the tax benefit is denied. The solution could be based on the probability of the benefit. If the benefit was thought to be almost certain and held little to no controversy, then the reason would no doubt be legitimate. If, however, the tax benefit itself is a gamble and the taxpayer should have known it would likely be denied later, then the tax reason would not constitute a legitimate business reason to prevent piercing.

In case law and legal literature, it has appeared that the arrangement can be deemed tax avoidance only partially.³⁵¹ Insofar as the business arrangement has a legitimate business purpose, it has been accepted. Yet the parts that had no such purpose were disregarded. The arrangements can be disregarded partially. Case law has also accepted the courts' discretion over the consequence. In a few cases where tax avoidance was found, the Supreme Administrative Court of Finland did order taxation according to the true form of the arrangement but with lesser tax consequences.³⁵² It is important to note, though, that the tax avoidance norm was applied to these cases, but the tax consequences were determined by applying the hidden dividend distribution norm.

Completely disregarding a corporation is currently a rare occasion in taxation.³⁵³ In cases where this has been done based on the tax avoidance provision, the courts have emphasized certain facts, for example, few stockholders, low capital, no employees besides the stockholders, allocation of benefits from corporate operations and low number of assignments.³⁵⁴ Also, the allocation of business risk³⁵⁵ and control³⁵⁶ have been deemed significant in proving the legitimacy of the business. Simplifying corporate group structure and thus cutting costs can be an acceptable business reason.³⁵⁷ Other practical considerations are laid out in a memo regarding

351 *Ryynänen* 2000 at 119–121. See also KHO 1996 B 534 and KHO 1997:77.

352 *Ryynänen* 2000 at 116–119. See also KHO 1989 B 550, KHO 3.10.1997 t. 2458.

353 See the tax authority's guidelines on the application of tax avoidance sections 2016 at 7.2. See also *Tikka* 1972 at 266–271.

354 *Myrsky – Råbinä* 2015 s. 358–360 and the court cases cited there.

355 KHO 103/2010 not published (as cited by *Knuutinen* 2012 at 139–141).

356 KHO 2016:71.

357 KHO 2016:72 and Helsinki administrative court 2009 09/1311/6.

one tax avoidance norm,³⁵⁸ which mentions using special purpose entities, shutting down operations soon after funds have been transferred away from the entity³⁵⁹ and selling operations soon after the arrangement is completed.³⁶⁰

The typical tax avoidance situations, according to *Matti Myrsky* and *Timo Rabinä*, are 1) the disparity of legal form and economic content; 2) consecutive or to-and-fro legal actions (chaining); 3) lack of interest situations; and 4) joint interest. Corporate separation settles with the first item on the list. This does not mean that the other items are insignificant. Chaining legal actions can be found in piercing case law also. A corporation could have moved some functions it used to perform itself and immediately bought those services from the other entity. Lack of interest situations appear, for example, when a straw man is used. Joint interest by default exists between the corporation and its owners, and the group it might belong to and thus this criterion cannot be effectively used to discern legitimate and illegitimate corporate use. However, should the corporation do business only with interested parties, some suspicion is well-founded. This sort of behavior should always cast doubt and support veil piercing. The significance of these should not be overestimated, as establishing a legitimate business reason should suffice to counter these.

2.4.3. Tax Avoidance Norm's Relation to Veil Piercing

It is easy to detect similarities between the tax avoidance norm and veil piercing. The artificiality requirement of veil piercing corresponds well with the disparity of substance and form found in tax avoidance.

The second similarity is the business reason consideration. In both doctrines, a legitimate business reason prevents the disregard for legal form. There is no reason the concept of legitimate business reason should be understood fundamentally differently in each doctrine. Two exclusions need to be made, however. First, in veil piercing, obtaining an acceptable tax benefit is a legitimate business reason.³⁶¹ In tax avoidance, it cannot be, as the norm targets behavior that seeks to abuse tax norms. If obtaining tax benefits would justify the arrangement, then the tax avoidance norm would have no function whatsoever. Second, in tax avoidance, the reallocation and limitation of the corporation's risk does constitute a legitimate business reason. If risk is understood as costs only (*negative risk*), in veil piercing situations, its

358 Valtiovarainvaliokunnan mietintö VaVK 49/1995 vp

359 KHO 3.10.1997 t. 2458.

360 The memo also mentions chaining legal action in corporate rearrangement schemes. This criterion has been discredited in legal literature. See *Mehnton* 2005 at 144–145, who states that it is almost inevitable that rearranging corporate relations within group structures requires several consecutive legal actions. These actions cannot be assessed separately from the totality of the arrangement.

361 See KKO 2015:17.

allocation does not speak of the legitimacy of the arrangement. Veil piercing targets arrangements where the allocation of negative and positive risks are manipulated to the detriment of the creditors. Risk can be understood as both the risk of costs and the chance of profits, but in veil piercing, these two should be kept separate in examination. To put this more clearly, tax avoidance aims to prevent the abuse of tax norms, and thus, tax benefits do not constitute a legitimate business reason when considering the tax avoidance norm. Veil piercing aims to prevent the abuse of corporate form and limited liability, and thus, the reallocation of risk does not constitute a legitimate business reason when considering piercing. Aside from these two limitations, the legitimate business reason practice developed in tax avoidance case law and can be used in veil piercing also.

The Supreme Court seems to have adopted the tax avoidance norm's burden of proof structure for veil piercing.³⁶² The tax authority needs to show disparity of substance and form, which the taxpayer can then disprove by showing legitimate business reasons. The structure is not expressed directly in the KKO 2015:17 decision, but the argument of the court seems to follow this pattern. First, the facts that constitute artificial and reprehensible use are examined. This seems to shift the burden of proof, as the Supreme Court next assesses whether the defendant provided sufficient legitimate business reasons for dividing the business into two entities. The defendant was unsuccessful in this, and the veil was pierced. A similar structure can be found in the artificial property arrangements section in the Enforcement Code. The structure should be accepted as the standard for veil piercing.

As for the scope of application, veil piercing and tax avoidance partially overlap. The tax avoidance norm can be used as justification for piercing the veil for the benefit of the tax authority. There should be no obstacles to utilizing the veil piercing doctrine within the tax avoidance norm to support the disregard for the company in taxation. If the strict requirements of piercing the veil are fulfilled, the disparity of the legal form and reality of the situation are likely present. It cannot be used to substitute the tax avoidance norm. An entirely separate issue is whether the veil could be pierced to benefit the tax authority as a creditor should the taxpayer neglect the duty to pay. The tax avoidance norm, whether applied to the case or not, does not preclude this, as it applies only to assignment of the tax. There is no reason to treat the tax authority differently from other creditors in this regard. The veil could be pierced for its benefit, though the doctrine of legitimate expectations should prevent the tax authority from reassessing the situation. If the corporate arrangement was assessed in the assignment of the tax, the taxpayer should be allowed to trust this assessment, and the tax authority should not be granted piercing relief based on the same arrangement it already deemed legitimate.

³⁶² But the structure could also be explained with the principle of preponderance-of-the-evidence. About this principle, see *Saranpää* 2010.

2.5. Pay Security

Section 17 of the Pay Security Act determines which parties are liable for repaying the amounts covered as pay security.

(1) The employer, a responsible partner in a limited partnership and a partner in a general partnership and another party responsible for the payment of employees' claims shall repay the amounts paid as wage guarantee to the State, including interest under Section 4(1) of the Interest Act (633/1982) calculated from the date of the decision.

The section defines from whom the State can collect the amount it has paid as pay security. A responsible partner in a limited partnership and a partner in a general partnership, by law, are responsible for the liabilities of the partnership. The section only makes implicit that the employees do not need to collect the unpaid wages from these parties. They can instead rely on the pay security system and leave the risk of collection and insolvency to the State.

Considering veil piercing, the interest focuses on “another party responsible for the payment of employees' claims.” The preparatory work of the section states that the expression covers situations in which the employer has made arrangements that fulfill the requirements of piercing the veil.³⁶³ Unfortunately, the preparatory work or the wording of the section give no hints whatsoever as to what makes veil piercing acceptable. Veil piercing remains a preliminary question for the application of the section on a formally non-labile party. It follows the piercing doctrine developed in case law. There are piercing cases from this exact situation, though the doctrine laid out in the KKO 2015:17 decision applies as well.

In the decision in KKO 1996:2, the Supreme Court held a formally separate corporation liable for wages covered by the pay security system based on piercing the veil. The case examined actual control over corporate actions, straw men arrangement and how the operation appeared to an outside party. Similar pay security cases can be found within appellate court case law.³⁶⁴ KKO 2017:94³⁶⁵ is a more recent case in the pay security context. In it, piercing was accepted, and the decision discussed systematic neglect of obligations and the symbiotic relationship between the corporations. Genuine and legitimate business reasons were also of high significance. These pay security cases emphasize which corporation benefitted

363 See HE 104/1998 at 17 and HE 219/2009 at 6. The earlier preparatory works explicitly mention the KKO 1996:2 decision and three appellate court cases justifying piercing. Other than that, the information in these two preparatory works is identical.

364 Appellate Court of Turku 28.11.1986 no. 974, Appellate Court of Turku 21.4.1989 no. 326 and Appellate Court of Turku 8.12.1989 no. 1121. See also *Leppänen* 1991 s. 295–309 and KM 1992:32 s. 372.

365 See also Appellate Court of Turku 29.6.2016 no. 711.

from the employees' work, ownership, actual control, the reality of the business relationship between the companies and the location of offices. Additionally, they held meaning as to whether an outside party could discern the involved corporations from each other.

These cases have apparent similarities with the KKO 2015:17 case. The objective facts in the evaluation match. Another similarity is that both the pay security decisions and the KKO 2015:17 decision have significant community interest behind them. The KKO 2015:17 case involved an EU-level regulation demanding the national legislation to guarantee the payment of remunerations. Pay security cases involve the security provided for workers and the prevention of system abuse. Another commonality is that the creditors are involuntary in both. In none of the cases has the creditor had the chance to affect whether a credit relationship will be formed or the terms of it. The Supreme Court in KKO 2017:94 even emphasized the pay security system's inherent vulnerability to abuse. Based on these similarities, the wage security piercing case law is fully utilizable for the development of the piercing doctrine. There is no apparent reason to develop piercing doctrine separately in the pay security environment.³⁶⁶

2.6. Criminal Liability and Forfeiture

2.6.1. Criminal Liability and Forfeiture or Piercing the Veil?

Often, the behavior that could be remedied with veil piercing nears criminal conduct, namely debtor's dishonesty. There is only a thin line between the two. In this section, I proceed to examine the scope of criminal liability, namely what kind of conduct it remedies and whether it leaves any room at all for veil piercing. For this purpose I will analyze debtor's dishonesty. Another relevant factor with criminal liability is the forfeiture of the proceeds of crime. Along with having to pay compensation for damages caused by the crime, this doctrine is meant to prevent benefitting from the crime in any way. From this, it follows that if the conduct is found to be criminal, there is less likely a need for piercing the veil, as creditors can demand compensation for damages. The forfeiture can also be extended to persons not guilty of the crime based solely on their relationship with the guilty party and the unexplained wealth they possess. This extension reflects the doctrine of the prohibition of abuse of rights and has some similarities with veil piercing and is thus worth looking into.

³⁶⁶ Cf. *Koskinen* 2018. He sees at least the employment law doctrine of piercing as separate from the rest. He does not provide much argumentation to support this opinion, though. This work sees piercing as a conflict of norms where one of the norms is abused. Naturally, the nature of the norms involved guide the piercing decision, creating different patterns in each field of law. This could explain the observation of *Koskinen*.

Due to the strong moral condemnation of criminal acts, the legislation allows much more intrusive methods for the prevention, investigation and remedying of such acts. It is of significant advantage to a creditor trying to get payment if a criminal investigation is launched. With veil piercing, we are interested in situations where someone formally not liable is held liable for the obligations of another. Two sections of criminal law fulfill this requirement. Chapter 9, Section 2 places criminal liability on the legal person for crimes committed in its operation. Criminal liability of a corporation follows from the formal relationship it has with the natural person actually performing the criminal act (CC 9:2 and 3).

The setting is flipped in CC 5:8, which allows holding natural persons liable for crimes committed in the operations of a legal person. CC 5:8 extends the criminal liability for the debtor corporation's actions to those holding formal positions on the board and the CEO. It also allows holding a person liable if they, in reality, control the corporation but hold no formal position in it. No clear definition exists as to when someone in reality holds control, although making decisions and contacting clients have been deemed significant.³⁶⁷

In the literature, *Reima Kukkonen* does provide a much more detailed description. He names share ownership, participation in profits, and the ruining effect of the corporation's bankruptcy on the person's finances as significant factors. He continues that the concrete actions of the person also need to be taken into account, for example, participation in meetings, communication with financiers and co-operating businesses as well as giving orders outside the formal procedures in a corporation. When assessing the evidence, the business partners' perceptions of the controlling person can be significant, as well as the allocation of profits to the claimed controller or their close parties.³⁶⁸ Finally, resigning the formal position shortly before the crime combined with the new holder's lack of competence on that position hint toward the resigned person holding control.³⁶⁹ I will discuss these themes further in V.3.4.2. of this work.

Liability is placed on the person(s) who should have acted within the organization, i.e., who had the duty to act. The assessment as to who this is is an overall assessment based on the formal position, assignment of tasks and competence to act on behalf of the organization.³⁷⁰ This makes disregarding the separate personality shield justified by law, and no piercing is then required. Criminal liability then allows the forfeiture of the proceeds of a crime and liability for damages caused by the crime. Thus, the separate personality is bypassed, and compensation for creditors is enabled.

The following part of this work begins with the examination of the debtor's dishonesty. This is followed by a brief look into forfeiture.

367 See KKO 2001:86. About control in a corporation, see V.3. of this work.

368 *Kukkonen* 2018 at 35.

369 See HE 44/2002 vp at 163–164.

370 See *Frände* 2012 at 270–271.

2.6.2. Debtor's Dishonesty

2.6.2.1. General on Debtor's Dishonesty

Whether by forfeiture or extended forfeiture, a crime is still necessary to access assets of a person who was formally not liable. The attempt here is to limit the scope of piercing the veil, and the examination mainly focuses on the debtor's dishonesty as it targets similar activity as piercing—conduct that potentially damages creditors and benefits the debtor/controller.

Debtor's fraud (CC 39:2) is not considered relevant as it affects situations in which the debtor is misleading or withholds some meaningful information. Although debtor's fraud considers arrangements where property has been transferred to a formal third party, it does not criminalize the transfer of such arrangements. The protected interest behind debtor's fraud is, instead, the adequate information of insolvency proceedings. Not revealing potential veil piercing relationships between corporations would not fulfill debtor's fraud, but not disclosing transactions between close corporations would. The common view in criminal law has been that the debtor's dishonesty targets arrangements where assets actually leave the ownership of the debtor, whereas debtor's fraud can target arrangements where assets leave the debtor's ownership only in form.³⁷¹ These in-form arrangements are then dissolved with other remedies. Veil piercing is not a remedy for this sort of dissolution. Veil piercing targets arrangements that are valid in a civil law sense. In these arrangements, piercing allows for holding additional persons liable despite the transfer being genuine where the conduct is dishonest and has caused damage.

Kukkonen has examined the relationships among artificial property arrangements, debtor's fraud and debtor's dishonesty. He arrived at the conclusion that the nature of artificial property arrangements creates problems in the traditional division, mainly because both could be applicable sometimes if the artificial arrangement is made to include an entity from a foreign country.³⁷² This observation is valid here as well, as piercing targets artificial corporate arrangements. Both debtor's dishonesty and debtor's fraud could thus sometimes apply to the same legal actions that allow veil piercing. Still, applying debtor's fraud would require withholding information in an insolvency procedure.

The Criminal Code Chapter 39, Section 1 incriminates the debtor's dishonest conduct. According to it:

A debtor who
(1) destroys³⁷³ his or her property,

371 See *Heinonen* 1966 at 295–296, *Koponen* 2001 and *Kukkonen* 2014 at 833–838 and 846–850.

372 See *Kukkonen* 2014 at 848–850.

373 The term “destroy” is used in the translated version provided in Finlex. The term does not entirely match the Finnish term used in the section. The term needs to describe actions that are meant to remove

- (2) gives away or otherwise surrenders his or her property without acceptable reason,
- (3) transfers his or her property abroad in order to place it beyond the reach of his or her creditors, or
- (4) increases his or her liabilities without basis and thus causes his or her insolvency or essentially worsens his or her state of insolvency shall be sentenced for dishonesty by a debtor to a fine or imprisonment for a maximum of two years.

Criminal liability, according to this section, needs three elements: an action, insolvency and causality. A fourth requirement is the debtor status, though that seems obvious. The relevant actions are described in sections one through four. These actions, in turn, need to cause the insolvency (or essentially worsen it). The action need not be the only reason for insolvency, but it needs to fundamentally affect the outcome.³⁷⁴ If, however, the insolvency is due to an unforeseeable event, the debtor's action does not incur criminal liability.³⁷⁵

This liability in itself does not extend the sphere of persons liable for corporate obligations. It offers no additional funds for the satisfaction of creditors. It is an additional person who is liable on the basis of her criminal actions. Criminal liability allows the creditors or bankruptcy estate to claim damages. The liable person is not obligated to compensate more than the damage caused.

The line between the legitimate attempt to save the business and dishonest conduct is unclear. The first three parts of the section evidently do not constitute a legitimate attempt to save the business. Incurring additional liabilities, on the other hand, could possibly be intended to save the business. Still, it needs to be determined what actions are such attempts.

According to *Ari-Matti Nuutila* and *Kaarlo Hakamies*, with dishonesty by a debtor, the solution can be found by thoroughly assessing the actions taken and their effects on the crisis of the business. If the incurred liabilities have no effect whatsoever in making insolvency less likely, then they are clearly not legitimate attempts. This includes actions that prolong an unprofitable business, support unremunerative production or are meant to acquire assets that have no benefit for the business. At the extreme, any unfavorable commitment with absolutely no basis on the business,

property from the creditors' reach. Physical destruction is one method of this and concealment would be another. See HE 66/1998 at 161.

374 HE 53/2003 vp s. 39.

375 See *Koponen* 2007 at 123. For criminal liability not to apply, the debtor needs to argue that there was no possible way to prevent or mitigate the event that enabled the otherwise acceptable transaction to cause the insolvency.

such as guaranteeing loans, obviously has no basis.³⁷⁶ In another instance, Hakamies further elaborates that the key element is to determine the critical point, after which practicing unprofitable business so clearly hurts the creditors that it must be ended. After this point, incurring any additional liabilities would constitute dishonesty by a debtor. The actions are not within the acceptable negative business risk, but the intentional damaging of the creditors.³⁷⁷

Harri Vento uses a similar concept of acceptable business risk. Acceptable risk is one that is in the interest of society. In a normal course of business, some risk is always involved, and it is perfectly acceptable to include the same level of business risk even in a crisis. If the level of risk does not change with the actions taken, the risk is always acceptable. An acceptable risk level is when the expected return surpasses the additional negative risk to the creditors. As the violation of creditors' rights becomes more apparent, it gets harder to deem the risk acceptable. The assessment of risk becomes a weighing of interests between the additional negative risk to the creditors and the returns sought.³⁷⁸ Some guidance to the assessment can be derived from the duty of care standard of Company Act 1:8.³⁷⁹

The actions described there are typically such that are used to transfer property outside the creditors' reach. Destroying, surrendering and transferring abroad could be categorized simply as siphoning funds. Increasing liabilities does not fall under this category directly. The benefits obtained by neglecting obligations can be siphoned away, though.

2.6.2.2. Debtor's Dishonesty and Piercing the Veil

2.6.2.2.1. Burden of Proof

The differences between criminal liability and veil piercing can be placed at two levels: One is concrete normative prohibitions, that is, which actions are actually sanctioned by each of the doctrines. The other level is the more general level of legal principles. Criminal law itself is very peculiar in its principles. Compared to other fields of law, the differences are apparent. For the questions asked in this work, the most significant difference would be the level of proof requirement.

In criminal cases, the prosecutor needs to prove the case beyond reasonable doubt, not only that the perpetrator did the criminal action but also the intention or excessive negative risk. If the Criminal Code provision has multiple requirements, each must be proven beyond reasonable doubt. Failure to do so with any of these

376 See *Nuutila – Hakamies* 2004 at 27: Velallisen epärehellisyys: Tekotavat: Velvoitteiden lisääminen. See also *Kukkonen* 2018 at 100.

377 *Hakamies* 2011 at 190.

378 See *Vento* 1994 at 236–240 and 244.

379 Similarly *Vento* 1994 at 237–238.

leads to dismissal of the charge. This is only reasonable since criminal liability is the most extreme measure offered by the legal system.

Let us take the debtor's dishonesty as an example. The three required elements are action, insolvency and causality. The prosecution needs to prove all these beyond reasonable doubt. It will not matter if the action and insolvency are proven 100% if the causality is only 50%. Although the totality of the proof is 250/300, there could still be reasonable doubt. The certainty of one requirement is not allowed to compensate for the lack of evidence for the other. They are all examined strictly separate.

If we compare this to veil piercing, we notice some key differences. The veil piercing claim is a civil claim. The level of proof required is lower as the provisions of the Code of Judicial Procedure apply. Instead of beyond reasonable doubt, the claimant needs to give plausible evidence of the facts. Generally, this is thought to mean that, more likely than not, the case exists, translating to 51% proof. This is reasonable since the claimant's possibilities to acquire evidence are much narrower than those of officials in criminal procedure. If we apply this to a piercing case, the claimant needs to prove that the use of corporate form, control, reprehensibility, artificiality, damage and causality more likely than not exist in the case. In addition, within the sphere of property law, separation in the evaluation of these factors need not necessarily be absolute. Failing to prove one factor completely can be compensated by the strong evidence of another. It is in the nature of an overall assessment to make this sort of compensation.

As an example, the control is proven 100%, artificiality 60%, reprehensibility 40%, damage 100% and causality 60%. The totality of the proof is 360/500. Although the totality cannot be used as such to determine the outcome, strong evidence given in support of one of the factors can compensate for some of the evidence lacking in another.

It is important to note that control, damage and causality are much easier to prove and are commonly present in a piercing situation. Thus, they should not be allowed to compensate the lack of artificiality or reprehensibility extensively.

2.6.2.2.2. Manipulating the Debtor Status and Other Requirements of Debtor's Dishonesty

Criminal Code Chapter 39, Section 11 explicitly states that only the debtor can be held liable for the crime. Only actions made as the debtor can fulfill the requirements of dishonesty by a debtor. Yet it remains important to ask the question: When is the corporation a debtor? The creation of an obligation or a debt makes for the debtor

status. The problem is that this time of creation can be manipulated to a great extent. Take the KKO 2015:17 case for instance. Verkkokauppa had continuously neglected the payment of remunerations, but it was considered the debtor until Teosto demanded payment. Arctecho claimed it had no obligation to pay remuneration since its operations were abroad. After this claim had been proven false, the debtor status was undisputed and clear. It is possible to manipulate the emergence of the debtor status as well as the insolvency status required by the debtor's dishonesty.

The traditional use of veil piercing in criminal law has been determining some status necessary for the application of a criminal provision. For example, the KKO 2018:20 decision took veil piercing as a preliminary question when determining how the accounting should have been done.³⁸⁰ If they would have pierced the veil, this would have meant that the accounting should have been made to include the total enterprise instead of being entity-specific. As the accounting was entity-specific, piercing would have meant that accounting fraud sanctions were applicable. So in some cases, veil piercing could act as a remedy for this sort of status manipulation to avoid some relevant status.

In debtor's dishonesty, this gives the controller an opportunity to manipulate who exactly owns the property.³⁸¹ If the controller has transferred some assets to herself from the corporation, veil piercing could be used to determine that they are, in fact, the same person in regards to the ownership. This, in turn, would mean that the assets never left the debtor in the sense that the debtor's dishonesty requires. This would then make the transfer punishable only through debtor's fraud if the debtor does not reveal the transfer. This would solely benefit the controller, though, and that person has usually chosen to operate in corporate form. This sort of self-piercing should be denied.³⁸² Kukkonen describes another example: When one person controls several corporations, that person could manipulate one of them to have a tort claim against another based on a crime the controller herself committed as the representative of the liable corporation. The separate personality in these situations could be denied and the tort claim rejected.³⁸³

If the business can reasonably expect a crushing liability in the future, veil piercing could apply. If the operator of the business knows that such a liability is certain or very likely and continues the business, veil piercing is a possible remedy, especially so if the operator makes no further investments in the business or does not prepare

380 Similarly in KKO 2010:85. See also *Kukkonen* 2014 at 835–836 and *Kärki* 2018b.

381 See *Kukkonen* 2018 at 39–40.

382 See V.8.3.2. of this work.

383 *Kukkonen* 2018 at 368.

for the liability in any way. The operator knowingly accumulates as much benefit as possible before the obligation manifests. This avoids criminal liability, but veil piercing should apply. Though Criminal Code 39:1 does incriminate increasing liabilities without a basis, this sort of behavior does not necessarily fall into this category. The benefits can be siphoned all the while, tending to existing liabilities without incurring additional liabilities.³⁸⁴

If the obligation is likely enough, then it needs to be accounted for when utilizing the solvency test (Company Act 13:2). The reasonably unexpected but still unknown creditor can easily be damaged in other ways should the arrangement be designed for this. The issue is whether the obligation is likely enough to affect the outcome of the solvency test. When a business is split into multiple entities, it can be assumed that the arrangement is perpetual. This creates a discrepancy between the solvency test and piercing. The solvency test needs to account for only a relatively short time period when assessing the likelihood of an obligation. The corporate arrangement can be made to circumvent this obligation since the controller of the corporation can be certain that the obligation will manifest sometime during the corporate existence. The certainty of this obligation does not necessarily affect the solvency test at all if the obligation is unlikely to manifest soon.

The assessment becomes dependent on the probability of the liability. This, in turn, makes it a question of business risk. To what extent is an unprofitable business operation allowed to take on a negative risk in pursuit of profit?³⁸⁵ The realization of a business's negative risk should not incur criminal liability. On the other hand, running the business by placing negative risks on the creditors should not be allowed either. Veil piercing would target arrangements where the business's negative risk is made to materialize outside the sphere of persons benefitting from the business and holding the assets. The similarity to debtor's dishonesty and incurring excessive liabilities ends there. Piercing does not require insolvency, or the intentional causing of insolvency. Piercing is not tied to transfers of assets, although siphoning would support piercing.

The application of dishonesty by a debtor requires transactions. The debtor needs to either actively lose some assets he already has or incur additional liabilities. If the debtor does not cast away the funds but first structures the operation so that the gains flow into one entity and liabilities into another, there is no debtor's action. Alternatively, the operation itself could be deemed a crime from the start if the due payments are systematically neglected from the beginning.³⁸⁶ As debtor's dishonesty requires intent to cause the insolvency, if more time passes from the action to the manifestations of the insolvency, it becomes increasingly difficult to show this

384 See, for example, the Swedish case NJA 2014 s. 877.

385 Similarly *Hakamies* 2011 at 190.

386 Similarly *Tapani* 2014 at 762 and those cited therein.

intention.³⁸⁷ When liabilities are neglected, there is a clear duty to act, but it is ignored. This action is the basis for criminal liability. Channeling the gains into another entity involves no such action; it only means that the debtor had no assets to begin with. Therefore, there is no way for criminal liability to attach since the debtor did not need to destroy, surrender or transfer property or incur additional liabilities. If the benefits of the operation are siphoned in this manner, though, there are no accumulated assets to cover future liabilities. There is nothing to prevent this sort of limitation. Debtor's dishonesty would apply only when future liabilities were known well enough that they needed to be accounted for. Arguably, this leaves a large window for manipulation. Similarly, veil piercing gives significance to whether the arrangement was made to avoid specific and reasonably obvious liabilities.³⁸⁸

2.6.2.2.3. Chaining Bankruptcies

Chaining bankruptcies as a certain pattern of the debtor's dishonesty should be noted here. Despite the heading being piercing the corporate veil, in some cases, CC 39:1 applies to these arrangements. Chaining bankruptcies refers to business activities where one company accumulates debt and liabilities until it can no longer operate or until the controller feels the need to "cleanse" the operation of liabilities. During the operation of the business, any gains are allocated to one company, whereas the liabilities stay with the other company. This can be achieved by renting a means of production from the benefitting company to the other or some other undervalued transaction.³⁸⁹ This creates a symbiotic relationship between the two, where the benefitting company cannot operate and be profitable without the other company operating unprofitably.³⁹⁰

These arrangements can operate seemingly within the limitations of law but can still end up incurring the criminal liability for the debtor's dishonesty. By default, making a bad—even unprofitable—contract is not criminal. *Markku Salminen* lists some key factors about when criminal liability can attach to chained bankruptcies and actors behind them.

1. The arrangement is executed on purpose and to the detriment of the creditors.
2. The business is run as a single economic unit where negative risks and profits are systematically separated.
3. The other company starts out and is continuously unprofitable.

387 *Hakamies* 2011 at 179.

388 See V.4.3.3.1. and V.6.2.4 of this work.

389 See, for example, *Kukkonen* 2018 at 68–70.

390 See *Salminen* 1998 at 203–208. About the symbiotic relationship, see II.5.1. of this work.

4. The contracts between the companies are designed to transfer funds to the detriment of the tax receiver, pay security or other creditors.³⁹¹

It is easy to see comprehensive similarities between the list Salminen provides and the veil piercing requirements set forth in the Verkkokauppa case. Parts 2–4 describe the improper behavior requirement, part 1 corresponds to the damage requirement and part 2 can be read to include using formally separate corporate entities and thus corresponding with the requirement of control and abuse of separate personality.

Currently, most churning bankruptcies and other debtor's dishonesty cases utilizing formally separate entities could be targeted with Criminal Code 9:2, which allows placing criminal liability on the one who, in reality, controls the corporation. The section was adopted into criminal law in 2001, three years after Salminen gave the above-mentioned opinion. This makes veil piercing obsolete when criminal liability is established. The veil is pierced by allowing the disregard for the separate personality with Criminal Code 9:2 and showing reprehensibility by showing the criminal conduct. Damage is optional, though the creditor can recover it in full if a crime is present. If criminal liability for some reason does not attach, then the creditor could claim damages for exactly the same situation. The problem is that in a civil law damages claim, Criminal Code 9:2 does not apply, so the liability cannot be extended to separate persons based only on control. The creditor can only make a claim against the corporation. Veil piercing could change this by allowing an extension to the controller and possibly other entities of the corporate arrangement. Depending on why the criminal charges were dismissed, an investigation and charges can be utilized in showing of reprehensibility as required by piercing. Reprehensibility could be claimed especially if the dismissal was only due to procedural rules.

2.6.3. Forfeiture

2.6.3.1. Basic Forfeiture

For the subject of this study, only the forfeiture of the proceeds of a crime is relevant as, in a corporate context, the crimes are white-collar and are committed to obtain economic gains. Thus, two sections of the Criminal Code are relevant here: Chapter 10, Sections 2 and 3. The analysis starts with Section 2 as it relates to the basic situation of proceeds confiscation. It is not relevant to examine the estimation of the proceeds in this study. Section 3 will be examined as it relates to cases in which a more comprehensive forfeiture is possible.

³⁹¹ See *Salminen* 1998 at 204.

The Finnish Criminal Code allows the court to confiscate any proceeds of criminal activity.³⁹² Traditionally, this has meant items – either the proceeds of the crime or the tools used to perform the crime. The purpose of forfeiture is to prevent further criminal activity and is not considered a punishment.³⁹³ If the same person is held liable for both forfeiture and damages, the damages take precedence. If the liability for damages exceeds the amount gained by the perpetrator, then no forfeiture is ordered.³⁹⁴

The proceeds of crime shall be ordered forfeit to the State (CC 10:2.1). The forfeiture shall be ordered on the perpetrator, a participant or a person on whose behalf or for whose benefit the offense was committed (CC10:2.3). Forfeiture can be ordered even on a person who is not aware of the crime if they are beneficiaries of it.³⁹⁵ When ordering forfeiture based on this provision, only the direct proceeds of the crime can be confiscated.³⁹⁶ If the proceeds have been transferred, forfeiture still applies. Forfeiture can be demanded in a trial separate from criminal proceedings and even without prosecution.³⁹⁷

Forfeiture of the proceeds of a crime has three requirements: 1) fulfillment of criminal provision elements; 2) economic gains; and 3) causal relation between the two.³⁹⁸ Proceeds of a crime means any economic gain as a result of the crime; it can be saved expenses or transferred funds. Yields of these can be ordered forfeit too. It is meant to cover any beneficial outcome.³⁹⁹ The Criminal Code enables the forfeiture of any economic benefit directly related to a crime,⁴⁰⁰ but any rights not protected by the legal system are not the proceeds of a crime.⁴⁰¹ In debtor's crimes, proceeds of the crime equal the amount of transferred or hidden assets.⁴⁰² Although isolating

392 The forfeiture provisions were recently amended to implement Directive 2014/42/EU of the European Parliament and of the Council on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union. The amendments came into force 1.9.2016.

393 See HE 80/2000 at 15.

394 See *Rautio* 2007 at 33.

395 *Kukkonen* 2016b at 897.

396 See *Rautio* 2006 at 300 and *Viljanen* 2007 at 174.

397 HE 4/2016 at 29 and *Kukkonen* 2016a at 723.

398 *Korkka* 2015 at 19.

399 Excluding such economic rights, the legal system does not enforce, e.g., gambling debt. See *Kukkonen* 2016a at 727.

400 HE 80/2000 vp. at 21 and HE 4/2016 vp. at 31.

401 *Kukkonen* 2016a at 727. Forfeiture is possible even when the proceeds are obtained through random occurrence or chance.

402 Cf. HE 53/2002 vp. at 18 and *Kukkonen* 2016a at 729. These sources opine that the amount of unpaid debt is the amount of criminal proceeds, but this is unacceptable. The amount of unpaid debt is no doubt the damage the creditor suffers. This surely also equals the total economic benefit the debtor obtains. It does not directly translate to the amount of the economic benefit the debtor obtained *with the criminal act*. The circumstances can very well be such that the debtor has used the loan to further a legitimate business. At some point, all available assets are transferred from the business to the debtor's spouse, rendering the business bankrupt. This act is dishonesty by a debtor. The economic benefit obtained from

the business's negative risk to another entity is beneficial in an economic sense, it can hardly be given monetary value. The economic value that forfeiture could tackle is the assets transferred between the entities. Additionally, the causal link between the benefits of risk separation and the crime is difficult to establish. Criminal law does not prevent founding separate entities to carry business risks if the transfers of assets between them are done within the confines of the law.

From CC 5:8 and 9:2, it follows that criminal liability and therefore also forfeiture can be ordered on a corporation or the person who controls it if the crime has been committed within its operations. In a corporate context, the crime is often committed on behalf of the corporation by the operative management.⁴⁰³ Even if the criminal liability cannot be attached to the corporation, the benefits it has received from the crime can be ordered forfeit.

2.6.3.2. Extended Forfeiture

CC 10:3 allows the extended forfeiture of the proceeds of crime. Extended forfeiture means ordering forfeit of all assets that originate from criminal activity. Extension requires a "trigger crime" that, in its essence, can produce economic benefits.⁴⁰⁴ Attempted crime is enough, though.⁴⁰⁵ There is an exhaustive list of these trigger crimes in CC 10:3.1. These include money laundering, narcotic crimes, bribery, organized crime, etc. In addition to these specific crimes, any crime in which the maximum sentence is at least four years allows for the extension. In the corporate context, the interest naturally shifts to fiscal crime and the veil piercing focus further moves the conversation toward crimes of the debtor. Dishonesty by the debtor thus applies if it is aggravated (CC 39:1a). The same goes for fraud by a debtor (CC 39:3), accounting offense (CC 30:9a) and tax fraud (CC 29:2); only the aggravated form fulfills the requirements of the extension. All of these have exactly four years' imprisonment as the maximum sentence.

When this sort of trigger crime is present, the forfeiture can target any assets originating from crime (CC 10:3.2). The assets do not need to be related to the trigger crime.⁴⁰⁶ They just need to be related to crime in general. The court has

this crime is not the total unpaid debt, only the amount of assets transferred to the detriment of the creditors. The debtor/perpetrator is still liable for the damage caused to the creditors. This can be argued to be the full amount of the debt if the business could have eventually paid the debt had it kept on operating. The damage could be calculated otherwise. For example, the transfer added to the likely sum the business could have produced before it would have failed.

403 See *Viljanen* 2002 at 6.

404 These crimes only need to be such that they can produce significant economic benefits. The realization of significant gains is not actually required from the crime, on the basis of which forfeiture is ordered. Any gains will suffice. See HE 80/2000 vp. at 24

405 See *Viljanen* 2002 at 12.

406 CC 10:2 and regular non-extended forfeiture applies to assets obtained with the trigger crime. See also *Viljanen* 2002 at 13.

discretion as to whether to order extended forfeiture, even in situations where the requirements are fulfilled. In the use of this discretion, the court especially needs to account for whether the assets originate from criminal activities that cannot be considered minor, whether ordering the forfeiture is necessary to prevent further criminal acts and whether the possessor of these assets receives a significant part of their income from criminal activities (CC 10:3.2). The use of discretion is not limited to these things, and the court is allowed to consider other factors and the totality of the arrangement.⁴⁰⁷ In fact, the totality of the arrangement is a necessary consideration as, especially in prolonged economic crimes, the roles and actions of the involved parties are altered, and allocation of benefits might also be altered during the crime period.⁴⁰⁸

Case law is minimal, but the Supreme Court of Finland has based the emphasis on seeking economic benefit, being part of a criminal organization and systematic operation for criminal proceeds.⁴⁰⁹ These need not be interpreted as absolute requirements for extended forfeiture, though. Especially requiring being part of a criminal organization would effectively exclude debtor's crimes from extended forfeiture.

2.6.3.3. Forfeiture, Abuse of Rights and Veil Piercing

Most interestingly, the criminal code has a provision reflecting the doctrine of abuse of rights. CC 10:2.4 allows ordering forfeiture on persons to whom the proceeds or other property have been transferred. Forfeiture is possible if the person receiving the proceeds knew or had a sufficient reason to suspect that the transfer was orchestrated in order to avoid forfeiture or liability for damages. Thus, there are two requirements: 1) the transfer was intended to avoid forfeiture or paying damages and 2) the transferee knew of this intention. The intent to avoid can be that of the transferor or the receiver.⁴¹⁰ In the corporate context, the corporation has knowledge of this intention if the person representing the corporation at the time the proceeds were transferred knows of the intention.⁴¹¹ For forfeiture to apply, the receiver must be aware that the assets received originated from a crime.⁴¹² Using middle men does not affect the application as the provision does not require the direct transfer from the perpetrator to the third party.⁴¹³ The forfeiture order follows the transferred assets and not the person holding them. If the perpetrator never held the assets, the

407 See HE 4/2016 vp. at 41

408 See *Rautio* 2006 at 305.

409 KKO 2006:51. The decision was a vote decision. See also *Viljanen* 2007 at 233–234 and *Kukkonen* 2016b at 901.

410 See HE 4/2016 at 34–35.

411 *Kukkonen* 2016b at 899.

412 See HE 4/2016 at 34–35.

413 *Kukkonen* 2016b at 899. See also *Viljanen* 2002 at 15.

transfer requirement does not apply, and the assets can be ordered forfeit on the basis that the crime was originally committed to the benefit of this person.⁴¹⁴

This provision holds liable someone who is not formally liable or even involved in the crime. This approach is similar to veil piercing. The difference is that the liability is absolutely limited to what was obtained in the transaction.⁴¹⁵ Liability follows the transferred property, whereas in piercing, the liability is personal. The provision relies on the subjective criterion of intention. If the intention was to avoid forfeiture, the court can disregard the transfer. In the end, this is nothing but a shortcut. If the court does not use this criterion, then during the enforcement proceedings, the Asset Recovery Act or artificial property arrangement provision can be utilized for the same results.⁴¹⁶

A similar norm exists with extended forfeiture. It is not limited to the person committing the crime, but it can target close persons of the perpetrator if there is sufficient reason to assume that the assets were transferred to avoid forfeiture (CC 10:3.4). A close person is defined the same as in the Act on the Recovery of Assets to Bankruptcy Estates Section 3; it covers spouses, children, parents, etc. But, more importantly in the corporate context, a close person is a legal person: 1) with which the perpetrator alone or with another close person has substantive common interest based on share ownership or a similar economic factor; 2) whose operations the debtor substantially controls by holding a commanding position; 3) who is a close person to a close person of the debtor.

Additionally, extended forfeiture targeting a close person requires that the assets have been transferred to that person in order to avoid forfeiture or liability for damages (CC 10:3.5). This is significant because it enables applying forfeiture to persons who are not related to the crime. It allows ordering forfeit of any unexplained assets that people close to the perpetrator have. It only requires that there is sufficient reason to assume that the transfer was in fact made in order to avoid forfeiture. Yet even when a close person receives a transfer of the proceeds but the transferee has then lost or spent these proceeds, forfeiture cannot be ordered.⁴¹⁷ Close persons are thus not held personally liable, i.e., they are not liable for the value of the assets. The liability follows the assets—a key difference to piercing the veil.

According to Kukkonen, extended forfeiture should not be applied to a corporation operating legally, even when crimes are committed to its benefit. Standard forfeiture does apply, and with it comes the requirement of a causal link between the criminal act and the proceeds of the crime. Extended forfeiture

414 See *Viljanen* 2002 at 14.

415 It is in no part a punishment and thus cannot exceed the benefit amount. Forfeiture is intended to prevent the criminal from benefitting. But it has some preventive effects as it removes potential gains from the calculation on whether to commit a crime. See *Hakamies* 2008 at 54.

416 Similarly HE 4/2016 vp. at 35 and *Kukkonen* 2016b at 899.

417 See *Viljanen* 2002 at 16 and *Rautio* 2007 at 37 and 50.

should be ordered on a corporation mainly when the corporation acts as a front for criminal operations.⁴¹⁸ The corporation's nature as a front for criminal activities is assessed considering the unexplained assets of the corporation, legal rights it possesses and connections between these assets and the rights of the perpetrator.⁴¹⁹ Case law has emphasized the cautious use of the extended forfeiture in the corporate context.⁴²⁰

Although these norms aim to prevent avoiding forfeiture and somewhat reflect the abuse of rights norm, veil piercing cannot obtain much from forfeiture via analogy. It is undeniably a doctrine that allows the liability of another person. Like artificial property arrangements, it follows the property, whereas piercing follows persons. Another difference is the forfeiture requirement of unexplained assets or assets deriving from criminal activities. It does not target abuse of legal instruments but prevents certain uses of them. Liability is in no way a result of the disparity of used legal form and reality. It does not target artificiality nor reprehensibility.

These norms prove to be nothing more than yet another remedy for the dishonest transfer of assets. One could think of it as a more extensive asset recovery in criminal matters. Still, it serves to limit the need for piercing the veil. Assessment of the intention will also prove useful in the veil piercing context, as veil piercing requires reprehensible behavior, and intent to avoid obligations fulfills this requirement admirably.

2.7. Other Related Legal Doctrines

2.7.1. Unlawful Distribution of Assets

Company Act limits the amount of asset distribution the company can lawfully make. Only profits and reserves can be distributed as dividends (Company Act 13:1). Aside from dividends, a reduction in share capital and acquisition of a company's own shares are also allowed methods of distribution. Assets can also be distributed if the corporation is dissolved (Company Act 13:1). Any other transactions that reduce the assets of the company or increase its liabilities without a sound business reason shall constitute an unlawful distribution of assets (Company Act 13:1). Assets shall not be distributed if it is known or should be known at the time of the distribution decision that the company is insolvent or that the distribution will cause the insolvency of the company (Company Act 13:2). Basically, a corporation cannot distribute assets in any way unless it is profitable, is dissolved, or if the

418 See *Kukkonen* 2016b at 901–902. Similarly see HE 80/2000 vp. at 15 and 24–25, requiring that the corporation be attained solely or almost solely to hide the criminal origins of assets or to keep the proceeds of a crime out of the reach of forfeiture.

419 See HE 85/2000 vp. at 25.

420 See HE 80/2000 vp. at 15, KKO 2009:1 and *Kukkonen* 2016b at 901.

transaction has a business reason justifying it. The assets need not be distributed to shareholders—any transaction can be unlawful distribution.⁴²¹

If an obligation is likely enough, then it needs to be accounted for when utilizing the solvency test. The management needs to investigate the relevant and predictable factors that will affect the solvency of the corporation, even if those factors are uncertain.⁴²² The test, unfortunately, is rather ambiguous and open to interpretation. The definite time period and the relevance of information are not defined and tend to differ depending on the performer and situation.⁴²³ The solvency test offers some limitation to abusive corporate arrangements but proves insufficient in risk separation situations. The abused corporation is founded to carry the negative risk. It is part of the inherent business risk, and even ventures with high negative risks are perfectly legitimate. Only if the realization of said risk is probable enough, the solvency test prevents asset distribution. Risk separation structures are such that the actors know that the negative risk is likely or even certain to occur, but when it will materialize remains uncertain.

Any transaction the corporation makes can be unlawful distribution unless it has a sound business reason, which means that the transaction needs to advance the corporate purpose as defined either in Company Act 1:5⁴²⁴ or the Articles of Association. Benefitting the parent corporation or the corporate group is not a sound business reason.⁴²⁵ Similar to tax avoidance, the sound business reason material from unlawful distribution analysis no doubt needs to be considered with veil piercing also.

If the assets have been unlawfully distributed, they need to be returned if the recipient knew or should have known that the distribution was in violation of the Company Act or the Articles of Association (Company Act 13:4). Alternatively, the board members that decided on the distribution are liable for the damage their decision caused to the corporation. These provide the corporation with some funds, but it might not be enough to cover the actual claim. If the business is divided into separate entities, then the unlawful distribution and refund obligation only make it harder to transfer assets from one entity to another. The transactions need to be at market value or, at minimum, close to it.⁴²⁶ However, even when the transactions

421 *Airaksinen – Rasinaho – Pulkkinen* 2010b at 31 and HE 109/2005 at 124. For a good list of example situations, see *Kyläkallio – Irola – Kyläkallio* 2017b at 1099–1102.

422 See *Ruohonen* 2012 at 199.

423 See *Mähönen – Villa* 2015 at 311.

424 See *Mähönen* 2006 at 22.

425 *Rasinaho* 2013 at 552. Similarly, see HE 109/2005 vp at 123–124 and *Immonen – Villa* 2015 at 135–137. Transfers to other members of the group are either loan, dividends or capital investments.

426 See *Airaksinen – Rasinaho – Pulkkinen* 2010b at 29–30. Similarly *Immonen – Villa* 2015 at 75.

eventually prove unprofitable, distribution is not unlawful if the transaction had a business motive behind it.⁴²⁷ Unlawful distribution further limits the need to rely on piercing in cases of asset transfers.

This does prevent extracting value from one corporation into another quite effectively.⁴²⁸ Separate personality enables arrangements where the value never appears in the supporting corporation. Even at market value, transactions do not mean that the support corporation is profitable. It can be operated at zero-sum principle or even at a loss.⁴²⁹ The value created by the support corporation appears directly in the asset corporation without needing to transfer it, making the unlawful distribution norm insufficient from the creditors' viewpoint. Veil piercing, however, can address these situations. Unlawful distribution is not suitable for situations in which the negative business risk is illegitimately placed on third parties. These arrangements do not transfer anything from the support corporation to the asset corporation. Instead, the realization of the negative risk is arranged into an entity other than the one holding the assets, resulting in losses for the creditors.

2.7.2. Liability for Damages

Since one of the key requirements of piercing the corporate veil is causing damage to creditors, it is natural that liability for damages should be assessed here. The liability for damages can be based on Company Act or the Tort Liability Act. It is debatable whether the Tort Liability Act applies to damage caused by corporate organs at all.⁴³⁰ This question is beyond this study, and only the liability in damages per Company Act 22:1 is examined here.

The basic situation we are interested in with veil piercing is when the corporation is found liable but is unable to satisfy the claim, and the creditor suffers damage that equals the amount left unsatisfied by the corporation. Then veil piercing is used to extend liability to persons other than the corporation. The initial liability for the damage is contractual or based on the Tort Liability Act, and the one held liable is the corporation. This liability is taken as a given in this study, and its basis is not analyzed further. We are interested only in the extension of liability to other persons. Due to the scope of the study, a general introduction to the subject is enough.⁴³¹

427 *Airaksinen – Rasinaho – Pulkkinen* 2010b at 29 and similarly *Immonen – Villa* 2015 at 69–70 and 74.

428 Or at least it makes the system comprehensive. In practice, unlawful distribution and the management's damage liability are often overlooked. See *Tuokko* 2016 at 819.

429 Cf. KKO 2003:33. If the corporation's purpose is to provide the shareholders some benefit, i.e., housing, then the corporation is obligated to collect enough revenue from the shareholders to cover its expenses. The precedent should not be extended to business corporations. See *Villa* 2003 at 7.

430 On this question, see *Nyström* 2015.

431 For a more comprehensive discussion on the liability of damages in the corporate context, see, for example, *Immonen – Villa* 2015 at 179–189, *Savela* 2015 at 11–150 or *Airaksinen – Pulkkinen – Rasinaho* 2010b at 748–772.

Company Act does provide for liability of corporate organs when the damage was caused by activities of the corporation. The organs acted in their formal capacity within the corporation, so their decisions were those of the corporation. The requirements for such liability are rather strict, however.

Management of the corporation can be held liable according to Company Act 22:1.

(1) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall be liable in damages for the loss that he or she, in violation of the duty of care referred to in Chapter 1, Section 8, has in office deliberately or negligently caused to the company.

(2) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall likewise be liable in damages for the loss that he or she, in violation of other provisions of this Act or the Articles of Association, has in office deliberately or negligently caused to the company, a shareholder or a third party.

This allows holding the directors, managing director and even members of the supervisory board liable for damages they have caused deliberately or by acting negligently.⁴³² They are liable for damage caused to the company, shareholders and third parties. Liability toward the corporation is more comprehensive, as it can materialize even from violations of the duty of care in addition to violations of the Company Act or the Articles of Association. Basically, there are two general bases for liability: 1) violation of the duty of care⁴³³ and 2) violation of the Company Act provisions or Articles of Association.⁴³⁴

We are interested in both. If the management has caused damage directly to third parties with its violations, veil piercing is not needed if they are found liable this way. Proving liability in damages is simpler. If they have caused damage to the company, it can lead to bankruptcy. Then the creditors can hold the management liable via the bankruptcy estate, as the estate gains the same rights as the corporation had before it.⁴³⁵

Liability for damages caused to third parties can result only from violations of the Company Act or Articles of Association. This is a significant limitation to liability. If the management follows these rules, they are not liable. From the creditor's point of view, we are interested in the Company Act provisions protecting creditors.

432 Violations of the Company Act Provision or Articles of Association are presumed negligent, and the management must prove otherwise to avoid liability (Company Act 22:1.3).

433 For an analysis on this, see *Immonen – Villa* 2015 at 181–184.

434 For an analysis on these, see *Immonen – Villa* 2015 at 185 and *Savela* 2015 at 144–147.

435 But the estates are a bit passive in exercising this right. See *Tuokko* 2016 at 824. For a general discussion on the bankruptcy estates' right to derivative suit, see *Tuokko* 2016, *Savela* 2015 at 148–150.

The focus is on Company Act 13:1, which explains how corporate funds can be distributed. Beyond this provision, most creditor protection provisions protect the capital and assets the company already has. It is possible to have provisions in the Articles of Association that incur different kinds of duties such as paying dividends to third parties. Neglecting these duties results in liability as well.⁴³⁶ Liability for damages is firmly anchored in actions and duties to act.

Veil piercing and liability for damages. Veil piercing should be possible even when the management's liability exists. This in itself does not eliminate the need for piercing the veil. The management can be straw men, which do not necessarily have any assets or they might disappear. In these situations, veil piercing could be one method for the creditors to secure a payment. In these cases, depending on the nature of the corporate actions, criminal liability for dishonesty of the debtors placed on the actual—albeit not formal—controller of the corporation could apply (Criminal Code 39:1 and 5:8). But if the creditor's damage has been caused by methods other than the distribution of assets, hiding assets, or incurring additional liabilities without a basis, criminal liability is not available.

Due to the clear requirements of liability in damages, circumventing its application to the detriment of a third-party creditor is rather easy. Only the corporation can demand compensation for the management's breach of the duty of care, though shareholders can sue on behalf of the corporation. Damage suffered by a third party will be compensated only if it has been caused by a violation of the Company Act or the Articles of Association. A further limitation to this is that the norm violated needs to be one that has been created to protect the party demanding compensation.⁴³⁷ Unless the Articles of Association have explicit statements providing third parties with some rights, violating them does not damage these parties.⁴³⁸ In Company Act, there are some provisions to protect the creditors, mainly those that prohibit the distribution of funds if they render the company insolvent or if a transaction has no business purpose and disclosure norms.⁴³⁹ Breaking any other provision can hardly cause damage to a third party. In conclusion, the liability in damages enforces the creditor protection norms of the Company Act. It offers compensation from corporate actions that already violate a norm. As limited liability and separate personality are allowed by the Company Act, even abusing them falls beyond the application of liability in the damages sections of the Company Act.

Perhaps the Tort Liability Act could cover this sort of third-party damage. Though according to Chapter 5, Section 1 of said Act, however, purely economic loss can be ordered compensated only if there are “especially weighty reasons.” Potentially,

436 See *Kärki* 2017 at 170–172. Cf. *Savela* 2015 at 148.

437 See *Airaksinen – Pulkkinen – Rasinaho* 2010b at 761.

438 See also *Kärki* 2017 at 170–172.

439 Similarly *Kyläkallio – Irola – Kyläkallio* 2017a at 607.

the interpretation of these reasons would come to resemble the current veil piercing test. Some opinions even see veil piercing as unnecessary altogether and replaceable by expansive interpretation of the principles of tort law.⁴⁴⁰ On the other hand, an expansive interpretation of some key concepts in the conflicting norms could also replace piercing. For example, the KKO 2015:17 case could have been solved by interpreting the concept of a party responsible for paying the remunerations.⁴⁴¹ Justification of such an expansive interpretation would no doubt have come to greatly resemble the veil piercing considerations.

It will be interesting to witness the development of case law and implementation around Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. In Article 19, the Member States are obligated to maintain regulations where management is required to account for the creditor, equity holders and stakeholder interests in its decision-making if the corporation is likely to become insolvent. They are also mandated to take steps to avoid insolvency and deliberate or grossly negligent conduct that threatens the viability of the business. For the most part, debtor's dishonesty, asset recovery, asset distribution and liability for damages cover most, if not all, of the requirements of this article. Still, the article could mostly offer additional support for the reprehensibility requirement of veil piercing, for it offers a clear condemnation of benefitting oneself at the expense of others.

Another limitation compared to veil piercing is the persons liable for damages. Only the management, board members, managing director or shareholder can be held liable. In some jurisdictions, veil piercing is commonly substituted with a *de facto director* doctrine.⁴⁴² It allows treating someone as a director who is not formally a director and applying liability in damages as well as the duty of care standard. Still, if the damage is not caused by the management's decision but just the separation of corporations has left the creditors unsatisfied, there is no action on which to base the liability. Veil piercing can target the arrangements where the potential for damages is built into the structure of the arrangement so that it needs no decision or action from the management to materialize. For example, separating the business

440 See the argument in *Hagström* 1993 at 251. He chooses to discard the view.

441 See *Havu – Pihlajarinne – Vesala* 2015 at 600. See also C724/17 and KKO 2019:90 where the competition law concept of enterprise was interpreted broadly to include corporation that received the business activities of a voluntarily dissolved corporation.

442 For example, Belgium. See *Vandekerckhove* 2007 at 31–32.

into two corporations, one holding assets and one performing a high tort chance operation. The corporation carrying a negative business risk can perform in every way in accordance with the law until the risk realizes and it is unable to cover the damages. Veil piercing could apply, but liability in damages cannot.⁴⁴³

2.7.4. Company Law Offense

Company Act includes a provision criminalizing certain violations (Company Act 25:1). If a person intentionally performs a violation, she can be issued a fine or a maximum of one year imprisonment. If another criminal provision provides a more severe penalty for the conduct, it should be assessed per that provision. The conduct prohibited by the provision includes public trading of a private company, violation of the drafting of the statement of an auditor and circumventing voting restrictions. Most significantly for this study, Subparagraph 4 prohibits conduct that “violates the protection of the shareholders or the creditors by distributing the assets of the company in contravention of the provisions of this Act.” This criminalizes intentional unlawful distribution.

Whereas it is admirable that unlawful distribution is so strongly condemned, this criminalization does not prevent additional types of conduct. Unlawful distribution is already governed by the refund obligation and liability in damages. It is uncertain whether Subparagraph 4 has any application at all, as debtor’s dishonesty also applies in similar situations.⁴⁴⁴ For these reasons, company law offense is not further considered in this work.

2.7.3. Asset Recovery

Asset recovery is the method of creditor equality and the preventive tool for detrimental transactions. It is governed by the Act on the Recovery of Assets to a Bankruptcy Estate. If the debtor makes any transaction that improperly favors one creditor over another, removes property from the ownership of the debtor or contracts further debt to the detriment of all the creditors, asset recovery allows the reversal of that transaction (Asset Recovery Act Section 5). This is the general recovery norm, and there are several recovery norms that target specific types of transactions, i.e., gifts, debt payments, giving collateral or oversized compensation (Asset Recovery Act 6–14 §). Reversal has several conditions that must be met. The transaction needs to have been made while the debtor was insolvent or while the transaction led to insolvency. If the transaction was a gift, it should be made while overindebted or lead to overindebtedness instead of insolvency. The other party to

⁴⁴³ A similar isolation problem exists with supply chains. Separate personality is used to hide things down the supply chain to keep the visible part of the business clean of unwanted issues. See *Salminen* 2017.

⁴⁴⁴ About the question see *Savela* 2009.

the transaction knew or should have known about the insolvency or the significance the transaction had on the financial standing of the debtor as well as the facts that made the transaction improper. In addition, the transaction needs to have been made in proximity to the insolvency proceedings. The time frame ranges from three months to five years. The further the transaction was made from the bankruptcy, the harder it is to show the improper nature of the transaction or the financial state of the debtor at the time.

Asset recovery differs from veil piercing in several key aspects. Like the unlawful distribution of assets, it is restricted to transactions where assets are transferred away from the debtor's estate. It does entail every possible transaction, even those where the debtor remains passive. Still, it requires the assets to leave one entity's estate and enter another. Like unlawful distribution, asset recovery is not suitable for situations in which the negative business risk is placed on third parties illegitimately. These arrangements do not necessarily need to transfer anything from the support corporation to the asset corporation, at least not in a manner that would fall under the application of asset recovery. Instead, the realization of the negative risk is arranged into an entity other than the assets, resulting in losses for the creditors. The entity carrying the negative risk need not make any transfer of assets to the entity carrying the assets. Their relationship can be formed in an at-market-value business relationship, turning the transactions into legitimate business transactions that are hardly improper. At the least, it significantly limits the transactions that can be reversed. At-market-value does not mean that the corporation turns a profit or has enough assets to cover the realization of the negative business risk.

A more interesting point of comparison between asset recovery and piercing would be the close party concept. The Asset Recovery Act Section 3 deems a corporation a close party to the debtor based on essential joint economic interest or competence in the corporation. Close party status is based on either share ownership or some factor that is comparable to share ownership and creates an essential joint economic interest. In preparatory works and literature, this comparable situation has been interpreted to mean a right to the profits of the corporation.⁴⁴⁵ The right to payment based on the level of the profits could also create such joint interest.⁴⁴⁶ Potential use for the analysis of this would have been the allocation of benefits criterion explicated in KKO 2017:94 and discussed in V.6.4. of this work. Alternatively, it could have been used to develop the views on a business operation run in symbiosis between several entities. If we accept such a narrow interpretation of the criterion, it does not seem especially useful for these purposes. Some weak support could be derived,

445 See HE 102/1990 at 45, *Ovaska* 1991 at 155 and *Tuomisto* 2012 at 26.

446 HE 102/1990 at 45, *Leppänen* 1992 at 121, *Immonen* 1994 at 52 and especially *Tuomisto* 2012 at 26–30. See also *Ovaska* 1991 at 155, who sees it necessary for additional elements to be present for closeness to be established. He does not specify what sorts of elements.

though, mostly through the observation that similar issues have emerged in another context.

Urpo Kangas does present the opinion that control rights combined with aligned economic interests allow holding the parties as close regardless of the formal legal status that exists.⁴⁴⁷ This characterization would seemingly mean a greater resemblance between veil piercing and closeness, in the sense that they allow disregarding the formal outlook. In my opinion, though, this only amounts to another repetition of the “principle of substance over form”. Leppänen concludes that comparability to share ownership exists when one corporation practices its business through another one that it controls through finance or other contracts.⁴⁴⁸

A more interesting criterion would be the closeness based on the control position in a collective. Persons who hold essential control over the corporation based on leadership are close parties. This criterion could prove useful when assessing control in veil piercing situations. It does emphasize control, in fact, as opposed to the formal view of position.⁴⁴⁹ Any person with control could be a close party. Control is essential when the controller can affect any contract made with herself.⁴⁵⁰ This issue is further discussed in relation to veil piercing in chapter V.3.4. of this work.

447 See *Kangas* 1994 at 277 and 280.

448 See *Leppänen* 1991 at 279 footnote 29. Similarly, see *Ovaska* 1991 at 155. He also gives significance to the financial relationship and the control it brings over the corporation.

449 See *Tuomisto* 1997 and *Tuomisto* 2012 at 35. He is of the opinion that no form of control is sufficient, but it needs to be based on a formal position within the organization. Other forms of control could instead be interpreted through the comparable to share ownership criterion. A bit differently, see HE 102/1990 at 45–46 and *Kangas* 1994 at 280–281, where no requirement of a formal position is laid out. This difference does not reduce the usefulness of this section when developing the control requirement in veil piercing. Therefore, I will not discuss the correct interpretation any further here.

450 See *Immonen* 1943 at 53.

3. Conclusions

3.1. Short List of Elements

The examined doctrines need to be divided into two categories. First, there are the doctrines that allow for veil piercing and act as points of analogy for developing the veil piercing doctrine. These include artificial property arrangements, tax avoidance, environmental damage liability and pay security. The second category includes creditor protection doctrines that serve similar purposes to veil piercing, thus serving to limit the need for it. Some interpretative support could be derived from them, although these doctrines are essentially different from veil piercing. Support derived from these doctrines needs to be evaluated more thoroughly to determine whether it is compatible with piercing. These doctrines include debtor's dishonesty, forfeiture, unlawful distribution, liability for damages and asset recovery. The questions are: what can be adopted from these doctrines, and how does the second category diminish the need for piercing the veil? The similar features of these doctrines are displayed in the table below.

	Artificial property arrangements	Environmental damage liability	Tax avoidance	Pay security	Veil piercing
Insolvency	No	No	No	Yes	No
Intent to abuse	Yes	Yes	Yes	Yes	Yes
Transaction required	No	No	No	No	No
Risk isolation	Yes	Yes	Yes	Yes	Yes
Business reason	Yes	No	Yes	Yes	Yes
Creditor equality	No	No	No	No	No
Damaging creditor's	Yes	Yes	No	Yes	Yes
Reprehensibility	No	No	No	Yes	Yes
Artificiality	Yes	Yes	Yes	Yes	Yes
Substance over form	Yes	Yes	Yes	Yes	Yes
Control	Yes	Yes	Yes	Yes	Yes
Departing from standard patterns	Yes	Yes	Yes	Yes	Yes

Figure 4. The analogous doctrines' elements and veil piercing

	Debtor's dishonesty	Unlawful distribution	Liability in damages	Asset recovery	Company law offense	Veil piercing
Insolvency	Yes	Yes	No	Yes	Yes	No
Intent to abuse	No	No	No	No	No	Yes
Transaction required	Yes	Yes	No	Yes	Yes	No
Risk isolation	No	No	No	No	No	Yes
Business reason	Yes	Yes	No	No	Yes	Yes
Creditor equality	No	No	No	Yes	No	No
Damaging creditor's	Yes	No	Yes	Yes	Yes	Yes
Reprehensibility	No	No	No	Yes	No	Yes
Artificiality	No	No	No	No	No	Yes
Substance over form	No	No	No	No	No	Yes
Control	Yes	No	No	Yes	No	Yes
Departing from standard patterns	No	No	No	Yes	No	Yes

Figure 5. The limiting doctrines' elements and veil piercing

From this list of elements, some observations can be made. Most creditor protection instruments require insolvency. Veil piercing does not, though it is commonly thought that piercing liability should be secondary in nature. It should be possible only when it has been established that the primary liable party is unable to satisfy the claim. The courts in the KKO 2015:17 procedure did not adopt this position, though it could be argued that Arctecho's inability to satisfy the claim was apparent, as it had seized operations soon after the claim was made. The courts did not address the question directly, though. In addition, the creditors usually have no interest in a piercing claim should the debtor be able to satisfy the claim.

The intent to abuse appears in several doctrines in addition to veil piercing, and these doctrines can be used to develop veil piercing in this regard. Many of the legal creditor protection doctrines seem to require a transaction—a transfer of assets. They follow the assets the debtor has accrued and attempts to transfer outside the reach of creditors. These doctrines set effective limitations on the transfers. The protection they offer is comprehensive. Veil piercing case law shows that piercing does not target transfers of assets.⁴⁵¹ Rather, it targets situations in which the corporate separateness is used to accrue illegitimate benefits or separate the negative risks from those benefits. This goal is attainable without relying on transactions or, at the least, without making transactions limited by the described legal tools. This difference needs to be considered when developing the piercing doctrine later in this work.

451 KKO 1996:2, KKO 1997:17 and KKO 2015:17. Also THO 29.6.2016 no. 711, THO 26.10.2016 no. 1070.

The business reason is a common factor in most of the examined doctrines. Without an exception, business reasons are used to prevent liability. Legitimate business reasons prove that the arrangement does, in fact, match the reality of the case. If the asset transfers have a business purpose, e.g., they further the profit-making purpose of the corporation,⁴⁵² they are neither unlawful distribution or detrimental to the creditors in a criminal law sense, but in taxation, the tax benefits alone do not constitute a business purpose even if they increase corporate profits. The term's given content differs a bit from doctrine to doctrine. Veil piercing based on the KKO 2015:17 decision adopts the term, though it leaves open the exact meaning of it.

Damaging creditors would seem the most basic requirement in the application of creditor protection norms. Figures 4 and 5 do confirm this. The exceptions are tax avoidance, forfeiture and unlawful distribution. Tax avoidance is not a creditor protection norm as it aims to the correct assignment of tax. Forfeiture is an attached consequence of criminal activity that allows the seizure of any criminal proceeds. It does not require damaging some other party, though another damaged party is usually present. Unlawful distribution can damage creditor's, but damage is not needed to make the distribution unlawful. The veil piercing doctrine laid out in the KKO 2015:17 decision explicitly requires damaging creditors or evading a norm. These doctrines could offer support in determining what constitutes damaging creditors.

Reprehensibility is one of the requirements of veil piercing per the KKO 2015:17 decision. It does not commonly appear in creditor protection norms. Only pay security and asset recovery have it. Pay security has it only because it utilizes the piercing doctrine as it is in case law. There is no legislation about pay security that would use the reprehensibility requirement. Asset recovery does use the similar term "improper," which could provide some useful material for the interpretation of reprehensibility. A closer inspection later in this work, however, will reveal that the intent to abuse criterion and reprehensibility are largely compatible.⁴⁵³

Artificiality is another requirement of piercing. The tables show that the analogous doctrines unanimously give it some significance. The next item in the table, substance over form, is pretty much the same as artificiality. These items appear separately in the table to accommodate the wordings of all the relevant provisions, but these elements are so alike that they will be treated as a single element from this point in this work. Artificiality is when the legal form (form) does not match the economic reality of the case (substance). These doctrines then allow for treating the arrangement based on the economic substance of the case, hence substance over form. No doubt, the artificiality in veil piercing can derive material from these doctrines.

452 See *Mähönen – Villa* 2015 at 349 and 375.

453 See V.4.3.3. of this work.

Kukkonen has used three criteria to determine the application of debtor's fraud, debtor's dishonesty, artificial arrangement and asset recovery. He inspects the nature of the arrangements and actions. If the actions are fake legal actions, the effects of such arrangement are void and cannot be upheld to the detriment of third parties. Even the creditors in insolvency proceedings can make this claim. Not disclosing fake legal actions fulfills the requirements of debtor's fraud. If the legal actions are genuine, they can be targeted only with asset recovery, and the conduct can constitute debtor's dishonesty. If the legal actions are artificial, then they can be disregarded in relation to some party by utilizing the abuse norms, though they are not deemed void nor are they illegal. The disregard only affects the process in which the abuse norm is invoked and could constitute debtor's fraud.⁴⁵⁴ This division is applicable as such in veil piercing. The risk isolation structure targeted by veil piercing is neither fake legal action nor genuine. It is artificial in the same sense that Kukkonen defines artificiality. This would lead to the application of Criminal Code 39:2.1.3, *withholding information on control the debtor holds over some property* should the debtor neglect to disclose the arrangement in an insolvency proceeding.⁴⁵⁵ The fact that the information needs to be disclosed does not necessarily mean that the information leads to the disregard of the arrangement. The focus on this study is precisely on the requirements under which the artificial arrangement can be disregarded and the answer to that follows not from this division.

Control also is required for piercing the veil. Again, the analogous doctrines all adopt this in their application, though they do not place as strong of an emphasis on it as veil piercing. In addition, asset recovery and forfeiture do utilize the concept of control when determining whether a legal person is a close party to the debtor. The control concepts these doctrines use can provide some interpretative material for piercing.

The last item is departing from standard patterns. This examines whether the doctrines consider deviating from ordinary and accepted business practices and legal forms. Many of these doctrines interpret this deviation as a sign of artificiality and are supportive of piercing. It is worth considering whether this sort of behavior is meaningful in veil piercing also.

454 See *Kukkonen* 2011 at 147–153.

455 See *Kukkonen* 2011 at 151.

3.2. Limiting the Application of Veil Piercing

Two elements from the list were intentionally left for last. Risk separation (or isolation of negative risk) and requiring a transfer of assets seem to be the dividing factor between creditor protection rules in legislation and legal norms allowing veil piercing.

Veil piercing should not be used to further limit the transfers of assets. This is an area of business the legislator has thoroughly attended to. Business practitioners should be allowed to trust the legal situation and plan their actions accordingly. Transfers of assets do not correlate with the requirements of veil piercing as they were laid out in KKO 2015:17. Transfers do not utilize corporate group relations, intercorporate relations or shareholder's control. Additionally, as with tax avoidance norms, veil piercing should not be used to create more comprehensive restrictions on asset transfers.⁴⁵⁶ Veil piercing could apply to situations in which these norms are circumvented by isolating the negative business risk. Either assets can be transferred legally for a time or no transfers are needed at all for the benefits to materialize outside the creditors' reach. The transfer of assets, especially if used systematically to empty the corporation, can indirectly hint toward reprehensibility. The corporate controller aims to minimize the exposure of assets to negative risk at the expense of the creditors. Then the application of unlawful distribution norms, asset recovery or debtor's dishonesty would not prevent the application of piercing as well. In fact, applying these doctrines would hint toward the systematic behavior and support the finding of reprehensibility in a piercing decision.

This brings us to risk separation. Figures 4 and 5 show a clear pattern. The doctrines that allow veil piercing unanimously consider separating negative risk for losses from positive chance for profit when disregarding given legal forms. These doctrines can assess whether using separate entities was inappropriate risk management. The more transaction-oriented doctrines in Figure 5 assess whether the transaction changed the creditor's risk position and not whether the arrangement itself was undertaken to isolate the negative risk.

The exclusion of transactions and the existing doctrines' embracing of risk separation means that veil piercing's scope should be construed around risk. With piercing claims, the court should examine the damage creditors have suffered and the actions that led to it. If the creditors were damaged because the debtor transferred assets outside their reach, veil piercing should not apply. If the damage results from isolation of negative risk from positive risk into another entity, and later the realization of said negative risk, then veil piercing will apply. It is entirely possible that some damage is the result of transfers and some is due to the separation or that

⁴⁵⁶ For similar warnings in the US, see *Bainbridge* 2000 at 56–57, although he argues to abolish veil piercing and use asset transfer restrictions and tort instead.

the isolation of risks is partly done via transfer. In these cases, the transfers are part of the pattern that supports veil piercing. In these cases, veil piercing should be allowed alongside the legislated creditor protection doctrines that target transfers. The amounts not recoverable from transfer-oriented doctrines would equal the amount of damage done by isolation.

A few more words are needed on the relationship between debtor's dishonesty and veil piercing. Debtor's dishonesty can apply in risk separation situations also. The isolation of negative risk can be achieved using a single limited liability corporation in a situation where the corporate controller continues business operations even when she knows the risk for losses is clearly greater than with standard business. If there is no chance the controller would incur the damages the realization of the negative risk would cause, veil piercing could apply alongside debtor's dishonesty. This would mean strong disincentives to operate an especially high-risk business if it is not given sufficient assets and any accrued assets are systematically siphoned away. The benefits do not necessarily exist, as they could materialize if the gamble is won. Then the negative risk is carried by third parties and the chance for profits by the controller. Veil piercing could apply to these situations if the controller manages to manipulate the requirements of debtor's dishonesty so that it will not apply to the conduct. Veil piercing and debtor's dishonesty can target the same conduct.

If criminal liability for some reason does not attach, then the creditor could claim damages for the exact same situation. The problem is that, in civil law, damages claim Criminal Code 9:2 does not apply, so the liability cannot be extended to separate persons based only on control. The creditor can only make a claim against the corporation. Veil piercing could change this by allowing the extension to the controller and possibly other entities of the corporate arrangement. Depending on the reason criminal charges were dismissed, the existence of investigation and charges can be utilized in the showing of reprehensibility as required by piercing. Reprehensibility could be claimed especially if the dismissal was only due to procedural rules.

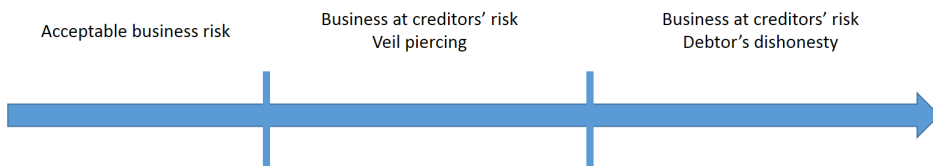


Figure 6. Business risk, piercing the veil and the crime of debtor's dishonesty visualized

In practice, criminal investigation allows access to information that would not normally be available to creditors. Even if the criminal charges are dropped, the plaintiff is left with a more comprehensive information set. On the offset, however, criminal investigation and prosecution are independent of the creditor, and the creditor cannot affect the procedure that much. Debtor's dishonesty and liability in damages that follow from criminal conduct are statutory tools with unambiguous application. This makes them more predictable, and hence, it is safer to seek satisfaction using them. Criminal liability utilizes a stricter burden of proof requirement, though. Veil piercing should be secondary to debtor's dishonesty for only practical reasons, simply because the presence of criminal liability makes it obsolete to pierce the veil. In theory, there are no reasons to favor one or the other. This leaves the choice to the creditor.

IV PRACTICAL CHOICE OF REMEDY

1. Introduction

Situations around corporations and creditors are often complex and often facilitate opportunistic actions that complicate things even further. To combat opportunism, several liability doctrines exist. Earlier in this work, I have examined some liability doctrines in a brief manner. This section takes those doctrines and some others into account in an attempt to show just how complex and even random the piercing situations can be. The available evidence can enable the utilization of several of these doctrines, and the same pieces of evidence can be useful in multiple doctrines. I will examine the Supreme Court decision in the KKO 2015:17 case and seek alternative methods to achieve the same result of creditor compensation. Then I will perform the same examination with the arrangement from KKO 2017:94. It should be noted that, for this section, I will use the totality of the public court materials from these cases and not only the published precedent.

Would tort liability, debtor's dishonesty, forfeiture, asset recovery or unlawful distribution provide a sufficient answer? Could the creditor's claims have been satisfied without relying on the controversial veil piercing doctrine? Each of these remedies does address certain conduct by examining their strengths and weaknesses. The analysis in this section serves to examine the scope of application for veil piercing in relation to these other remedies. By doing this, the piercing doctrine should become more concrete and accurate as I show the inadequacies of the statutory remedies in certain situations. Through this, I attempt to map an unregulated grey area of opportunism where the statutory remedies do not apply but where intervention still is necessary.

This examination also serves another function. The practicing lawyers often need to make a choice between these remedies. The choice can be far from easy. In this section, I will analyze the potential choices. The facts of the cases are taken as a given, and I will discuss the application of the potential remedies based on the facts.

2. The Verkkokauppa Case – KKO 2015:17

2.1. A Short Description of the Case

I will begin by describing the facts and the story of the KKO 2015:17 decision, as I did in I.2. of this work. I leave it up to the reader to choose whether another read-through is necessary. The repeated parts are indented. For the coherence of the analysis, though, the description is necessary here.

The case was about a Finnish corporation named Verkkokauppa.com Oy and its Estonian subsidiary, Arctecho Oü.⁴⁵⁷ The court found that Verkkokauppa had practiced part of its business through Arctecho and thus had avoided paying remuneration for private copying. The court inspected the ownership and control structure of the corporations and deduced that the central interest in the division of business was avoiding said legal obligation. Verkkokauppa was held liable for the neglected remunerations along with Arctecho.

Arctecho had sold storage devices exclusively to Finnish consumers via verkkokauppa.com. On this website, the user selected a product category called “direct deliveries.” Selecting this category transferred the user to a page that informed that she could order products directly from the warehouse of verkkokauppa.ee from Estonia without having to pay the remunerations. After making a purchase, the client received a confirmation email from an employee of Verkkokauppa, and the contact information given was that of Verkkokauppa. The confirmation email made no mention whatsoever of Arctecho or verkkokauppa.ee.

Of the of Arctecho stock, 51% was owned by S, 29% by Verkkokauppa, and the rest by two board members of Verkkokauppa until 30 June 2009. After said date, the whole stock was owned by Verkkokauppa. S also held the positions of CEO and chairman of the board of directors. At the same time, S was a member of Arctecho’s board of directors, which only had two positions. S had the right to represent both of the corporations alone.

Teosto, the Finnish agency for the collection of remunerations for copyright usage, argued that Arctecho had been founded only to avoid the legal obligation of paying remunerations. Verkkokauppa should be held liable for the neglected remunerations as the real operator of the business. Verkkokauppa denied liability and claimed that Arctecho was an independent limited liability company situated in Estonia and, as such, its liabilities could not belong to a Finnish corporation.

In its defense, Verkkokauppa claimed various other reasons for situating Arctecho in Estonia, such as taxation and general level of costs. However, Arctecho was shut down right after the remunerations were demanded, despite the fact that it could have continued the business and just added the remuneration to the selling price of the products, as is customary. The Supreme Court found that the sole or the primary purpose of the corporation was to avoid the remunerations.

The fact that Arctecho itself had acquired some products it was selling from manufacturers and that it contracted the product logistics was not

⁴⁵⁷ The fact that the subsidiary was foreign holds no meaning for the future interpretation of the veil piercing requirements. See *Savela* 2015 at 409 and 412.

enough to prove that Arctecho was an independent actor. In addition, from the customer's viewpoint, Arctecho's operations appeared as Verkkokauppa's business. The Supreme Court found Arctecho to be completely dependent on Verkkokauppa. Verkkokauppa had, in fact, conducted part of its core business via Arctecho in order to achieve advantage by avoiding legal obligations. Considering ownership and control relationships, the Supreme Court deduced that the key objective for founding a limited liability company in Estonia and operating the business from there was in fact avoiding the legal obligations. The conduct of Verkkokauppa was found reprehensible enough to set aside Arctecho's position as a corporation separate from its owners, and Verkkokauppa was held liable for the neglected remunerations.

It was clear from the start that Arctecho was founded under the assumption that the remuneration duty did not apply to it. The defendants even claim that they asked Teosto about this, and in their opinion, Teosto had affirmed the non-existence of the remuneration duty. Teosto denies giving such an answer. In all simplicity, if such an answer existed, then Teosto was certainly aware of the damaging actions and had accepted them. On that occasion, no damage could be claimed. The evidence the defendants brought about Teosto's answer was not convincing, and the courts denied this argument.⁴⁵⁸

This case was interesting from a tort perspective, as the parties discussed the nature of the remunerations. The prevailing opinion was that the remunerations are a natural compensation for damage caused by illegally copying artists' works.⁴⁵⁹ As such, they are tort claims under Brussels I Article 5. This question was discussed because Arctecho claimed the Finnish courts had no jurisdiction and the correct forum was Estonian. The claim was dismissed as the characterization of tort established the Finnish court's jurisdiction.

Even if the remunerations are, in essence, compensation for damage, they are not directly claimable in accordance with the Tort Liability Act. The ruling was in accordance with Brussels I Article 5 and was solely meant to establish the jurisdiction. When jurisdiction was established, the Finnish court could decide on Arctecho's duty to pay these remunerations. The duty to pay was in turn decided by determining the importer of the products in accordance with Section 26a of the Finnish Copyright Act. All the court instances deemed Arctecho the importer and thus held it liable for the neglected remunerations. Unfortunately, during the trial, Arctecho had terminated its operations and could not pay the remunerations.

458 See especially the appellate court decision's differing opinion by Judge Palmela at 11 and 12.

459 The opposing opinion was that the remunerations are just normal credit and claiming them is normal debt collection.

Fortunately, Teosto had claimed both Verkkokauppa.com Oy⁴⁶⁰ and Arctecho Oü liable from the beginning. I will not discuss Arctecho's liability further. Instead, I will focus on the liability of Verkkokauppa and potentially S. Going forward, I will not address all the facts of the case. I only pick relevant ones from the written materials and base my analysis on them.

2.2. Liability for Damages

2.2.1. Limitations to the Application of the Tort Liability Act

The Tort Liability Act Chapter 2, Section 1 reads, "A person who deliberately or negligently causes injury or damage to another shall be liable for damages, unless otherwise follows from the provisions of this Act..." The damage thus needs to be caused deliberately or negligently and in causal relation to the action. In a corporate group context, the liability dilutes very likely. The default situation is that the company is liable for damages caused in its operations based on the Tort Liability Act. Within the company, liability is determined according to Company Act. Here, however, we are not interested in the default situation. We seek to hold someone else liable because the default liable party cannot pay the remunerations. Potential liable parties include Verkkokauppa, S as he was the control holder in Verkkokauppa, and the board of directors of Arctecho. Regarding Verkkokauppa and S, the argument is that they have used their control in Arctecho to ensure that remunerations were not paid, thus causing the damage. As for the management of Arctecho, Company Act Chapter 22, Section 1 determines the liability for damages. The management is liable for damage caused to the company if the management has violated its duty of care, a Company Act provision or the bylaws.

Currently, a strong division exists between Company Act liability for damages and the Tort Liability Act. The argument goes that when another law governs the liability for damages, the Tort Liability Act does not apply.⁴⁶¹ The liability system in Company Act is exclusive and cannot be complemented by the Tort Liability Act.⁴⁶² However, the decision in KKO 1983 II 157 takes the stance that if one person acts in several different capacities and causes the damage, the systems could be used as alternatives to each other.⁴⁶³ It remains debatable as to whether this can be applied in a corporate context.⁴⁶⁴ Company Act also governs the liability of the shareholders

⁴⁶⁰ Then Arctecho Oy, the Estonian subsidiary, had the same name aside from the different corporate identifier "Oü."

⁴⁶¹ This is even expressed in the Tort Liability Act Chapter 1, Section 1. About the interpretation, see *Nyström* 2015 at 636–640.

⁴⁶² See *Saarnilehto* 2007 at 30 and *Nyström* 2015 at 636–637.

⁴⁶³ See also *Nyström* 2015 at 638.

⁴⁶⁴ See *Nyström* 2015.

for damage they caused in that capacity (Company Act 22:2). It could thus be argued that we cannot apply the Tort Liability Act to the conduct of Verkkokauppa or the management of Arctecho as the Company Act liability system takes priority.

We could argue, however, that Verkkokauppa or S acted in a different capacity in Arctecho's operation. Besides their positions as shareholders and in the case of S as a board member, did they act like the ones causing the damage? If they acted to cause the damage in a capacity that was not their capacity in the corporation, the corporation is not liable,⁴⁶⁵ but they would still have caused the damage. It is easily established that S was the one actually making the decisions and held *de facto* control over the conduct either directly or through Verkkokauppa. Could they then be held liable for using this control? This interpretation could be possible but is a large step away from the requirements of the causal relationship between the actions and the damage.

Unfortunately, the material of the case does not mention acts of control that could be considered to enable liability for torts. The material does not mention a direct or implied order to neglect the remunerations given by Verkkokauppa or S to Arctecho in their capacities as controllers. The Supreme Court held apparent in the decision that the corporate group structure was designed to neglect the remunerations. The materials do not even give reasons to believe that Verkkokauppa or S acted in capacities other than shareholder and board member, respectively. It would also be extremely problematic to base the hypothetical other capacity to the exercise of control, as it would be impossible to differentiate at which capacity they acted when controlling Arctecho: as the corporation-related shareholder and manager positions or as persons outside the corporation capable of influencing the corporation.

Should we still wish to apply the Tort Liability Act to this conduct, we would have to show that the decision made in Arctecho was actually made by Verkkokauppa or S and that Arctecho was but a straw man acting according to the directions of Verkkokauppa. This would not change the formal actor, however. We would need justification for going over the formal actor. *Applying tort liability in this case would require extending its usual interpretation to resemble veil piercing.*

2.2.2. Especially Weighty Reasons as a Requirement for Compensating Economic Loss

Another issue arises from the Tort Liability Act Chapter 5, Section 1. According to it, economic loss that is not connected to personal injury or damage to property shall be compensated only where the injury or damage has been caused by an act punishable by law in the exercise of public authority or in other cases where there are especially weighty reasons. It is obvious that there has not been personal injury or damage to property in the inspected case. Compensating such pure economic

⁴⁶⁵ See *Karhu – Ståhlberg* 2013 at 111.

loss needs some justification. Of the options, only the especially weighty reasons seem plausible. This provision of law is especially hard to interpret. In the literature, violating fair business practices has been cited as justification,⁴⁶⁶ although in one Supreme Court case, even violations of the Fair Business Practices Act were not enough to allow the compensation of economic loss.⁴⁶⁷ *Ari Savela* sees the nature of the damaging action being as something that can only lead to economic loss. In these cases, the tort system's coherence requires finding the especially weighty reasons.⁴⁶⁸ Within the context here, only economic loss can result from the use of the corporate form. This would somewhat support the presence of especially weighty reasons in the grey area between piercing and tort. Still, the causality requirement of tort would need to be somewhat loosely interpreted even then.

In the literature, even abuse of rights has been thought to constitute especially weighty reasons.⁴⁶⁹ This opinion has an interesting connection to the KKO 2015:17 decision since veil piercing was formulated based on the abuse of corporate form. Violating some internationally established norms could also allow the compensation.⁴⁷⁰ Pihlajarinne, Havu and Vesala have argued that veil piercing was adopted in KKO 2015:17 because Finnish courts had the obligation to achieve the results laid down in EU legislation,⁴⁷¹ e.g., not doing this would have led to a violation of an international norm. The case is full of similarities to tort liability, but at all points, it seems that deviation from a standard interpretation would be necessary to establish liability. A similar issue was raised in C-724/17 and KKO 2019:90. The Finnish Supreme Court asked the European Court of justice for resolution, whether requiring artificiality and reprehensibility to establish liability would obstruct the fulfillment of desired results of EU legislation. Artificiality and reprehensibility criteria appear also in veil piercing test and thus it would have been clarifying to receive this resolution. Unfortunately for this research, the case was resolved with other means and neither court addressed this question.

2.2.3. Possibility of Applying Tort Liability in KKO 2015:17?

I find some support for the idea that veil piercing was adopted in the decision because applying tort liability would have required too many concessions to the tort doctrine. Basing the liability on tort doctrine would have required the court to interpret causality more loosely, greatly extend the especially weighty reasons beyond their established interpretation, or alternatively, consider the founding of

466 See *Ståhlberg – Karhu* 2013 at 326–328.

467 See KKO 1991:32.

468 *Savela* 2015 at 390–392 and the cases cited therein.

469 See *Ylöstalo* 1975 at 242–243.

470 *Karhu – Ståhlberg* 2013 at 329.

471 See *Pihlajarinne – Havu – Vesala* 2015 at 602. Similarly, see *Airaksinen – Rasinaho – Pulkkinen* 2018a at 19–20.

a corporation as the damaging action. All would have undesirable consequences, as they would make the tort doctrine less consistent and predictable. By adopting piercing, at least the tort doctrine remained intact.

Let us inspect two concessions to causality that applying tort doctrine to the case would have required: 1) loosening the requirement of causality or 2) deriving the causality from founding the corporation.⁴⁷² Both of these would require ignoring the formal actor. If we loosen the requirements of causality, we still would interpret the decision not to pay remunerations as the primary cause of the damage. However, the events and influences leading to this decision would be given greater emphasis. This would allow looking into the reasons for founding Arctecho and the primus motor behind the decision to found a subsidiary to sell products without paying the remunerations. This would utilize the connection between influence over the decision and the damage, regardless of the formal decision being made by others. This would resemble the piercing doctrine decided by the Supreme Court.

If we hypothetically place a different action as the basis of causality, we arrive in a bit of a different evaluation. The action that should be looked for is the founding of Arctecho. When Verkkokauppa founded Arctecho, it set in motion the chain of events that eventually led to the damage, whereas founding the corporation made it impossible to claim the damages from a solvent company. Thus, the damaging action was founding Arctecho. The damage is not the neglected payments but in the loss of the creditor's claim. If we use this formulation of tort in piercing situations, we actually arrive with two damage concepts: first, Arctecho is liable for the damage it caused by neglecting the remunerations, and second, Verkkokauppa is liable for the damage caused by founding a corporation incapable of compensating the damage its operations caused. Verkkokauppa would most likely not be liable under non-stretched tort doctrine.

If someone attempted to base a tort claim on founding a corporation, it would be rather easy to dismiss. Every decision to found a corporation is a risk limitation; this risk limitation is generally accepted in society and is thought of as beneficial and protected under freedom of trade. Under these circumstances, it would be laborious at best to establish negligence and especially weighty reasons required for compensating economic loss. That is, how far did the conduct derive from normal parent corporation guidance in a corporate group? Likely not at all.

2.2.4. The Introduced Piercing Doctrine Resembles Tort

The Supreme Court did arrive at a piercing doctrine that greatly resembles tort liability, though. The key elements of tort liability are still there. There needs to be an action

⁴⁷² Note that I am analyzing only the KKO 2015:17 case here. In general inspection, the corporation does not need to be founded for unacceptable purpose, but, besides it, causality could be derived from any moment where the operation of an existing corporation was altered to enable the abuse.

that is condemnable and results in damage to others—action, negligence, damage and causality are still there. They are all limited, however, and one requirement is added: the use of corporate group structure, intercorporate relationships or shareholder's control is the first limitation. The act part of tort doctrine is thus made much more narrow. It is limited to apply only to the use of the corporate form. Similarly, it limits the causal relationship part. The damage or evasion of a legal duty needs to causally link to the use of the corporate form. Finally, piercing required the use to be artificial and reprehensible. Deliberate or negligent behavior in tort law includes an element of reprehensibility and moral condemnation. They include an *ex post* opinion that someone should have acted in a different manner. Similarly, the reprehensibility requirement of veil piercing addresses the choice *ex post* and expresses a moral condemnation, that the behavior was not acceptable. The piercing doctrine adds the requirement of artificiality. This requirement is unknown to tort liability.

These similarities are striking. It seems that the veil piercing doctrine is modeled after tort liability and was born out of the need to extend the causal link to lengths that would have threatened the consistency of existing tort doctrine. Veil piercing could be thought of as a narrow exception to the general doctrine of torts, which would allow the use of the familiar concepts of causality and damage.

One addition must be made, however. If we adopt elements from tort, then the aforementioned question about what the causal link is needs to be answered. The formulation of the piercing doctrine guides us here. Piercing is possible when someone uses corporate group structure, intercorporate relationships or shareholder's control. The actions are determined and limited to these. This loose wording allows different interpretations. The damage can be from the creation of the arrangement, e.g., founding the corporation group structure prevented collection of the debt and thus caused damage. It can also be from the influence over the decision-making, e.g., one person could manipulate the contractual relationships of two corporations, and this manipulation caused one corporation to lose its assets.

Inspecting causality in piercing doctrine seems redundant, though. As mentioned, every founding of a corporation is a limitation of liability. If the negative risks are realized, then one benefits from the limitation of liability and another person is worse off. If the corporation fails, then the founder benefits from the limitation of liability and the creditors suffer some damage. *Thus, the causality between the founding of the corporation and the damage is automatically present when a corporation fails.* The same is true when someone uses a corporate arrangement. Being able to manipulate corporate actions without the action of founding them still bestows the benefits of separate personality and limited liability on the controller. Causality between the use and damage is an inevitable consequence of the nature of limited liability. No effort should be necessary to show the causality in a piercing case.

It is worth noting that KKO 2017:94 disfigures the comparison to tort a bit. In tort liability, the one performing the action would be liable. However, in said

decision, liability was not placed on the one exercising influence but rather on the party who benefitted from the actions. This is a clear deviation from tort. Piercing disregards condemnable arrangements, whereas tort doctrine seeks to compensate damage caused by condemnable arrangements.

2.3. Company Act Liability for Damages

2.3.1. Narrowing the Selection

Company Act 22:1 lays out the situations in which the management can be held liable. Liability follows from violations of the Company Act provisions, bylaws or duty of care. Almost identically, Company Act 22:3 governs the liability of a shareholder for violations of Company Act or bylaws.⁴⁷³ Verkkokauppa and S were both shareholders of Arctecho, and S was, along with another person, on Arctecho's board of directors. Therefore, Company Act liability doctrines could potentially be applied here. Liability of the CEO or the chairperson of the board is not discussed here.

If we try to hold Verkkokauppa or S liable with the Company Act Chapter 22 provisions, we encounter a problem. These sections require that the actions were in violation of the Company Act or the bylaws. The actions in the case were in violation of copyright law but not the Company Act. These liability provisions would prove inapplicable. Company Act liability provisions are problematic for other reasons, also. These sections are meant to cover damage to the corporation itself and third parties only if the Company Act or bylaws were violated. In practice, the Company Act provisions, a violation of which could lead to the damage of any third party, are limited to asset distribution and other creditor protection norms.⁴⁷⁴ Violating the bylaws can cause damage to a third party only when the bylaws have a clause that grants that party direct benefits.⁴⁷⁵ The management can also be liable for breaches of duty of care (Company Act 22:1.1). This liability is only for damages caused to the company. Plausibly applicable sections would thus be in violation of creditor protection norms, namely unlawful distribution (Company Act 13:1.3) and violation of duty of care.

2.3.2. Unlawful Distribution

Company Act 13:1.3 set out a norm that prohibits any transactions that reduce the assets of the company or increase its liabilities without a sound business reason. Any such transaction constitutes an unlawful distribution. If the recipient knew that the

⁴⁷³ For more of these doctrines, see *Savela* 2015 at 11 onwards and 201–214.

⁴⁷⁴ *Savela* 2015 at 143–150. He inspects each situation separately and only arrives at the affirmative conclusion in regard to the creditors.

⁴⁷⁵ About these sorts of clauses, see *Kärki* 2017 at 168–173.

transactions were in violation of Company Act or the bylaws, they must refund the assets received (Company Act 13:4). The Company Act is not entirely explicit as to what constitutes unlawful distribution. Essentially, assets can be distributed from the corporation without receiving anything in return, only according to the rules in Company Act 13:1.1.⁴⁷⁶

Sound business reason can be understood to mean that the transaction needs to somehow further the purpose of the corporation,⁴⁷⁷ which, by default, is to create profit for the shareholders (Company Act 1:5). Thus, any motive counter to this purpose makes the transaction an unlawful distribution unless the bylaws contain a provision allowing such a transaction. The preparatory materials of the company give some guidance as to what unlawful distribution is. This includes gratuitous transactions and transactions where the compensation does not match the actual value of the assets leaving the corporation. For example, an overly high or low interest rate on a loan is an unlawful distribution.⁴⁷⁸ This effectively means that corporations have a duty to price their transactions at market value. However, the business reasons behind the underpriced transactions can be a bit more indirect. For example, an advertisement campaign and discount prices are a tool for attaining market share and thus constitute a sound business reason to justify the discount. It is arguable that the benefit of the corporate group also constitutes a business reason, at least to some extent.⁴⁷⁹

Did anything in the Verkkokauppa case suggest unlawful distribution? First of all, I must note that the analysis of the Finnish distribution and management liability system in the Verkkokauppa case would have been moot as Estonian law would have governed those claims. It is, thus, only theoretical interest in the relationships between different liability doctrines that are served through this examination. The analysis is therefore operated under the (false) assumption that Finnish law would have governed Arctecho's operations. While this would not have benefitted the lawyers in the actual case, this change allows for deducing whether piercing or more traditional liability approaches are appropriate in an all-Finnish case. The examination only lends the facts of the corporate relationship, not the applicable laws.

The relationship between Verkkokauppa and Arctecho was organized as a contractual relationship. Arctecho purchased a lot of products and services from

476 Excluding corporate gifts (Company Act 13:8).

477 See HE 109/2005 vp at 124.

478 HE 109/2005 vp at 124.

479 See KKO 2015:105. This sort of indirect corporate benefit through the corporate groups' well-being is discussed in the context of group subsidies. See, for example, *Nyström* 2013, *Villa* 2016 and *Vahtera* 2016.

The issue is far from resolved, though, and further analysis on the subject would be interesting but falls outside the themes of this work.

Verkkokauppa, and its funding was arranged in large part by loans from Verkkokauppa. Clearly, these transactions were happening between the two corporations. The case materials do not express any values for these transactions, and it remains undesirably laborious to seek those values and assess whether they matched the market value. This would require a thorough examination of the corporation's accounts, as well as knowledge of the financial and data storage device markets during 2005–2009. For the purposes of this work, it is sufficient to note the existence of these transactions. Thus, some fertile ground for the unlawful distribution speculation is to be found.

To chase this line of argumentation further, we would have to prove that the transactions in reality were made below market value and were to the benefit of Verkkokauppa and at the expense of Arctecho. If this were established, Verkkokauppa would be duty-bound to refund the assets it received unlawfully. Insofar as these assets cannot be recovered through refund duty, the management of Arctecho would be liable for the damage caused by the unlawful distribution. The question is about whether they allowed the company to distribute assets at below-market value, thus violating Company Act provisions on asset distribution. The defendants did claim that the transactions were made according to at-arm's-length terms.⁴⁸⁰ I will not go into detail who could be liable within the management, as the materials of the case do not provide information on this regard.

It is important to note that the refund obligation as well as the liability in damages would only cover the difference between the market value and the actual value of the transaction. This is because the loans and purchases no doubt had business purposes behind them – making Arctecho's business possible. The transactions were unlawful distribution only for the parts that did not have a business purpose. When these transactions are made at market value, they have a business purpose, but when deviation from that value exists, there is damage to a party of the transaction and a benefit for the other.

Another hindrance with unlawful distribution is that only the corporation itself can claim these damages and refund obligation. Unlawful distribution does not directly hurt the creditors, though it makes it less likely that they receive their dues simply because the debtor corporation is worse off. Thus, for the creditor's claim to damage, the corporation unlawfully distributing funds should first be proven unable to fulfill the creditors' claims. Essentially, this means bankruptcy. In the examined case, this would have been a rather arduous procedure. Teosto would have had to first confirm Arctecho's duty to pay remunerations through a court procedure, after which they would claim payment from Arctecho only to notice that it has seized operations. Then they would have had to make an application to an Estonian court to have Arctecho declared bankrupt. The bankruptcy estate could then claim some assets back from these transactions. They would naturally apply Estonian law to the

480 See the District Court decision in KKO 2015:17 at 25–26.

claims, and thus the refund obligation and liability in damages could be determined in a different manner, but the wording of the Estonian commercial code §167¹ could allow for a claim in damages similar to that in Finland. Estonia does not have a provision that would prohibit unlawful distribution similar to Finland. This would certainly have been a laborious and uncertain route to pursue the remunerations. Surprisingly, veil piercing does not seem too complicated in comparison.

2.4. Debtor's Dishonesty, Damages and Forfeiture of the Proceeds of the Crime

Here again, I must note that the analysis of the Finnish dishonesty by a debtor provision would not apply. The potential crimes would have been committed in Estonia and would thus be governed under Estonian law. I will not analyze the choice of law and jurisdiction in this work, as those questions are not of interest in the development of the veil piercing doctrine. It is thus only a theoretical interest in the relationships between different liability doctrines that are served through this examination. The analysis is thus operated under the (false) assumption that Finnish law would have governed Arctecho's operations. While this would not have benefitted the lawyers in the actual case, this change allows for partially deducing whether piercing or more traditional liability approaches are appropriate in an all-Finnish case.

The examination only lends the facts of the corporate relationship, not the applicable laws. It is productive to lend the facts and impose a select alteration. This allows us to use the familiar facts and explore possibilities based on them. The alternative would have been either to seek another case or to invent one. The two major piercing cases are KKO 2015:17 and KKO 2017:94, and both are under analysis. There is simply no piercing case concrete enough to replace KKO 2015:17. Inventing one also seems worse than using an alternative law to the existing case. In an invented case, every fact would be made up, possibly leading to an arbitrary choice of facts and opening the work up to a critique of selecting the facts on an ideological basis or to favor an outcome of personal desire. The choice of law does not matter in a hypothetical analysis. Thus, the question answered here is what to note when making the choice between these doctrines in the future. It is most definitely not about how the actual situation described in KKO 2015:17 could have been resolved.

Debtor's dishonesty, similar to unlawful distribution, requires transferring, giving away or destroying property, or alternatively, the baseless addition of liabilities. This action, then, needs to cause or worsen the insolvency of the debtor. Again, we have the same evidence on the transaction between the two corporations. Arctecho operated with funds it received from loans granted by Verkkokauppa, and Arctecho purchased the products mostly from Verkkokauppa. Should these transactions have been priced under market value, then these actions would constitute giving away

property without an acceptable reason. It was entirely possible and acceptable to operate Arctecho without the need to distribute assets and transfer the profits away as loan payments. If we could also determine that Arctecho was insolvent or became insolvent due to this, then the actions would constitute debtor's dishonesty. We do not have any evidence of this. On the contrary, on the materials, the defendants argue that Arctecho was shut down in large part due to the cost risk created by Teosto's claim. While this is not concrete proof of solvency, it certainly hints that the business was otherwise operational.

Yet one could argue that Arctecho should have been considered insolvent from the beginning. This would require an *ius infinitum* argument. Everyone must be aware of the content of the law, and ignorance is no excuse. Therefore, Arctecho and the management had to be aware of the remuneration duty, and by neglecting it, they added corporate liabilities without a basis. If these neglected liabilities are taken into account, it is arguable that Arctecho was insolvent at the time these remunerations were demanded at the latest. If we affirm that the management had to be aware of the remuneration duty, then the insolvency may have started even earlier. A third option for the beginning of the insolvency would be the date that the judgment on Teosto's claim became final.

Determining between these dates becomes an effort to ascertain how obvious the remuneration duty was. Verkkokauppa and Arctecho did deny their remuneration duty in court and made a lot of effort to contest the duty. The most complicated legal issues were the correct forum and Verkkokauppa's liability from piercing. Arctecho's duty to pay remunerations was a much more simple issue, and arguably, it was simple enough that denying it was clearly without a basis in law. Should Arctecho and its representatives have known that contesting the duty was moot? The duty to pay remunerations is based on EU regulation, which requires the member states to ensure that the artists receive the remunerations. The EU Court's case law had an earlier decision deeming it impossible that a seller does not pay remunerations to any member state.⁴⁸¹ It arguably could not have been obvious to Arctecho that an arrangement where no one pays the remunerations is impossible. The question was argued in the EUC and was only resolved after the Arctecho arrangement was dissolved. At the time, the legal issue was unclear. The argumentation that the purchasers were the importers of the products was also obviously *contra legem*. This interpretation would have invoked an exception to the remuneration duty. Denying the remuneration duty was plausible at that time.

Instead of providing some route toward satisfaction of the creditors, debtor's dishonesty seems to only take the existing approach of unlawful distribution and adds

481 EUC 16.6.2011, C-462/09 (Opus) at 10,12 and 38–40. Additionally, KKO 2016:65 established the management's duty to be aware of the core legal issues of the company even when a division of duties exists.

another requirement to the mix. Establishing debtor's dishonesty in this case would require proving the same aspects as unlawful distribution and then one would still need to prove that the corporation was insolvent during the distribution or became insolvent due to it. The heightened burden of proof in the criminal procedure creates yet another disadvantage to this approach. As an advantage though, the prosecutor would be on the case, and the cost risk of trial would be lower.

If a crime has caused damage, then that damage can be claimed in full. If the damages are not claimed, then the prosecutor needs to demand forfeiture of the proceeds of the crime. Could Teosto claim the full amount of the neglected remunerations as damage? The amount of unpaid debt no doubt is the damage the creditor suffers. If the transactions caused the insolvency of Arctecho, then a causal relation between the damaging act exists, and the full unpaid amount could be claimed. The transactions caused insolvency and then insolvency caused damage to creditors, as the company could no longer operate and receive cash flow to pay creditors, although a contrary argument could be presented about limiting the liability to transferred amounts when the debtor's cash flow was uncertain.⁴⁸² If the company was legitimately nearing insolvency and thus unlikely to ever be able to pay the credit, then the criminal transactions might not be in causal relation to the total unpaid debts that could be claimed in bankruptcy. Instead, the damage would only be the amount these transactions caused, e.g., the transactions that had no benefit for the business or those that deviated from the market value to the detriment of the debtor.

Although dishonesty by a debtor could, in theory, apply to a situation with these facts, it does have several key complications. First, will the prosecutor take the case? Second, there is a heightened burden of proof in a criminal case. Third, the amount of damage is contestable. Fourth, debtor's dishonesty is reliant on transactions or the increase of liabilities, the same as unlawful distribution. If these are overcome however, the criminal procedure does have its benefits. Firstly, the police will conduct an investigation and do the relevant fact-finding. Second, if the damage was caused by a crime, economic losses are claimable without having to prove especially weighty reasons.

2.5. Asset Recovery

Asset recovery is a doctrine that is meant to prevent the debtor from making transactions that damage the creditors or that favor one creditor over the others. The Act on the Recovery of Assets to Bankruptcy Estates sets the rules of asset recovery. Asset recovery enables the reversal of transactions made by the debtor

⁴⁸² Cf. *Kukkonen* 2016a at 729.

during a set period before bankruptcy or another insolvency proceeding. From this short description, we find three key limitations to its application: the time period limitation, requirement of an insolvency proceeding and transaction orientation. Similar to the previously discussed doctrines, asset recovery is applicable solely to transactions.

Depending on the type of transaction, a different section of the Act on the Recovery of Assets applies. In KKO 2015:17, the intercorporate relations were forged contractually. The contracts were loans and sales of product. The Asset Recovery Act Section 10 would allow reversing any payment on a loan made three months before bankruptcy if the payment was made with an unusual method before the expiration date or if it was disproportionately large compared to the debtor's assets. There are no indicators in the material about any of these elements. Section 5 of the act allows the reversal of any legal action that has favored one creditor over others, has transferred assets away from the debtor to the detriment of the creditors, or has added liabilities to the detriment of the creditors. The application of Section 5 requires the debtor to have been insolvent during the time the legal action was made. This raises the same problem as discussed before in the context of dishonesty by a debtor. When should Arctecho have been considered insolvent—from the start, from the claim for remunerations or from the finality of the remuneration judgment? This assessment of insolvency would bring a lot of uncertainty to the asset recovery claim. If the contested claim for remunerations is taken into account as a debt of Arctecho, then insolvency was no doubt present, but the question of when it needed to be taken into account remains open to interpretation.

In addition, the other party in the transaction needs to have been aware of the insolvency. This is not an issue since Paragraph 2 of Section 5 allows for assuming this knowledge when the other party is considered a close party to the debtor. Section 3 of the act determines who can be considered a close party. The relevant part of Section 3 is the second paragraph, stating that any enterprise, corporation, foundation or other society is considered a close party to the debtor if they are fundamentally united in interests or if one holds substantial influence over the other. Their businesses were entangled, and Verkkokauppa shared the financial interests of Arctecho through sales and loans. Verkkokauppa and S were both shareholders of Arctecho, and S, in turn, owned Verkkokauppa. S held board memberships in both corporations. Arctecho and Verkkokauppa were no doubt close parties through either factor.

The close party status allows different, more creditor-friendly treatments and enables reversing transactions made more than five years before the insolvency proceeding application was submitted. Other than that, it allows utilizing the assumption of gratuitous transaction in Section 8. Any transfer of assets from the debtor to the close party that was made without counter value or the value the debtor receives is disproportionately small compared to the given assets and is assumed a

gift. Gifts, in turn, are reversible by Section 6 of the act. This returns us to the same analysis as the unlawful distribution and dishonesty by the debtor if the contractual relations between Verkkokauppa and Arctecho were made at market value. If they were not, we have yet another doctrine capable of remedying those undervalued transfers of assets.

Still, it is important to note, that Arctecho never went bankrupt. Teosto would have faced the same hardships with asset recovery as it would have with a liability in damages claim based on Company Act 22:1. I will not repeat the analysis here and refer the reader to section IV.2.3. of this work. Additionally, the bankruptcy proceedings and asset recovery would have been conducted according to Estonian law.

3. KKO 2017:94 and Appellate Court of Turku 26.10.2016 no. 1070

3.1. General Notes on the Method of Analysis of These Two Cases

The cases KKO 2017:94 and Appellate Court of Turku 26.10.2016 no. 1070 (THO 1070) were about the same corporate arrangement. In the KKO 2017:94 case, the piercing claim was made by the pay security and on the THO case by a group of employees. The defendants were the same two companies in both cases, and the same facts were present in both. One person owned the shares of a corporation practicing logistics business, and that same person was the chairperson of the corporation's board of directors. Initially, the business was practiced through one corporation, which employed several persons as truck drivers. The business consisted mainly of delivery contracts with Itella/Posti Oy. The shareholder decided to make a risk limitation arrangement. He founded another corporation, owned solely by him, and he occupied the chairperson position on its board. The new corporation was a staff rental business (staff corporation). All the existing truck drivers' employee contracts were transferred to the new corporation. All the assets and delivery contracts were left in the old corporation (asset corporation). Both operated from the same address.

The shareholder and a witness in court elaborated on the purposes behind the arrangement thusly: The main motive was to simplify the corporation's operations since the primary client sometimes required the service of drivers without the trucks. The arrangement was also meant to isolate the risk of diminished demand for the company services. In that case, the arrangement would allow renting staff services to others. They expressly denied any financial troubles as a motive behind the arrangement. According to them, the pricing of staff rental contracts between the two companies allowed the staff corporation to pay all the wages and other legally mandated fees as well as taxes. In a report conducted by the bankruptcy estate, the

shareholder listed the primary purpose behind founding the staff corporation as a means of outsourcing the employee contracts into a separate corporation to allow the asset corporation to better compete in the logistics market.

Following some disputes with the employees and the logistics workers' union AKT, Itella eventually terminated the delivery contracts. These contracts constituted around 90% of the business. Unable to replace the lost business, the asset corporation seized renting the staff services from the staff corporation. The staff corporation ended up in bankruptcy soon after because the asset corporation was its only client. The management claimed that other contacts were sought, albeit unsuccessfully. The bankruptcy estate serviced an investigation into the debtor's finances, which revealed that the corporation had operated at a loss every year. The losses were between 48 000 euros and 120 000 euros annually. It had also neglected to pay value-added tax and employee fees, totaling 140 000 euros.

In KKO 2017:94, the authority responsible for pay security (ELY) paid the unpaid wages of the employees of the now-bankrupt staff corporation. It demanded the asset corporation to refund the unpaid wages of employees based on piercing the corporate veil. Piercing in a pay security context derives support from the Pay Security Act Section 17 and the legislative works behind that section. Thus, it seems that piercing is more easily accepted in pay security cases.⁴⁸³ Veil piercing in general, however, can adopt interpretation and support from these pay security piercing cases.⁴⁸⁴ Since veil piercing in pay security is founded in the section and pay security as a creditor is unable to even invoke the other doctrines discussed here, the discussion from here on out focuses on the employee creditors' position.

In the THO 1070 case, the employees claimed some unpaid wages. Although they did demand piercing, they won the case on other grounds in the appellate court.⁴⁸⁵ The employees thought the intercorporate relation was so commingled that the asset corporation should also be responsible for the unpaid wages. The employment contracts were unilaterally transferred, the entire benefit of the employees' work befell the asset corporation and the corporations' operations clearly were operated in unison, neglecting the individual corporate benefit. The district court pierced the veil on these grounds.

The discussion from here on out is from the viewpoint of the employee creditors in the case. In theory, they could be replaced by any bankruptcy creditor. The aim is thus to look at the possibilities the bankruptcy creditors have toward holding additional parties liable, namely, which doctrines would allow holding the beneficiary of the described corporate arrangement liable. This includes the doctrines that return assets to the bankruptcy estate, as well as those that benefit one creditor directly.

483 See *Kärki* 2018a.

484 As done in both KKO 2015:17 and KKO 2018:20.

485 Although not in any of the doctrines discussed here.

3.2. Liability for Damages

Any person causing damage to another is liable to compensate that damage. The requirements for compensation are an act or omission, damage, negligent behavior and causality between the damage and the act. In the materials of the case, no elements appear that would allow for utilizing the tort doctrine. Even if there were some, applying tort liability would be difficult for the same reasons described earlier when discussing KKO 2015:17.

It is also hard to isolate which act the damage is based on. Again, was it some concrete decision during the operation of the company or was it the founding of the intercorporate arrangement itself? From among the corporate operations, we could point to the contractual relationship between the two corporations and claim the damaging act to be the undervaluation of those. At that point, one should use the unlawful distribution clause and follow it up with the management liability claim according to Company Act 22:1.

We could alternatively choose the formation of the arrangement as the damaging act. The damage is simple enough to determine, as is the causality. Clearly founding a limited liability company limits the liability should some risk be realized. The problem is that founding a corporation to limit liability is exactly how the corporation is meant to be used. Establishing negligence or deliberate behavior is redundant; one can found a corporation only deliberately. The situation comes down to assessing whether especially weighty reasons exist to compensate economic loss. There is no need to repeat what was previously said on the subject in IV.2.2. Finding the especially weighty reasons would be extremely difficult. Applying tort law in the situation would have required concessions to the causality requirement or would establish causality from the founding of a corporation. In either choice, some justification needs to be provided for disregarding the formal actor.

In this case, a key deviation from KKO 2015:17 is present. Liability in damages places liability on the one causing the damage, e.g., the one performing the damaging act. In this case, the beneficiary of the arrangement was the one held liable. One person controlled both corporations and was able to determine how they acted. He was also the initiator behind founding the arrangement. If liability for damages could be based on the founding of a corporation, then it follows that the founder is liable, as he committed the damaging action. As said, the courts deviated from this in a dismissive manner, not even discussing the possibility of holding the founder liable. This would suggest a key difference between veil piercing and liability in damages. *Veil piercing as a remedy disregards a damaging arrangement, whereas liability in damages compensates a harmful action.* The difference appears in the nature of the remedy—disregarding the damaging arrangement versus compensating the damage one has caused. This would suggest that veil piercing is not a tort doctrine and would support the finding that veil piercing reflects the abuse of rights doctrine. As

a remedy, veil piercing has more in common with restoration as understood within contract law and asset recovery law. The parties affected by a nullified contract or unacceptable legal action are restored as close as possible to the status quo that existed before the legal action.

3.3. Company Act Liability for Damages

Company Act 22:1 seems applicable in this case also. One person acted as the entire management in both corporations. He was obligated by the Company Act regulation as well as the duty of care. Were these violated at any point? Potentially and likely they were. The staff company operated at a loss through the entirety of its existence, which suggests that the pricing set between the corporations was not at market value. If the pricing was not at market value, then every transaction between the asset corporation and the staff corporation would constitute a distribution of assets. These distributions would have been unlawful, as they do not provide assets for the shareholders but for the other corporation (Company Act 13:1).⁴⁸⁶ Naturally, if the transactions had a business reason, then they were not unlawful distribution. No evidence of any of these aspects is present in the documents.

However, the logistics services market is extremely competitive, so it is possible that the staff renting services were at market value as set by the competition. It would be extremely difficult to determine what the correct market price was, but it is clear that the asset corporation was able to turn a profit in the highly competitive market. The management's claims about the staff corporation being able to meet its obligations could be true. All the materials reveal is that the corporation was operated at a loss. It is clear, then, that the pricing did not allow the corporation to turn a profit or even cover its expenses. Additional funding was needed to pay the wages. There is no information in the materials as to where that funding came from. With this fact, the case is similar to NJA 2014 s. 877. The corporation in that arrangement was founded to manage a court case. The corporation received exactly the amount of funds needed to pay for its expenses relating to the case, but not enough to cover the legal expenses of the opposing party in case the trial was lost. The running expenses were covered by external sources of funding, but the corporation could be abandoned should the looming risk of greater expenses ever materialize. If the funds to pay wages in the KKO 2017:94 case came from the asset corporation, the situation is exactly alike and supports piercing.

One additional problem still appears with the market value consideration. The corporation's ability to turn a profit with their pricing does not tell anything about the market value. Market value is simply the price at which independent market

⁴⁸⁶ Unless the shareholders unanimously agreed to the procedure.

actors agree to buy and sell the services. It is thus entirely possible that the staff company in the case simply could not compete and was destined to fail eventually.

Another problem with applying unlawful distribution is that market value assumes unrelated at-arm's-length parties that form the price through negotiation. In this case, the two corporations were closely linked through ownership and the owner was able to manipulate the contractual relations between these corporations. Obviously, the opportunity to deviate from market value was present. Yet it could be argued that the asset corporation likely would not have terminated the contractual relationship had the staff corporation hiked its rates. The two were not competitive in that matter, as both could rely on the continuation of the patronage. Normal risks and incentive to compete with pricing simply did not exist in the situation. Even if the market value is determined by adjusting for these factors, it does not create the obligation to generate profit in both companies. Bad business is not forbidden. This setting does raise the question, though, as to how it is even possible to assess violations of the duty of care of the management here.

As the same person managed both corporations and was responsible for their contractual relationships, it seems likely that he would have been able to determine the division of benefits between the corporations. Thus, he would have known that the contract would be unprofitable for the staff corporation. This, in turn, would demand an explanation and justification per the business judgment rule. If he acted as per the purpose of separating benefits and risks, then making these contracts would always constitute a violation of the duty of care. Although running a business is complex and, even if one can unanimously determine the contractual terms and price, many other things could affect the profitability of the business. Being able to manipulate the contracts only shows that the opportunity was present and that liability would require some proof of the intentions and purposes behind the management's actions. Naturally, the purpose of the arrangement was not that obvious and needed to be determined in the court proceeding itself. The director/shareholder naturally denied this purpose through the entirety of the trial. It would seem, though, that liability in damages based on the violation of the duty of care could have served as an alternative to the piercing claim, although that claim, unlike piercing, could have only been made by the bankruptcy estate or a creditor on its behalf and for the benefit of the estate. The liable party would also deviate from the piercing claim as would the amount of claimable damages.

Additionally, no prohibition exists to operate the business at a loss. To avoid bankruptcy, the losses need to be covered somehow, by either price hikes or capital injections. Bankruptcies are a normal part of the market economy—the more efficient enterprise is able to price out the others. As such, we cannot really discern any information on the market value pricing from the profitability of a single corporation. However, neglecting to set the prices high enough to generate profit for the shareholders might constitute a violation of the duty of care set for

directors.⁴⁸⁷ In that case, the court would have to determine whether the business judgment rule's requirements on the *decision procedure* were met. The documents provide no material to assess the decision-making.

For the Company Act 22:1 liability for damages to materialize, one would need to prove unlawful distribution or violation of the duty of care. Regardless of the route chosen, the end result is a compensation for the company, divided *per capita* between the creditors through the bankruptcy estate. This would thus constitute a collective benefit instead of the individual benefit potentially achievable via piercing. As Company Act 22:1 is a damage compensation norm, it would not allow for recovering the full claim of the creditor. Instead, only the damage caused by the management is compensated. This issue was already discussed in chapter 1.2.3., so I will not repeat the arguments here.

3.4. Debtor's Dishonesty

The alternative elements of debtor's dishonesty that are potentially applicable in this case are that it "gives away or otherwise surrenders his or her property without acceptable reason" and "increases his or her liabilities without basis." Unlawful distribution was discussed in the previous section. The same difficulties as with the unlawful distribution part exist here. What is the market value and were there deviations from it? As noted earlier, no evidence of this sort of behavior is provided. Naturally, giving away or surrendering property can be done in ways other than unlawful distribution, though nothing in the case hints toward this.

As for the increase in liabilities without a basis, an argument exists that neglecting the taxes and employer fees would increase the liabilities. It no doubt creates liabilities and eventually leads to the inability to fulfill obligations in a timely manner. However, as those fees are derived from the business and its core functions, accumulating such liabilities are hardly without a basis. They are an automatic consequence of conducting the business. Neglecting to pay these fees is not increasing liabilities but simply neglecting them. The neglected amounts are temporarily available to the corporation before the authorities demand payment. How these "forcibly borrowed" resources are used can be criminal. Simply neglecting payments is also criminal, but not as a debtor's dishonesty. There are no indicators in the case material of any criminal uses. On the other hand, the shareholder of the corporations had claimed that the neglected payments accumulated after the contract with Itella fell apart. If this is the case, then a genuine crisis and eventually bankruptcy was the cause of neglect. It seems plausible that in such a situation, the corporation was simply unable to pay since no resources existed.

⁴⁸⁷ See also KKO 2003:33 and V.6.2. of this work.

Debtor's dishonesty also requires insolvency. The transfers of property need to cause or essentially worsen the insolvency. The staff corporation was operated at a loss, though it was able to operate. There are no indications that the company could not meet its obligations as they become due. The employees' claims in the THO 1070 case were contested and uncertain. The pay security authority's claim only covered the last three months before bankruptcy. It is also doubtful in this regard that the conduct described would meet the elements of debtor's dishonesty.

3.5. Asset Recovery

The Asset Recovery Act Section 10 would allow for reversing any payment on a loan made three months before bankruptcy if the payment was made with an unusual method or before the expiration date or if it was disproportionately large when compared to the assets of the debtor. There are no indicators in the material on any of these elements. Section 5 of the act allows reversing any legal action that has favored one creditor over others, has transferred assets away from the debtor to the detriment of the creditors or has added liabilities to the detriment of the creditors. The application of Section 5 requires the debtor to have been insolvent during the time the legal action was made. This raises the same problem as discussed before in the context of dishonesty by a debtor.

The Asset Recovery Act Section 3 names the following as close parties to each other: all corporations with which a person through shareholding or other economic relation has a significant unison of interests, as well as any close party of the person. Since both the asset corporation and the staff corporation were fully owned by a single person, that person was a close party to both corporations. This connection through the owner makes the two corporations close parties.

The close party status allows different, more creditor-friendly treatments. It enables reversing transactions made over five years before the insolvency proceedings began. Other than that, it allows utilizing the assumption of a gratuitous transaction from Section 8. Any transfer of assets from the debtor to the close party that was made without counter value or the value the debtor receives is disproportionately small compared to the given assets and is assumed a gift. Gifts, in turn, are reversible by Section 6 of the act. This returns us to the same analysis as the unlawful distribution and dishonesty by the debtor were the contractual relations between the asset and staff corporations made at market value. As discussed above, this evaluation is not possible within this research. As for other transactions between these companies, there is no evidence of any. Thus, the application of asset recovery would need to rely on the pricing of the employee rental contracts.

The same disadvantages exist as with the debtor's dishonesty and Company Act liability for damages. The resulting compensation or return of assets befall the

bankruptcy estate and, through it, to the creditors collectively. It does not serve the individual interest of the creditor itself, at least not in full.

4. Conclusions

In this chapter, I have examined the existing significant piercing cases to determine whether a satisfactory result could have been obtained through less controversial legal doctrines. The answer is a sound negative. Existing legal doctrines of liability in damages, criminal liability and asset recovery target different sorts of conduct and offer a different remedy to the situation. The findings somewhat repeat what was discovered in chapter III that sought to derive some analogy from these doctrines to develop the veil piercing doctrine. Some key differences exist, making it apparent that the doctrines are norms directed toward different sorts of conduct.

Tort liability seeks to compensate the damage one has caused by acting in a condemnable manner. The nature of condemnable actions makes this doctrine ill-suited for corporate arrangement situations. Founding a corporate arrangement is always according to the wording of the law, and the limitation of liability is always inherent in founding the corporation. This, combined with the especially weighty reasons required to compensate economic loss, make it undesirable to apply liability in damages to damages caused by founding a corporate arrangement. Such application would simply require many concessions to the doctrine of liability for damages. If the result were to be this controversial, it is better to make the exception as narrow as possible, thus creating a veil piercing doctrine that resembles liability in damages.

Company Act liability in damages, debtor's dishonesty and asset recovery all seem to boil down to the same question of whether the transactions between the companies had a business purpose and whether they were made at market value. They are tightly tied to transactions and their fairness. Creating the corporate arrangement predates the corporate transactions, however. The arrangement can be crafted to create a situation violating the creditors' right entirely without making these unfair transactions. This takes traditional approaches to creditor protection and renders them powerless.

The examined doctrines greatly differ in the type of remedy they offer. With tort liability, one seeks to determine the amount of damage caused and compensates that amount. The person liable is the one causing the damage, not the one benefiting from the action. Debtor's dishonesty allows claiming damages, and thus, the remedy is the same in criminal liability situations. The one who committed the crime is held liable. Similarly, Company Act liability holds liable the one who, in their role within the corporation, does not fulfill their duties, which causes damage to the company. It is also important to note an additional limitation: that the parties able to claim

Company Act liability are the corporation itself and the bankruptcy estate.⁴⁸⁸ Similarly, asset recovery is a remedy available for the bankruptcy estate and creditors in an insolvency proceeding. Debtor's dishonesty, on the other hand, requires the involvement of the police and prosecution. Veil piercing is a civil law claim and can be made by anyone who has suffered any damage from the arrangement. Veil piercing is like liability in damages as it is claimant-specific, e.g., the one suffering the damage can make the claim and gets awarded the remedy. Where piercing differs from liability in damages is the liable party. In this regard, veil piercing seems to resemble restoration. The arrangement is "cancelled" or disregarded, and the parties are granted rights as they would have been without the unfair arrangement.

From this analysis, we can deduce two definite limitations for veil piercing. The first elimination will be the transactions. There are several provisions in law meant to safeguard the assets and limit their transfer. Veil piercing needs not be one of those doctrines, and case law is unanimous on this thus far. Naturally, the transfers are likely to matter, as I will discuss in V.6.2 and V.6.5. of this work. They are used to siphon the corporation, and sometimes this is relevant in piercing.

The second piece of interest we find regards the tort doctrine. Depending on the case, the tort doctrine could apply if concessions were made, or it may not apply at all. Veil piercing cases have derived from tort doctrine mostly in regards to causality, though. There has been no explicit requirement to show the connection of cause and consequence; adopting one would not be of major importance, as case law has shown that damage in piercing situations is caused by using the corporate form. Limited liability, in turn, means that every time a corporate form is used and some relevant negative risk realizes, the incorporators likely benefit at the expense of some party. This is the accepted main function of the corporation. As such, we cannot place this sort of causality into the center of piercing doctrine. That would mean the end of limited liability. I will not kill limited liability here but will deduce a piercing doctrine that is capable of actually discerning the relevant conduct.

Although the discussion here has been brief, I feel it necessary to crystallize these findings even further:

1. Veil piercing does not target transactions.
2. Veil piercing requires a special kind of loose causality between corporate use and damage that is almost always present, and thus, no high significance should be given to it.

488 Usually like this, though the law allows shareholders and creditors to make the claim. These situations are rare since it is unlikely that these parties are damaged through the actions sanctioned in the Company Act 22:1 liability norm.

**V DEVELOPING THE DOCTRINE
OF PIERCING THE VEIL**

1. Introduction

Over the last few chapters, I have gone through issues that might seem auxiliary to the actual piercing test. At the least they were not about the test and its actual requirements. Those pages were not wasted, however. I have discovered a background theory that has actual implications in the interpretation of the test. Within them, I have shown several points of analogy that can be used to help interpret the ambiguous test laid out in KKO 2015:17. I have even discovered that veil piercing has distinct limitations in its application sphere. From this point onward, I will move the discussion toward the actual veil piercing test.

In this chapter, the veil piercing doctrine is further developed based on the Verkkokauppa decision and the three-prong test it laid out. The test was rather ambiguous and does not offer much guidance as it stands. Still, as laid out before in this work, the test in this form has a lot of theoretical and analogous support. Further analysis will show that the ambiguities can be reduced by analysis. In this scenario, it would be unjustified to alter the test for the abovementioned reasons, as well as the fact that after KKO 2015:17, the test has been used in several Supreme Court decisions.⁴⁸⁹

To recap, the test is as follows:

1. The use of corporate group structure, intercorporate relationships or shareholder's control
2. in a way that is artificial and reprehensible
3. causing damage to the corporation's creditors or evasion of a legal duty.

The first part of the test was dubbed the requirement of using the corporate form, the second as the requirement of improper behavior and the third as evading an obligation requirement. The third requirement is divided into two subcategories: evading a provision and causing damage to a creditor. These three categories derive support from objective facts. I borrowed terminology from Linna and Leppänen in I.3.2. of this work and dubbed these the supportive factors. It should be noted that these category names are rather arbitrary, and their functions are limited to simplifying the language used when referring to them. They have no interpretative significance.

This test will be developed by examining earlier case law on veil piercing, analogy to the doctrines analyzed in the previous chapter and opinions in the legal literature. The attempt is to further specify how these requirements should be interpreted. Similarly, attention is brought to deviations from earlier opinions and decisions.

489 See KKO 2017:94, KKO 2018:20 and KKO 2018:11.

And finally, recommendations are laid out as to how future decisions should react to piercing claims.

All this is supported with comparative analysis. The comparison is performed mostly in the indents of this chapter based on issues. Especially useful and compatible ideas are discussed in the main text, however. I will discuss the comparative elements during the analysis of the domestic relevant factors, which makes the comparison more easy to digest. The comparative elements seem to appear in three forms: 1) this issue is assessed the same or in a similar fashion; 2) this issue is assessed differently; or 3) this issue is not addressed at all. It would follow logically that situation 1 does not give rise to a lot of analysis. In situation 2, some pondering is necessary to reveal why things are different and whether the foreign interpretation should be considered in Finland as well. In hindsight, the third situation was most fruitful. Mostly, the influence is toward Finland as our fledgling doctrine has not yet encountered the numerous dilemmas piercing case law has seen abroad. These situations are addressed with a question: what should we do if this issue does appear in Finland?

The examination will begin with some notes on the use of corporate group structure, intercorporate relationships or shareholder's control in section V.2. Section V.3 addresses the question of control requirement. The examination will proceed to impropriety requirement in section V.4. The requirement of evading an obligation is discussed in section V.5. In section V.6., the supportive factors are laid out and inspected.

2. Use of Corporate Group, Intercorporate Relationships or Shareholder's Control

The first prong of the test accurately describes the key element behind veil piercing. The corporate form enables the separation of liabilities and other negative risks from benefits. In itself, this is a completely legitimate procedure. In fact, it is a key component of the corporate institution. These elements enable those with profitable ideas to found a business and fund it without the fear of personal bankruptcy. It encourages risk-taking while isolating or limiting the negative risk taken at the same time. It is relatively easy to find whether the corporate group, intercorporate relationships or shareholder's control have been used to isolate liability. Every instance of founding a corporation is a liability isolation. This is accepted as beneficial to the society. Veil piercing is the remedy when this element, the isolation of negative risks of the corporate form, is abused.

Corporate group use means using the corporate group structure to separate the obligations and assets into different entities. A corporate group is formed when one corporation controls another. The controlling corporation is the parent and

the controlled corporation is the subsidiary. The corporate group is an accepted institution in Finland; a corporation can own the stock of another corporation.

The Company Act and the Accounting Act provide us with some guidelines in assessing the significance of ownership for control. Company Act 8:12 states: “If a limited liability company exercises control over another domestic or foreign corporation or foundation, as referred to in Chapter 1, Section 5, of the Accounting Act, the limited liability company shall be the parent company and the other corporation or foundation a subsidiary. The parent company and its subsidiaries form a group. A limited liability company exercises control over another corporation or foundation also in the event that the limited liability company, together with one or several of its subsidiaries, or a subsidiary or several subsidiaries together exercise control over that corporation or foundation, as referred to in Chapter 1, Section 5, of the Accounting Act.”

Accounting Act 1:5 defines the situations in which one entity obliged to keep accounts holds control over another or a comparable foreign entity (target company or subsidiary⁴⁹⁰). Control exists if 1) the entity has more than half of the votes in the target company and this majority is based on ownership, membership, articles of association or other instrument constituting the legal relationships around the company;⁴⁹¹ 2) the entity has the right to appoint or dismiss the majority of the members of the board of directors in the target company or has the same appointment right in a corporate organ with the right to appoint the directors; or 3) the entity, in reality, controls the target company.

Corporate group structure always includes control. The group forms a network in which separate entities act coherently. The group can easily be made such that all the entities in it act according to the instructions of one entity, person or specific persons. Although inherently harmless, the possibilities for abuse are obvious. The legislation does include many provisions limiting these possibilities, but as the KKO 2015:17 case has proven, the provisions do not cover all the possible abuses.

The analogous doctrines do not limit their application to corporate schemes, though these schemes are definitely covered by them. This could be explained with their purposes. They exist to combat avoidance of tax, avoidance of attachment and avoidance of environmental liability with indifference toward how this is achieved. Veil piercing targets the avoidance of obligations achieved by utilizing the corporate form. Compared to the others, it specifically targets how avoidance is performed while being indifferent to what is avoided.

490 See HE 106/2005 at 98.

491 This definition includes the contracts the shareholders have made among themselves not involving the company at all, as long as such a contract entitles the entity with votes.

Intercorporate relationship use means using two corporations not in a corporate group to achieve similar results as described with corporate groups. What is different is the lack of the parent corporation and formal control, although the corporations can be under the same controller if she is a real person. This person founds two corporations and owns the shares and exercises control over both of them. A corporate group relationship exists only if the shareholder is a limited liability company.

Some element of common interest between the corporations in the arrangement is not explicitly required. Finding such an element would definitely support piercing.⁴⁹² Alternatively, some systematic behavior where the corporate arrangement is created to achieve the results detrimental to creditors should allow piercing. Piercing should not be used to limit taking advantage of market opportunities, even if they prove damaging to the creditors of one market actor. The intercorporate arrangement either needs to be created to cause the damage, or the corporations in an established arrangement need to serve some other common interest. Without requiring such interest, there is no way to discern legitimate corporate use in the market from illegitimate use allowing piercing. The common interest in intercorporate relationships should be interpreted as part of the improper use requirement, and it is further analyzed later.

It is thought that the shareholders hold the ultimate control in a corporation as they appoint the directors.⁴⁹³ They can even appoint themselves as directors, in which case their control over the corporation is thorough. Directors, in turn, decide what actions the corporation takes. Shareholders are not liable for the obligations of the corporation, but they can indirectly decide what obligations the corporation accumulates. Due to their position, shareholders can extract benefits from their corporation. Again, possibilities for abuse seem obvious. The determining factor is not control itself, but how it is used.

These three are not analyzed further since they are rather obvious. Using corporate group structure or intercorporate relations to the detriment of the creditors simply means that multiple corporations are involved, and their relationship somehow deviates from how the corporate form is meant to be used. The structure is used. The ambiguities with veil piercing lie not with whether the structure exists but with how it is used. The use determines whether the veil can be pierced. The corporate group and intercorporate relationships can be interpreted formally, as they are not decisive. The wording accommodates all uses of the corporate form.

492 See V.6.4. of this work.

493 See *Pönkä* 2008 at 739, *Mähönen – Villa* 2010 at 7 and *Berle - Means* 1933 at 70.

3. Control

3.1. Introduction

Shareholder's control, as mentioned in the Verkkokauppa decision, is not as simple as using the corporate group or intercorporate relationship. First, some party other than the shareholder can hold decisive control over the corporation. Second, it is not established how much comprehensive control the shareholder needs for piercing to apply. Veil piercing is only concerned with situations in which the corporate form is used to evade the application of provisions of law or to separate obligations from assets or benefits into different entities. The decision in KKO 2015:17 named three attributes of the corporation that could be targeted with piercing, all of which require control over the corporation. Of these, shareholder's control, by definition, includes control. With the other two, control is a prerequisite for use. Without controlling the entities involved, one can hardly use corporate group or intercorporate relationships to evade a provision or to damage creditors. Sometimes, a lesser degree of control or even a corporate connection is sufficient to extract some illegitimate benefit. Then one must be able to control the circumstances to a degree in order to succeed. Some influence over the decisions of the parties to the arrangement would seem crucial.

Some help could be derived from a reciprocal model of tort liability introduced by Pöyhönen, especially the concepts of operational and situational control describing control over the caused damage. The person with operational control is able to determine whether the operations are practiced and how. A person with situational control is able to affect the actual chain of events; this person can directly influence whether the damage will occur. Liability should match the level of control the person had, either operational or situational, and the fair assessment of whether the person could have prevented the damage.⁴⁹⁴ It seems clear that veil piercing targets situations in which the operational control is used. Use of the corporate form is about deciding the arrangement, whether the operations are undertaken and how they are performed. If situational control is found, this could constitute an entirely different liability basis. Alternatively, finding some situational control could be used to support a veil piercing claim when that control is not enough to constitute tort liability.

Although the Supreme Court in the KKO 2015:17 decision does not directly refer to control as a requirement for piercing, it remains imperative. Every veil piercing decision refers to control and holds it as significant. Enforcement Code 4:11 and the Bankruptcy Act 5:11 both give significance to control when assessing

⁴⁹⁴ See Pöyhönen 1999 at 349–350 and Mielityinen 2006 at 466.

the overall arrangement, and so does the Environmental Damage Act Section 7. Is it even possible to pierce the veil without the presence of control?

In the KKO 2015:17 decision, the Supreme Court gave significance to the dependence of Arctecho.⁴⁹⁵ Control and ownership were two factors used to show that Arctecho was, in fact, not independent—the other factors being the timing of Arctecho's businesses termination and the outward appearance of the business. Together, these considerations allowed the court to deem Arctecho's existence as artificial and the business conducted as part of Verkkokauppa's core operations.⁴⁹⁶

The debate in the literature has been about what level of control is enough for veil piercing. If there is no control relationship, the entities are able to make their own decisions and dispose of their own assets as they please as long as the decision procedure in Company Act is followed. They are not "used" in the sense of the word. Even if the initiative to found such a business originated from another corporation and the idea that its business would be more viable if certain provisions did not limit the operations, the arrangement is not abuse: it is business planning within the legal framework. The controllers of the original business can control the new operations without it being abuse. They can even operate it through a subsidiary. The line between abuse and legitimacy lies elsewhere, not in control.⁴⁹⁷ However, control is significant in determining who performs the abuses. Veil piercing seeks to extend the liability to additional persons, and control is necessary for the extension. Control is a necessary requirement of piercing the veil.⁴⁹⁸

Veil piercing targets arrangements in which the corporate form itself is abused. In its essence, abuse requires the ability to control something. After all, it means using something in an improper manner. Using requires power over something, the ability to decide how that something is utilized. One cannot abuse a privilege without having it first. The same goes for corporate form: one cannot abuse it without having it and controlling it.

Control is therefore always significant in piercing as it is the objective basic requirement for piercing the veil.⁴⁹⁹ The degree of control can vary greatly. The entity can be controlled by the ownership of shares and directorial competence. On the other hand, control can be based more loosely on a contract or even mere trust. The

495 See KKO 2015:17 at 32.

496 In a similar fashion, control has been seen significant in KKO 1996:2 and KKO 1997:17. Even in earlier case law, the dependence of a subsidiary was significant. See KKO 1929 II 638, KKO 1929 II 639 and KKO 1929 II 640. See also Swedish case law NJA 1947 s. 647.

497 See *Savela* 2015 at 413.

498 Of this, there is a consensus in the legal literature. See *Leppänen* 1991 at 300–301, *Toiviainen* 1995 at 279–280, *Tammi-Salminen* 2001 at 292, *Mäbönen – Villa* 2015 at 407, *Savela* 2015 at 413. See also *Kaisanlabti* 1996 at 233, who names (shareholder) control as a presupposition of his analysis.

499 See *Tammi-Salminen* 2001 at 292, the reprehensible or disloyal use being the subjective basic requirement.

control thus needs not be defined as formal corporate law control, but actual control will suffice.⁵⁰⁰

The analogous doctrines in the legal system differentiate between control over the operations of another entity and control over the entity itself.⁵⁰¹ The logical conclusion of these different lines of examination would be veil piercing and the expansive interpretation of the concept of an operator or some other concept, such as one obligated to pay remunerations.⁵⁰² Control over the entity is the realm of veil piercing, whereas control over the operation is about identifying the real operator. The difference should not be given a decisive role. Either way, the formal actor is bypassed and liability is placed on the controller.

As examined with the Environmental Liability Act, these characterizations aim the examination toward different facts. Control over the operation focuses on the relationship between the operations and the formally non-liable party. Control over the entity focuses on the relationship between the formally liable and non-liable corporations. Different factors arise as significant depending on the scope of examination. The KKO 2015:17 decision did not differentiate between the two. In it, both were examined and used to support each other. For example, the competence Verkkokauppa had in the organization of Arctecho was deemed significant. The Supreme Court examined Verkkokauppa's relationship to the sales operation run by Arctecho and deemed that it was actually an inseparable part of Verkkokauppa's operation. The sum effect of these factors deemed the arrangement artificial. An overall assessment of the situation would demand accepting both relations in the assessment.

With the Environmental Liability Act, the separate assessment results directly from the wording of Section 7. The separate consideration within artificial property arrangements results from the Supreme Court decision in KKO 2006:45. That decision somehow ended up separating piercing and artificial ownership of property, demanding that both need to be shown for the attachment. The wording of Enforcement Code 4:14 does not require this. Quite the opposite. It allows considering the totality of the arrangement and whether the given legal form matches the reality of the situation. It does not separate the assessment into two separate relations.⁵⁰³

500 See *Leppänen* 1991 at 330–331 and *Toiviainen* 1995 at 280. Relevant control can even be based on a leadership position within the company.

501 About artificial property arrangements, see KKO 2006:45. Also see Environmental Liability Act Section 7 and KKO 2012:29.

502 See *Pihlajarinne – Havu – Vesala* 2015 at 602.

503 Similarly *Linna – Leppänen* 2015 at 163. They discern two situations, one in which the corporation has no purpose other than owning the debtor's property and one where it practices business. In the former situation, the veil can be pierced, and in the latter, the ownership of some piece of property can be deemed

Some guidance could be derived from these two doctrines, though. They both allow liability based on the relationship between the corporation and the operation, even when the corporation-operator relationship does not enable piercing. This approach could be especially useful in evasion situations. The court could examine the relationship between the conduct regulated by the evaded provision of the law and the formally non-lieable party. This assessment could then result in an expansive interpretation of the evaded provision or piercing if supported by factors in the corporation-operator relationship. Even if these two relationships are considered separate, they do not exclude each other. The piercing assessment can and should utilize both in support of each other.

3.2. Judicial Control

Now that I have established the significance of control and briefly discussed what sorts of actions the control needs to be over, it is time to review the methods of controlling a corporation. *Adolf A. Berle* and *Gardiner C. Means* have divided control into five categories spread over two groups, judicial control and actual control.⁵⁰⁴ The judicial control categories are 1) control through almost complete ownership, 2) majority's control and 3) control through a legal device. The actual control categories are 1) minority's control and 2) management's control. The analysis starts with the target of control. One could control the operation or the corporation itself depending on the situation. Honoring the categories provided by Berle and Means, the next sections address these forms of control and their relationships to veil piercing.

Shareholding is one of the main characteristics of a corporation. The owners of a corporation do not directly own the company, its business or its property. They own the shares. The nature of shares specifies the owners' relationship with the company. Each share provides its holder with an interest in the company. In their default form, shares entitle the holder to partake in the dividends and to cast one vote per share in the general meeting. The bylaws can alter the default rule, and the company can have many classes of shares. The different classes have different interests in the company. One class can control more votes in the general meeting; the other can entitle the holder to a larger part of dividends or to a guaranteed dividend. The creation of hybrid forms of stock is limited only by Company Act and human imagination.⁵⁰⁵

artificial. Their opinion could be interpreted as seeing these situations as alternatives to each other, one focusing on the relationship between the corporation and the debtor and the other between the debtor and the property. However, they are not both required for attachment (Cf. KKO 2006:45), nor are there limitations on how to find the artificiality.

504 See *Berle – Means* 1933 at 70 onwards.

505 About hybrid forms of stock and mezzanine financing, see *Villa* 1997 and *Mäbönen – Villa* 2015 at 236–240.

When discussing veil piercing, we are concerned only with certain characteristics of the share–control rights. The concept of control rights means any power conferred by the share to its holder, which entitles the holder to decide what actions the corporation performs. The default control right is the vote. Company Act 1:6 specifies that “[t]he shareholders shall exercise their power of decision at the general meeting. Decisions shall be made by the majority of the votes cast, unless otherwise provided in this act or in the articles of association.” From this, it follows that the shareholder controlling the majority vote controls the decisions made by the general meeting. The power of the majority is not absolute, though, as there are several exceptions to the rule of majority designed to protect the minority shareholder or public interest.

Controlling the vote of the general meeting does not mean controlling the corporation, at least not directly. Company Act has divided power between corporate organs. The Company Act sets three mandatory organs: the general meeting, auditors and the board of directors. In addition to these organs, the corporation can appoint a managing director and a supervisory board.⁵⁰⁶ Each of the organs has its own powers specified in Company Act. Company Act 6:1 states that “[t]he board of directors shall see to the administration of the company and the appropriate organization of its operations (general competence).” The board of directors is the organ with most power over specific corporate actions. Because of their position, the directors are better equipped to control the corporation’s activities than the seldom-held general meeting. They hold actual decision-making power in all matters that are not in the power of the general meeting.

Company Act 5:3 lists the matters that the general meeting must decide.⁵⁰⁷ These include the adoption of financial statements, the use of the profit, the discharge of director’s liability, the appointment of directors and the other matters to be decided by the general meeting according to the Articles of Association.

The general meeting appoints the board of directors and decides whether they are discharged of liability. This power is why shareholders are seen as having control over a corporation.⁵⁰⁸ Majority control is based on the ability to decide matters in the general meeting. One who holds the majority vote can simply claim directorship. Then the same person holds both the general competence and the majority vote. Some classes of shares can even include the right to appoint one or more directors to the board. This itself is a control right implying control over the corporation. The directors can always be dismissed if they do not run the corporation the way the shareholders want it to be run. The appointment right does not give the shareholder control over what decisions the corporation actually takes.

506 The supervisory board holds no power to make operational decisions and, as such, does not hold control over the corporation. See *Kukkonen* 2018 at 32.

507 See also *Kyläkallio – Irola – Kyläkallio* 2017a at 396–399.

508 See *Pönkä* 2008 at 739 and *Timonen* 1997 at 240.

Control over a decision is always tied to the separate issue to be decided since provisions protecting minority shareholders and creditors limit the majority's power.⁵⁰⁹ Some decisions do require a qualified majority (Company Act 5:27), or even the acceptance of the minority shareholders can be required (Company Act 5:29). The existence of control can never be found on holding the majority vote alone.⁵¹⁰

The Company Act and the Accounting Act provide definitions of control that are used to define when companies form a corporate group. The same factors are significant for control as required by veil piercing. These acts consider appointment rights and votes, which are undeniable signs of control. The definitions also note votes and rights held through intermediaries and thus prevent escaping the definition via intermediaries.

The Company Act and the Accounting Act provide us with some guidelines to assess the significance of ownership for control. Company Act 8:12 states: If a limited liability company exercises control over another domestic or foreign corporation or foundation as referred to in Chapter 1, Section 5, of the Accounting Act, the limited liability company shall be the parent company and the other corporation or foundation a subsidiary. The parent company and its subsidiaries form a group. A limited liability company exercises control over another corporation or foundation also in the event that the limited liability company, together with one or several of its subsidiaries, or a subsidiary or several subsidiaries together exercise control over that corporation or foundation, as referred to in Chapter 1, Section 5, of the Accounting Act.

Accounting Act 1:5 defines situations in which one entity keeping accounts holds control over another or a comparable foreign entity (target company or subsidiary⁵¹¹). Control exists if 1) the entity has more than half of the votes in the target company and this majority is based on ownership, membership, articles of association or other instrument constituting the legal relationships around the company;⁵¹² 2) the entity has the right to appoint or dismiss the majority of the members of the board of directors in the target company or has the same appointment right in a corporate organ with the right to appoint the directors; or 3) the entity, in reality, controls the target company. The Securities Markets Act 1:5 adopts a similar definition for control as the right to appoint or dismiss a majority of directors in the board. Both

509 See *Pönkä* 2008 at 739.

510 See *Pönkä* 2008 at 739. About the limitations the Company Act places on the general meetings competence, see *Kyläkallio – Iivola – Kyläkallio* 2017a at 399–401.

511 See HE 106/2005 vp at 98.

512 This definition includes the contracts the shareholders have made among themselves not involving the company at all, as long as such a contract entitles the entity with votes.

the Accounting Act and the Securities Markets Act recognize that control can be acquired via contract.⁵¹³

Control through a legal device means achieving formal control through contract or a hybrid form of share ownership. One party owns the shares or holds a directorial position in the company and thus has control over the corporation. By contract, the controller can agree to use their control as specified in the contract or according to the wishes of the other party. The party formally holding the control relinquishes it in favor of another. As a result, the other party holds the control. The corporation can also give a person the power of attorney.⁵¹⁴

The legal device is not always so straightforward. Transfer of control can be hidden within a complex web of contractual obligations, conditions and special circumstances. The Company Act even allows the issuance of shares without any control rights, and creditors can contractually obtain control. All the elements normally attributed to share ownership are contractually transferrable. The creditor can contractually modify her position to resemble that of the shareholder. The creditor endeavors to secure payment of the credit by obtaining control and can end up with the rights of both the creditor and the controller. The assessment needs to account for all the contractual relationships between the parties.⁵¹⁵

3.3. Actual Control

Actual control refers to situations in which someone holds control over the corporation without actually holding formal control over it. Berle and Gardiner categorized minority control and management control as forms of actual control. There is no need to deviate from this, although one form of control, *de facto* control, must be added.

The management of the company can achieve actual control over the corporation if the ownership is so diversified that no group of shareholders is controlling it.⁵¹⁶ The general competence of the directors is actually formal control. Only when the ownership is so diversified that the directors are, in fact, the only controllers of the

513 See *Pönkä* 2008 at 740. He gives an example where the majority owners of A inc. make a contract with B inc. for the transfer of voting rights to B inc. (or contractually agree to vote according to the will of B inc.). Then it is B inc. who holds control of A inc.

514 About the representation of the company, see *Kyläkallio – Iivola – Kyläkallio* 2017a at 626. See also the piercing case KKO 1996:2.

515 See *Villa* 1997 at 360–364. In the extreme forms, the shareholder can have none of the usual rights attributed to share ownership. Noteworthy contract terms include, at the least, swap, option rights and connecting the interest to corporate profit.

516 See *Pönkä* 2008 at 740.

corporation, they hold actual control. Fortunately,⁵¹⁷ the Company Act has several provisions limiting the management's possibilities to control the company. They are under legal obligation to manage the corporation with care and to the benefit of the company (Company Act 1:8). Also, by statute, they are liable for damages they cause by decisions violating the provisions of the Company Act or the bylaws (Company Act 22:1).

Minority control is tricky as it can occur only in a corporation with a widely diversified ownership.⁵¹⁸ Minority control is a shareholder's ability to decide the outcome of the general meeting as if they held the majority vote. In corporations with diversified ownership, this power is likely achieved with a rather small ownership. In large corporations, often less than half of the shares are represented in the general meeting, allowing even a minority shareholder to control the general meeting decision. The required ownership percentage, and thus control, may be based on the participation in the general meeting during the previous years.⁵¹⁹

Control in fact means control through trust—the non-enforceable expectation that someone else will act as they say they will. One person issues commands and trusts that they are executed accordingly. Control is the probability that persons act according to specified instructions.⁵²⁰ Control of the company lies with the person according to whose orders or wishes the company's formal controllers are used to act.⁵²¹ There is not necessarily any legal relationship between the actors. The close relationship of the formal actor and the real controller supports finding control through trust.⁵²² Intermediaries and straw men cannot be accepted as a method to escape liability.

517 See *Pönkä* 2008 at 741. Pönkä expresses worry over the tendency that directors hold more power in a corporation. In his opinion, control should be paired with residual risk. The author agrees. Veil piercing for directorial liability could, in fact, discourage the directors from seizing control and encourage them to consult the shareholders more often.

518 The preparatory works for the Asset Recovery Act also mention the possibility that when the share ownership is diversified, minority holding could create an essential symbiosis of benefits between the shareholder and the corporation. See HE 102/1990 vp at 45.

519 See *Pönkä* 2008 at 740.

520 See *Weber* 1947 at 28. "Der soziologische Begriff der »Herrschaft« muß daher ein präziserer sein und kann nur die Chance bedeuten: für einen Befehl Fügsamkeit zu finden."

521 For example, a consultant or CEO who no longer holds the formal position is a good example of a person who might be capable of exercising this sort of control. See *Tuomisto* 2012 at 34.

522 See KKO 1996:2 where the son of the real controller acted as a straw man heading the corporation. Between persons close to one another, trust is likely present and thus requires less evidence.

3.4. Control in Veil Piercing

3.4.1. Judicial Control in Veil Piercing

3.4.1.1. Combinations of Formal Positions

Some degree of control over the corporation used to evade the liability is necessary for veil piercing liability to apply. The control need not be exclusive.⁵²³ Veil piercing should not be concerned with some specially constructed test for control, nor should differing standards be set. Adopting such measures would deviate the doctrine from traditional methods of assessing control and would perhaps serve to narrow the doctrine too much. Corporate law devices are perfectly adequate at determining whether control exists. Formal control is achieved through shareholding or a legal device, actual control through a formal position as a shareholder or manager and, alternatively, via mere trust or authority. Control has to be established case by case as the freedom of construing the bylaws and contractual freedom allow for near limitless differing solutions for establishing control. Thus, the courts should feel free to view the situation and detect the method of control present in that specific case. There is no need to scour the case facts for a specific control mechanism. The evaluation is kind of upside down. Determine whether control has been exercised and then specify the mechanism instead of looking for the existence of a specific mechanism.

Control alone is never sufficient for piercing, and the corporation as a juridical fiction is never independent in the sense of the word.⁵²⁴ Control could be characterized as a necessary precondition of veil piercing that is present in many other cases, even where piercing would be inappropriate.⁵²⁵ The control requirement can be interpreted rather formally. In the end, veil piercing becomes justified by abuse of the corporate form, not control.⁵²⁶ It should not be given any stricter interpretation in veil piercing than in any other area of law. When piercing, only actual control matters and the formal outlook should not prove decisive. However, formal judicial control is a strong indication of actual control. It is the default presupposition that one holding formal control, in reality, controls the corporation. Formal control creates the assumption, and the one claiming otherwise must prove their claim.⁵²⁷

523 See KKO 2018:20.

524 *Savela* 2015 at 411, KKO 1997:17 and KKO 2008:20 at 79. *Janne Ruobonen* also emphasizes the dependence of the corporation when piercing. See *Ruobonen* 2015 at 4.

See also *Huttunen* 2007. He argues throughout the article that the owner of the stock is not considered the owner of the corporation's property. This is definitely the rule, but it is not without exceptions. *Huttunen* 1996 at 30–33 and the KKO 24.8.1989 no. 2240, S 86/993 analyzed therein are also of interest. They expressly deny piercing based on full ownership, control or using legal rights. In addition, see KKO 1982 II 184, KKO 1983 II 185, KKO 1994:18 and *Tammi-Salminen* 2001 at 292 and 299.

525 *Krendl – Krendl* 1978 at 23.

526 See *Tammi-Salminen* 2001 at 292.

527 Similarly KKO 2011:49.

Formal judicial control is easy enough to find: if one person holds both the majority vote in the general meeting and control over the decisions made by the board of directors, control is clearly present.⁵²⁸ Control is most thorough when a single person owns all the shares and the same person acts as the only director of the company. Any variation toward a lesser degree of control accordingly makes piercing less justified.⁵²⁹ A majority vote alone should still be enough to find control, although the presence of other shareholders can then speak for the legitimate purpose of the corporation and thus prevent veil piercing.⁵³⁰ Diversified control helps to avoid veil piercing.⁵³¹

In the KKO 2015:17 case, the Supreme Court held both ownership and formal positions in management as significant for piercing the veil.⁵³² In the case, S was both the chairperson of the board of directors and managing director of Verkkokauppa while he also sat on Arctecho's two-member board of directors. In addition, the Supreme Court remarked that Arctecho had been through its entire existence in the ownership of Verkkokauppa, S and two minority shareholders who were also members of Verkkokauppa's board of directors. S was also the sole owner of Verkkokauppa. The Court determined that Arctecho had always been controlled by Verkkokauppa or S. The finding of control in the decision was entirely formal, and it considered that both the ownership and general competence held. The Supreme Court did not specify which held the control, but piercing was justified based on the finding that they held it together.

In the United States, control is often cited as a requirement of piercing. The prevailing view is that control alone is not enough to pierce the veil.⁵³³ This can be read from the wordings of the Court's veil piercing test formulations that require defrauding creditors, injustices and other wrongdoings.⁵³⁴ Despite this, some courts have imposed liability based mostly on control and contribution without proper distinction of abusive use and proper use.⁵³⁵

528 See *Leppänen* 1991 at 301. He sees a controlling position as sufficient to fulfill the control required by piercing. Formal judicial control is enough. Similarly in competition law context, see C-597/13 P at 35–36.

529 See *Leppänen* 1991 at 301. Similarly in Sweden, see *Stattin* 2012 at 933.

530 See KKO 1997:17 and *Mähönen – Villa* 2015 at 301 and 407–408.

531 See *Villa* 1997 at 360. See also KKO 2018:20 and *Kärki* 2018b.

532 See KKO 2015:17 at 30. See also the KKO 2017:94 case where the same natural person owned all shares of both companies and held the managerial positions in both.

533 For explicit statements, see *Marr v. Postal Union Life Insurance Co.* (1940) at 682 and *Shafford v. Otto Sales Co., Inc.* (1953). According to it, complete stock ownership and actual one-man control alone will not be sufficient. See also *Bainbridge* 2000 at 37–38 and *Peterson* 2017 at 71–73.

534 See also *Gelb* 1982 at 8, stating that domination alone speaks of no impropriety.

535 See *Janos v. Murduck* (1996). For the deserved criticism of the case, see *Matheson – Eby* 2000 at 179–181.

In Sweden, decisive influence is required for veil piercing. The NJA 2014 s. 877 decision found decisive influence, i.e., the ability to control the corporation based on 50% ownership of shares and the position as the sole member of the board. The other person held liable in the case also owned 50% of the shares and had the power of attorney to represent the company. He also was included in the decision-making regarding the trial that would eventually create the credit relationship. The third piece of evidence of control this person had was the fact that companies in his sphere of influence had participated in forwarding funds to the debtor company.

In the United Kingdom law, control is arguably one requirement of veil piercing liability.⁵³⁶ Similarly to Finland, control is often found through formal positions. Shareholding and directorial positions are important and intermediaries in these positions can be disregarded.⁵³⁷ For example, it does not matter whether the real controller does not formally hold these positions or if her spouse, employee or another corporation under her control instead holds them. In *Re F.G. Films* (1953), the president of an American corporation held 90% of the shares in a film corporation and was one of its three directors. The corporation under his presidency financed the operation entirely the film corporation did. This combination allowed the court to decide that the real operator was the American corporation. The case was not a piercing case in the strictest sense as it was resolved with the interpretation of the statutory concept of “undertake.”

The special case of corporations wholly owned by one person still needs addressing.⁵³⁸ Owning all the shares in a corporation provides rather comprehensive control unless another person is named in the board of directors. The owner can usually dictate the conduct without restrictions other than the law.⁵³⁹ In the absence of division of control, the control requirement is met by whole ownership, though veil piercing cannot automatically apply. Veil piercing does have other requirements that must be met, and nothing in the nature of wholly owned corporations automatically fulfills them. A wholly-owned corporation is not necessarily used artificially; it can have a genuine business purpose without being just a front for the personal business of the owner. The use is not necessarily reprehensible, as these one-

536 See, for example, *Tunstall v. Steigmann* (1962) at 599.

537 See *In Re Darby* (1911), *DHN Food Distributors v. Tower Hamlets* (1976) and *Prest v. Petrodel Resources Ltd* (2013). See also *Hannigan* 2013 at 19.

538 Huttunen adds two other constructions besides whole ownership of shares to the definition of a one-person company: 1) other shareholders are straw men and 2) one shareholder owns a percentage that excludes all minority rights provided in the Company Act. See *Huttunen* 1963 at 3–4.

539 The Company Act according to the will of the owner and in their interests. See *Huttunen* 1963 at 152.

person corporations are accepted in the legal system. The use of these corporations needs to be assessed just the same as any other corporation. Control, though, is always present.⁵⁴⁰

Sometimes the Finnish literature and that abroad refer to independence of the corporation instead or in addition to the control considerations.⁵⁴¹ Independence of a corporation means it is able to control its own means of existence. Practically, it is problematic to speak of a corporation's independence as it is always in some way dependent upon or under the control of some group of persons.⁵⁴² Independence, just as control, should not be assessed in the strictest sense. Formal assessment should be enough. As a result, a wholly owned subsidiary or a one-person corporation is always dependent or under the control of someone. Veil piercing is simply easier to apply in these companies as they always fulfill the control requirement, and the controllers should carefully devise the corporation's conduct as to not fulfill the other requirements. Legitimate lawful business is always protected.⁵⁴³

Company Act 5:2 reads that it may be provided in the Articles of Association that the general meeting decides matters that fall within the general competence of the managing director and the board of directors. Naturally, this could transfer the liability to the general meeting should they decide such matters. The Articles of Association are nevertheless nothing but clues to finding the existence of control. If accounting for the right of the shareholders to make a unanimous decision on a matter normally in the competence of the general meeting without actually holding the general meeting (Company Act 5:1), the powers of the general meeting are adequate for piercing, even without the general competence. Another question is whether the shareholders have actual control.

Control in a corporation is fully transferable by contract. If the shareholders have contractually transferred some or all control rights to another party, this party's control over the corporation depends on the contents of the contract. Should the corporation give its power of attorney to some person, this transfers the directors' general competence to another. For piercing purposes, this another is the controller

540 Same in the US, see *Oh* 2013 at 124 and *Sparkman* 2016 at 375.

541 More on this at V.4.2. of this work.

542 See *Savela* 2015 at 411. See also *Nerep* 2015 at 28–29.

543 Should the corporation dabble in a business that works within the grey areas of the law where the application of provisions is uncertain, the author's advice would be to diversify control, provide the corporation with adequate capital compared to expected liability, and, should the interpretation of the provision prove unsuccessful, to not dismantle the corporation immediately.

of the corporation.⁵⁴⁴ Even less thorough control rights derived from a contractual arrangement will suffice for piercing, though.⁵⁴⁵

3.4.1.2. Overall Assessment of Control Rights

Veil piercing requires an overall assessment of the corporate arrangement. If veil piercing is accepted as a remedy to abusing formal separateness, another formal isolation should not prevent it. Veil piercing can be used to hold the actual controller liable, even when she has no formal position in the corporation.⁵⁴⁶ Additional support can be derived from the tax avoidance norms and artificial property arrangement norms. Both note the disparity between the given legal form and the economic reality of the arrangement. Especially artificial arrangements place significance on who really controls the property and acts as an owner would.

In the artificial property arrangement case KKO 2011:49, the tenant initiated the sale of the apartment he occupied. The apartment was owned by a corporation. The Supreme Court assessed whether this and some other rights given to the tenant constituted control comparable to the owner's control. The assessment proceeded to view the individual rights the parties had and actions they had performed. The tenant had not provided funds for the purchase of the property. He had been evicted and the new owner held formal positions in the corporation controlling the apartment. This led the court to conclude that the ownership is likely genuine. It then examined whether the rights the tenant had would disprove this. The tenant had, in fact, given the buyer the opportunity to buy the corporation. Additionally, he had been given the option to buy the corporate stock within a year of the sale. The terms of the tenant agreement were ambiguous, and the tenant had agreed to cover the expenses related to the apartment for a defined time period. However, these were unusual arrangements, and the tenant definitely held some control but was unable to determine how the corporation would act.

This case goes to show that *control rights should be assessed individually in order to get an accurate view of the totality of the parties' control possibilities.*⁵⁴⁷ In the case, formal control and the control rights it brings both manifested in the same party, making it easy to determine that the actual owner and the formal owner were the

544 See KKO 1996:2. Similarly in an asset recovery context, see *Tuomisto* 2012 at 33.

545 See KKO 2011:62, where the contractual arrangement was analyzed to great length to discover who was the actual operator. The terms were incredibly restrictive, which led the Supreme Court to deduce that the business of Rantahuolto was, in essence, a business of Neste also. Contractual control rights were thought sufficient to disregard the formal operator. Eventually, though, the case was not resolved with piercing but by determining the party that, according to the contract, controlled the damage-inducing part of the business.

See *Tuomisto* 2012 at 27–28 for useful examples of relevant contractual rights. These include, for example, influence over the business model, marketing, design, purchases, accounting, and financial situation.

546 See *Toiviainen* 1995 at 281.

547 Similarly KKO 2011:62.

same party. The rights the tenant was given gave some specific control rights, though they were not enough to trump the general competence the owner possessed. As the case was about ownership, had the tenant been given the veto right to prevent the sale of the property or immunity from eviction, the assessment of the rights would probably have reached a different result.

In the United States, alter ego and instrumentality doctrines are specific veil piercing tests utilized by the courts. These tests require high levels of control over the corporation. Only if the level of control exceeds that which is acceptable commercial practice, the control is excessive, though no clear threshold for excessiveness exists.⁵⁴⁸ The company is *dominated*. This domination is then brought up by describing the controlled corporation in imaginative metaphors such as mere instrumentality, alter ego, adjunct, agency, conduit, department, puppet, sham, shell, tool, etc.⁵⁴⁹ Even so, something more than control is required for piercing.⁵⁵⁰ What that something is remains to be determined case by case. The situation in this regard is the same as in Finland. Mere ownership or control is never enough to pierce the veil. Similar to Finland, the courts do take into account a multitude of powers held by the parties. They can account for the influence on nominations, finances, business policy, daily operations, accounting as well as directorial positions persons have.⁵⁵¹ A parent placing its own personnel into the subsidiary's management has been cited as a sign of domination.⁵⁵² In *Luckenbach S.S. Co. v. W.R. Grace & Co.*, the court pierced the veil of the subsidiary to hold the parent liable, emphasizing, among other things, the fact that the two corporations had the same directors and officers and were controlled by the same shareholders, though the ultimate reason to pierce was the shareholder's unjust enrichment.⁵⁵³ In *Angelo Tomasso v. Armor Construction Paving, Inc.* (1982), Armor was no doubt dominated by Lemieux, though he was formally not affiliated with the corporation. Lemieux placed three employees of his former corporation as directors and officers, prepared every document for them to sign, loaned them the funds

548 See *Cheng* 2010 at 559–560 and *Craig v. Lake Asbestos of Quebec, Ltd* (1988), where the issue was discussed extensively.

549 *Oh* 2010 at 83 footnote 7.

550 *Shafford v. Otto Sales Co., Inc.* (1953): “complete stock ownership and actual one-man control will not alone be sufficient to impose liability on the individual,” although a reform has been suggested that in corporate torts and statutory violations, control should be enough to pierce. See *Mendelson* 2002 at 1247–1258.

551 See *Millon* 2007 at 1361–1362.

552 For example, *Consolidated Sun Ray, Inc. v. Oppenstein* (1964) and *Berkey v. Third Avenue Railway* (1926).

553 *Cheng* 2010 at 563. Similarly in *Soderberg Advertising, Inc. v. Kent-Moore Co.* (1974) at 722–723 and 733.

to pay for the initial stock capital of the corporation, was able to overturn the decision of the formal directors, had access to accounts, and received dubiously recorded payments from Armor weekly. The company could not make bids for paving contracts without financial backing by Lemieux, and even the tools required for paving work were not owned by the company but rented from another company owned by Lemieux. The court eventually denied piercing as Lemieux's actions were not found to be improper. The court did argue that, instead of requiring a formal position in the corporation as a director or shareholder, piercing liability can be placed on the control or influence exercised by the individual sought liable.⁵⁵⁴

An interesting borderline for sufficient control for considering someone a close party is drawn in the preparatory works for the Asset Recovery Act.⁵⁵⁵ Significance is given to whether the CEO or board member⁵⁵⁶ is able to influence the financial arrangements the corporation makes with the controller. This typically creates the chance for the controller to receive benefits that possibly damage the creditors.⁵⁵⁷ This cannot be adopted for veil piercing without amendments. Two factors can be derived, though: ability to affect financial actions and ability to derive benefits for oneself. But the question remains as to what level of affecting is enough. The right of initiative seems insufficient. Indubitably, *control is present when the party alone can make a decision that involves potential benefits to the party.*⁵⁵⁸ This should prove enough for piercing, even if the person is not able to control all the actions the corporation performs. They are nevertheless able to control the actions that potentially damage creditors.

3.4.2. Actual Control in Veil Piercing

Even though formal control is sufficient for piercing, it can be ignored if it is clear that another holds actual control.⁵⁵⁹ Actual control trumps formal control as questions about actual control arise only when it is not held by the formal controller. The separation of formal and actual control itself can be a device to escape liability

554 Angelo Tomasso v. Armor Construction Paving, Inc. (1982).

555 HE 102/1990 at 46.

556 Or someone else in a decisive position within the corporation.

557 HE 102/1990 at 46.

558 Similarly in HE 102/1990 at 46.

559 For support, see KKO 1996:2 and KKO 2011:49, *Toiviainen* 1995 at 280–281 and SOU 1987:59 at 105.

Traditionally named justification for piercing is that the corporation is dependent on some other entity. See *Leppänen* 1991 at 302 and *Tammi-Salminen* 2001 at 292.

Similarly in the asset recovery context, see *Leppänen* 1992 at 121, *Kangas* 1994 at 280–282 and *Tuomisto* 2012 at 34. Tuomisto argues that someone holding a formal position of control in the corporation cannot be considered a close party if that person holds no actual control.

or restrictions.⁵⁶⁰ Because the formal outlook does create the assumption of control, deviating from it must be well justified. Every corporation has a formal judicial controller, and the one claiming that actual control is held by someone else must prove their claim. The assessment of actual control needs to be based on observable facts and rights, not formal position.⁵⁶¹

Kukkonen has explored the theme of actual control amicably in the context of criminal law and debtor's crimes. I think these criteria can be used as they are in the piercing context as well. He names share ownership, participation in profits and the ruining effect the corporation's bankruptcy would have on the person's finances as significant. He continues that the concrete actions of the person also need to be taken into account, for example, participation in meetings, communication with financiers and co-operating businesses as well as giving orders outside the formal chain of command in a corporation. When assessing the evidence, the perception of the business partners on the controlling person can be significant as well as the allocation of profits to the claimed controller or her close parties.⁵⁶² Finally, resigning the formal position shortly before the crime combined with the new holder's lack of competence on that position hint toward the resigned person holding control.⁵⁶³

In the English case *Prest v. Petrodel Resources Ltd* (2013),⁵⁶⁴ the defendant did not formally own any of the corporations and the ownership of the corporations was never revealed in the case. In the past, the defendant had told that he owned the corporations, even though the means by which he owned them remained obscure. He held management control over the corporations, and the other members of the management were nominees consisting of relatives, employees and professional directors. The defendant was also able to use corporate funds without formalities for personal expenditure. The Supreme Court never assessed these factors in relation

560 See, for example, KKO 1996:2.

561 See KKO 2006:45. The case was about artificial property arrangement where an offshore corporation owned some real estate and rented it to the debtor. The corporation's shares were owned by another person. Within the circumstances of the case, the formal owner's claim that he was the actual owner was not enough to prove ownership. Instead, the court examined objective and observable facts. The debtor had signed documents relating to the property, had taken care of matters relating to the property, decided the sum paid as rent and set it remarkably low. The Supreme Court deemed that the debtor was, in fact, the owner and pierced the veil in regard of the ownership. The debtor was held as the true owner of the corporate property without having formal control in the corporation. The position of the formal owner was dubitable in part because the shares were issued to the holder of the share certificates. This made the use of an intermediary, straw man or an agent easier. See also KKO 1996:2.

Similarly in Sweden, see *Nerep* 2015 at 30.

562 *Kukkonen* 2018 at 35.

563 See HE 44/2002 vp at 163–164.

564 See also, *Gilford Motor Co Ltd v Horne* (1933) at 955–956. As for similar statements in the United States, see the decision *Tomasso v. Armor Construction Paving, Inc.* (1982) discussed above.

to veil piercing, though. In my opinion, the court accepted control based on these findings and proceeded to evaluate whether relevant wrongdoings had taken place. Control was thus established through managerial positions and share ownership combined with the ability to bypass formalities in fund use.

Actual control can also manifest through control of resources necessary for the operation. If another controls the resource, then the corporation is dependent. A corporation can be dependent on someone, for example, in finance, workforce or materials.⁵⁶⁵ In these situations, the other party can control whether the corporation receives these and, through that affect the corporate decisions. This can result in the resource holding party utilizing the leverage it has. It can threaten to withhold the resource unless the corporation performs certain actions. Controlling the resource is not enough in itself, even if the party is the sole provider in the market. This position only enables the party to influence the corporation in a way that could allow for piercing. This could be dubbed *creditor control* after the typical situation where the loan provider exercises pressure.

This sort of control has come up in piercing cases in the United States. In *Krivo Industrial Supply Co. v. National Distillers & Chemical Distill. & Chem. Corp.* (1973), National took a company called Brad's under its wing after Brad's had come under financial distress. It extended fiscal help and advisor services to Brad's. This was not enough to pierce the veil, as Brad's had continued its existence as an independent actor. In the case *A. Gay Jensen Farms, Co v. Cargill, Inc.*,⁵⁶⁶ the debtor company was deemed an agent of Cargill's. The debtor company, Warren, and Cargill were in a contractual relationship, and both operated an elevator business, purchasing grain and other farm produce. Cargill financed Warren's operations and, through Warren, contracted farmers to grow specific crops. Sufficient control was derived from a plethora

565 Similarly in the Act on Compensation for Environmental Damage. See HE 165/1992 at 26–27. The financier can retain some control rights with the leverage their position gives. In some cases, these rights can allow holding them liable. See *Hollo – Vihervuori* 1995 at 240. Similarly, in asset recovery context, see *Ovaska* 1991 at 155 and *Tuomisto* 2012 at 35.

566 Especially at 291–293. The financier's control in this sort of situation was established in Helsinki Appellate Court S 95/1367 and Helsinki Appellate Court S 95/2046. The cases were eventually decided based on participation in profit as a criterion required by asset recovery. Thus, the decisions cannot be used to rule out liability based on creditor's control or to favor it. Rather, it only shows a good example of the mechanism through which a creditor can attain some control over the debtor corporation. The control also holds some relevance in the determination of close party status. See also *Tuomisto* 1997 and *Tuomisto* 1999.

See also *Collet v. American National Stores, Inc.* (1986 at 279–280 and 284–286) where the parent started exercising intrusive control over the finances and operations of the subsidiary.

of factors not unique to the nature of the business but definitely affected by it: (1) Cargill's constant recommendations to Warren by telephone; (2) Cargill's right of first refusal on grain; (3) Warren's inability to enter into mortgages, to purchase stock or to pay dividends without Cargill's approval; (4) Cargill's right of entry onto Warren's premises to carry on periodic checks and audits; (5) Cargill's correspondence and criticism regarding Warren's finances, officers' salaries and inventory; (6) Cargill's determination that Warren needed "strong paternal guidance"; (7) provision of drafts and forms to Warren, upon which Cargill's name was imprinted; (8) financing of all Warren's purchases of grain and operating expenses; and (9) Cargill's power to discontinue the financing of Warren's operations. The court duly notes that some of these elements are found in ordinary debtor-creditor relationships, but these factors cannot be considered in isolation. This led the court to conclude that Cargill indeed controlled Warren and could be held liable as the principal in an agency relationship. The utilized doctrine was agency and not veil piercing, though. I do not recall anything that would prevent using the same considerations in a piercing case to establish control. It is also worth noting that the debtor-creditor relationship between Cargill and Warren went far beyond standard restrictions imposed on the debtor. It should be considered possible that a creditor controls the debtor corporation, but this case only shows the situation at the extreme.

Minority control is seemingly enough to fulfill the first requirement of the piercing test. In the KKO 1997:17 decision, the existence of other shareholders limits veil piercing but does not necessarily prevent it. However, the parent held majority control. Minority control is not stable, as the required number of votes needed for a majority in a general meeting can vary from year to year. Yet controlling the corporation is a prerequisite for using it to evade a legal obligation or damage creditors. It seems that, at least, we must inspect who held control at the time the evasion was performed. Minority control seems flimsy as a basis for veil piercing. It appears random and dependent on factors outside the influence of the claimed minority holder-controller. However, should the plaintiff be able to show that the defendant could control the circumstances enabling the abuse, it would not matter what control types she possessed. Sole undisputed control over the actions that led to the damage should suffice instead of requiring the capacity to control the corporation in all matters at all times.⁵⁶⁷

There is an inherent randomness and unpredictability in minority control. This makes it dubious when piercing. Existence of the control type is altered based on the time and activity of other shareholders. Thus, one should require additional

⁵⁶⁷ Similarly in the United States, see *Krendl – Krendl* 1978 at 16.

factors when basing a piercing claim on minority control. What these factors are is a more complicated issue. The core element is that these factors should eliminate the randomness from the control factors. The simplest answer would be to show a repetitive pattern from year to year that the minority shareholder has continuously been able to control the corporate decision-making. Similarly, one could establish that the corporate decision-making has consistently served the opportunistic interests of the minority. Still, both are prone to the counterargument that the examined year was when this pattern was broken.

In Sweden, though, some significance has been placed on whether only a single person has economic interest in the entity even though it has multiple owners.⁵⁶⁸ The idea is interesting, although case law seems to require that the determinative influence is required by Swedish piercing doctrine.⁵⁶⁹ Still, one person holding the sole economic interest would support the existence of determinative influence. This conforms with the idea that control in a corporation is based on the level of economic interest the party has. Shareholders as the ultimate economic risk bearers have the residual risk and thus have the largest control rights.⁵⁷⁰ If the actual risk allocation diverts from the formal list of shareholders, this factor would then suggest that the control rights are also, in reality, allocated according to that risk.

Gerhard af Schultén recognizes another influential factor with minority shareholders in his examination of the Nordic region's piercing doctrines. He sees it as justifiable to separate situations in which the minority conforms to the majority's will or remains passive and where the minority actively utilizes its rights in opposition to the majority. Active opposition makes it less likely that the corporation is solely dependent and under the dominance of the majority.⁵⁷¹ The majority shareholder is less likely able to use the corporation to evade an obligation or merely to her own benefit. The existence of the minority does not prevent piercing, but it can prevent someone from controlling the corporation completely.⁵⁷²

Tammi-Salminen finds that the economic ownership argument often ends up supporting veil piercing. Economic ownership refers to the combination of share ownership and control over the corporate property it bestows. Economic ownership is present when the shareholders are able to use and control the corporation's property as if it was their own because they control the corporation. The corporation owns the property, but command over it

568 See NJA 1935 s. 81. See also *Svensson* 2010 at 259–261.

569 See NJA 2014 s. 877 and *Nerep* 2015 at 30.

570 See, for example, *Mähönen – Villa* 2015 at 215–216.

571 See *af Schultén* 1984 at 81.

572 Similarly, see *Stattin* 2008 at 438.

results in the controller commanding the property. It is formally indirect control over the property but is, in fact, unrestricted and direct. In Tammi-Salminen's opinion, the corporate veil can then be pierced and the separateness of ownership disregarded, and legal assessment is made according to economic ownership.⁵⁷³

The economic ownership consideration is not veil piercing as it is traditionally understood. It is the reverse situation in which the corporation (or its property) is held liable for the obligation of its owner. This situation is sometimes referred to as reverse piercing.⁵⁷⁴ In case law, economic ownership has not been sufficient for liability.⁵⁷⁵ There needs to be another norm demanding liability.⁵⁷⁶

A committee memo from Sweden brings up an interesting problem that arises when someone votes and controls the general meeting by proxy. The memo concludes that the proxy holder then has actual control over the corporation and could be held liable with piercing if the other requirements are fulfilled.⁵⁷⁷ When thought out a bit further, holding the proxy liable as the one controlling the vote is a formal decision. The relationship between the proxy and the principal in the end determines the powers the proxy has. The principal is able to control how the proxy votes and can hold them liable should they fail to honor the principal's instructions. The decision on whether the proxy holder has control should be decided according to the terms of the principal-proxy relationship. If the principal has not placed any restraints on the actions, actual control rests with the proxy holder, just as the memo concluded. If the damage behind the piercing claim was caused by exercising control according to the principal's orders, then the control definitely was that of the principal.

The use of intermediaries or straw men is a form of control where the real operator has been hidden behind a formal operator. Someone acts as a front owning the shares but managing the ownership according to instructions from the real owner. In the end, these arrangements lead to a situation where formal control is held by one person, but this control is used per the wishes of another. The formal controller holds no actual control. Often, these sorts of arrangements are used to bypass certain

573 See *Tammi-Salminen* 2001 at 296.

574 See *Vandekerckhove* 2007 at 15–16.

575 See KKO 1982 II 184 and KKO 1983 II 185. For a more comprehensive analysis on these two cases, see *Tammi-Salminen* 2001 at 299. See also KKO 1997:17 and *Huttunen* 2007.

576 On the other hand, the ratio of a norm could be enough. See *Leppänen* 1991 at 287.

577 SOU 1987:59 at 133. Similarly, in the asset recovery context, see *Kangas* 1994 at 281. He argues that control can be held through delegation.

limitations the actual controller faces. These include nationality requirements,⁵⁷⁸ bans on business operations and even concealing income. It is not ruled out that the arrangement could just as easily be used to cheat creditors. Evidence-wise, if a person resigns the formal position of control shortly before the contested action is performed, this creates some suspicion. When this is combined with the new holder's lack of competence on that position, it hints at the resigned person holding control and the new person being a straw man.⁵⁷⁹

The relationship between the straw man and the real operator can be based on a legal device or mere trust. When piercing the veil, control is held by both formal control by the straw man and actual control by the real operator. The straw man does not actually have any control over what actions the corporation takes and cannot decide the corporate actions that eventually lead to a veil piercing claim. No one should be held liable for something one has no control over. When formal and actual control have been separated and the separation can be sufficiently proven, actual control should be decisive. The straw man can be disregarded.⁵⁸⁰ In the Swedish committee memo, it is thought that the one demanding piercing should not have to prove that the formal controller is a straw man. Proving that the actual controller's actions and opinions have a determinative impact on the decision is enough.⁵⁸¹ As this work sees actual control as the basis for veil piercing, there is no need to deviate from this opinion. Professional directors and family members as directors should raise suspicions.⁵⁸²

578 As was suspected during the Hanhikivi 1 nuclear power plant investor search. The government gave the plant project a prerequisite that 60% of the ownership must come from the EU or ETA area. At the last moment before the expiration of the project, a small Croatian company, Migrit Solarna Energija, announced its participation. It was publicly suspected that the company was implausible as a participant in such a large project and was nothing but a front to conceal Russian investors behind it. In the end, the Ministry of Economic Affairs and Employment argued that no sufficient proof was provided and that actual control in the company was held by citizens of the EU or ETA area, even though formal control was held by such individuals. The issue ended as Migrit withdrew from the project. See <http://yle.fi/uutiset/3-8118267>, <http://yle.fi/uutiset/3-8169619> and http://tem.fi/artikkeli/-/asset_publisher/ei-riittavaa-varmuutta-tosiasiallisesta-maaraysvallasta-migritissa.

The Hanhikivi decision was essentially a political one. A similar issue could potentially come up in court, though. The answer cannot be so straightforward. The political decision was simply to deem that the company did not fulfill the prerequisite. The courts need a framework to justify this. Piercing doctrine is one applicable choice.

579 See HE 44/2002 vp at 163–164 and *Kukkonen* 2018 at 35.

580 See KKO 1996:2 and KKO 2006:45.

See also *af Schultén* 1984 at 96. He seeks the lowest common denominator for piercing in Nordic law. He concludes that all Nordic countries allow the veil to be pierced, at least when the subsidiary can be characterized as the parent's representative, a straw man.

581 SOU 1987:59 at 105–106 and KM 1992:32 at 367.

582 Similarly in the United Kingdom, see *Prest v Petrodel Resources Ltd* at 12.

3.4.3. Control as Interpreted in Two Significant Decisions of the Supreme Court of Finland

3.4.3.1. KKO 1996:2

The KKO 1996:2 decision dealt with the abuse of wage security.⁵⁸³ The Supreme Court ended up piercing the veil of chained corporations⁵⁸⁴ and found actual control to be sufficient for it. The case also involved a straw man. The arrangement was dismissible as it was made only to obtain wage security benefits. The result of the case was piercing the veil, and the companies' separation was disregarded. The decision had its basis in a Pay Security Act Section 17, so the decision does utilize the piercing doctrine.

In the 1996:2 decision, the Supreme Court of Finland pierced the veil of a corporation for the wage debts the same business had before it was transferred to another company. Two companies, Stigell Ky and Tietotoimi Oy, had operated in the field of consulting and selling information technology. Stigell Ky owned 91% of the stock of Tietotoimi Oy. A and B were the general partners of Stigell Ky. When faced with the threat of bankruptcy, the businesses of these two companies were sold to a newly formed company, Stigell Oy. The new company was fully owned by C, the son of A. C was also the sole member of Stigell Oy's board of directors. Most employees of Stigell Ky followed to the new company. The new company issued a mandate allowing A to act as the representative of the company in anything relating to its business. The three companies then issued a statement intended for clients, stating that the businesses of Stigell Ky and Tietotoimi Oy were sold to and then combined under Stigell Oy and that operations would continue mostly as before.

The Supreme Court held that, despite the made contracts, ownership and being the sole member of the board of directors, C held no real control over Stigell Oy. It was deduced that the new company, regardless of its formal separateness, was, in reality, controlled by the general partners of Stigell Ky, A and B. The described arrangement itself shows that the purpose of it was to continue the same business in a new company under the control of the same persons.

The creditor in the case was the government agency responsible for pay security. The agency had covered the unpaid wages of the employees of Stigell Ky in accordance with the Pay Security Act. The Supreme Court held that one of the evident reasons

583 For similar cases, see Appellate Court of Turku 28.11.1986 no. 974, Appellate Court of Turku 21.4.1989 no. 326 and Appellate Court of Turku 8.12.1989 no. 1121. For a comprehensive analysis on these cases, see *Leppänen* 1991 at 295–309, who argues for the possibility of direct piercing (see dichotomy direct-indirect piercing at I.4.2. of this work) based on these three cases from the Turku Court of Appeals. See also KM 1992:32 at 372.

Cf. *Huttunen* 1996 at 30. He denies these being piercing cases as they were decided on the basis of labor law provisions. It remains indiscernible, why applying labor pay security provisions would exclude the application of piercing doctrine. In case law, the piercing doctrine has been used several times to apply the repayment section of the Pay Security Act.

584 Two or more corporations transfer the business from one to another while leaving some or all obligations in the previous company.

behind the arrangement described before was to abuse the wage security system. The arrangement had enabled the use of state funding to cover unpaid wages of Stigell Ky. These funds, in part, enabled the continuation of the business under a new company. Stigell Oy was held liable for the amount paid via the wage security system.

The Supreme Court deemed that the new company was founded only to abuse wage security. This was deduced from the overall arrangement. What arose as significant was the mandate given, the identical businesses, the close relationship between the owners of the new company and the old companies and even the young age of the new company's owner.

The Stigell case goes to show that the corporation can be controlled without formal control over the corporation, or even a position on the board of directors. Control was found as a combination of a commanding presence and a legal device. Interestingly, the legal device had nothing to do with the shareholder's power in a corporation. A was given a mandate providing an unlimited right to make commitments in the name of the company as long as it was related to its business. This itself is a significant form of control but does not allow the person to control the company, merely that the corporation would accept the decisions made by the holder. He did not have the general competence of the directors, nor the voting majority in the general meeting. Yet the Court found that the formal owner and director C held no real control over the corporation. Not even the sale of businesses, other contracts between the parties and the actual transfer of funds were enough to show that the arrangement was a legitimate business deal. C was nothing but a straw man, the front to the organization.⁵⁸⁵ Showing a formal arrangement between the straw man and the controllers was not necessary. It could very well be that there was a concealed legal device transferring the control more comprehensively, but finding it was unnecessary. The circumstances were enough to show the control.

3.4.3.2. KKO 1997:17

The KKO 1997:17 case is often cited in veil piercing literature in Finland, and it has inspired theorizing about veil piercing. *Jukka Mähönen* and *Seppo Villa* have deduced the possibility of veil piercing and derived four meaningful circumstances for veil piercing: control, other shareholders, practicing the parents own business in the form of the subsidiary and the arrangements intended purpose was violating the rights of the subsidiary's creditors.⁵⁸⁶ The first two will be analyzed here, the rest in the chapter discussing improper behavior.

⁵⁸⁵ Interestingly, the company existed until 8 March 2017 when it was declared bankrupt from its own initiative. Until then, C was the owner and managing director.

⁵⁸⁶ *Mähönen – Villa* 2015 at 407–408.

See also *Tammi-Salminen* 2001 at 291 footnote 12. She deduces the possibility of piercing the veil, although the requirements for it were not met in the case. She finds the piercing to require control and artificial division of business or the intent to damage creditors.

The Supreme Court has explicitly denied piercing based solely on ownership In the KKO 1997:17 decision. In the case, a parent corporation was the creditor, and the subsidiary was the debtor. The parent had obtained a security for the debt from the subsidiary. The subsidiary went bankrupt and the parent demanded payment in the bankruptcy proceedings. Another creditor of the subsidiary claimed that the parent corporation was not entitled to payment from the security because it held 63.4% of the bankrupted subsidiary's stock. The argument was that since the parent controlled the subsidiary, it did, in fact, own the subsidiary's property. This would have meant that the secured debt was held by the owner of the property acting as a security. Therefore, the parent could not claim payment from the security.

The Supreme Court declined this argument. It stated that the starting point is corporate separateness and separate property. A parent corporation's control over the subsidiary is not enough for the parent to be considered the owner of the subsidiary's property. The Court dismissed the claim.

Mähönen and Villa do not open the concept of control any further, although in the decision, the Supreme Court states that control alone would not suffice for liability. Mähönen and Villa have noted this in their analysis also but continue discussing only the required level of ownership. It would seem safe to conclude that they have made the same silent assumption that the Supreme Court made—controlling 63.4% of the vote constitutes control.⁵⁸⁷ They do note that, at least in this case, this percentage was not enough for piercing. A more interesting question is that of ownership conditions. In the decision, the existence of other shareholders besides the controller is mentioned. Exactly how this affects veil piercing considerations is left unexplained.⁵⁸⁸ The effects might be so obvious that the Court felt it unnecessary to state them. Ownership means interest. Interest in something confers the holder some rights, including legal protection of said interest.

The existence of minority shareholders in the debtor corporation should not prevent veil piercing for the controller's liability, at least automatically.⁵⁸⁹ If the corporation lacks the funds to satisfy the creditors' claims, holding additional persons liable could hardly be detrimental to the minority shareholders of the debtor corporation.⁵⁹⁰ In the KKO 1997:17 case, the minority shareholders would not have faced any negative consequences. They would have only benefitted from them. Piercing was not denied to protect them, and their presence should have been irrelevant to piercing.

587 Company Act 5:27 provides the threshold of a two-thirds vote to some more significant general meeting decisions. Thus, controlling this percentage gives control over most decisions. In the case, the minority held over one-third and thus provided more limitations to the majority owner's power.

588 See also *Mähönen – Villa* 2015 at 408. They recognize that the existence of other shareholders apparently has meaning when piercing, but also that piercing does not require a 100% ownership.

589 Similarly in Sweden, see *Stattin* 2008 at 438.

590 See *Kaisanlahti* 1996 at 249.

In other situations, however, minority interest could affect the decision by opposing the finding of evasive purpose. A minority presence can be used to show that the arrangement was not solely for an illegitimate purpose. The minority's presence can also dilute the control and, therefore, serve to oppose piercing. It speaks of a legitimate business purpose as investors are sought to partake in the enterprise.⁵⁹¹ In an endeavor made solely in the interest of one attempting to transfer negative risk to an outside party, the presence of genuine minority interest would only be detrimental to that purpose.

It seems important to note that this is not necessarily the case in every veil piercing decision. Sometimes the claimants demand the so-called "reverse piercing," meaning they seek to hold the company liable for obligations of the controller. This is often the case in the enforcement procedure utilizing the artificial property arrangement provision. In these reverse piercing situations, the minority shareholders' interests would be violated should the company or a piece of its property be liable for the obligation. In these situations, the presence of other shareholders speaks against piercing.

In the US, the presence of other shareholders does not prevent veil piercing, at least in situations where the other shareholders remain passive. Then it is only the active shareholder controlling the corporation that can be held liable for corporate obligations.⁵⁹² In that situation, though, the other shareholders have no interest at stake in the piercing trial, similarly to KKO 1997:17.

In the United Kingdom, the stance is very different. There, the presence of unconnected shareholders means that the veil cannot be pierced, for then the company cannot be identified with its controller.⁵⁹³ Unlike in the other jurisdictions discussed here, the issue is not viewed as per control but rather as per identity, as if deeming the entities to be the same person. The view is much more strict than in Finland and the United States. In *Nicholas v. Nicholas* (1984), the majority shareholder owned 71% of the shares. The court decided not to mandate the transfer of company-owned property to the majority shareholder's wife but noted the result might have been different had it not been for the position of the minority shareholders. The court also made a difference between nominal and real minority shareholders. This gave the impression that only genuine minority interest would prevent piercing.

591 About this, see V.4.2. of this work.

592 See *Cheng* 2010 at 512.

593 See *Trustor v. Smallbone* (2001) at 14 and 20 and *Ben Hashem v. Ali Shayif* (2009). See also *Hannigan* 2013 at 19.

In case 1997:17, the claim did not violate the interests of the subsidiaries' shareholders. Rather, it would have furthered their interests by providing the bankruptcy estate with more funds. In the case, others held 36.6% of the votes. The Court did not specify why the presence of other shareholders was significant. The author's opinion is that their presence helped prove that the corporation was not founded solely on the parent's interest as a device to cheat creditors. It speaks for the independence and legitimate business purpose of the subsidiary.

The decision can be interpreted that the control requirement was present, but the diversity of ownership prevented piercing. On the other hand, it can be that piercing was denied solely because of the other missing elements, artificial division and the intent to damage creditors.⁵⁹⁴ Maybe the presence of other shareholders supported the existence of a legitimate corporate purpose and spoke against the artificial and detrimental nature of the arrangement.⁵⁹⁵ Due to the general language used and lack of analysis in the decision, no concrete interpretations can be made. The decision only helps to identify factors significant for veil piercing but unfortunately remains silent on their specific interpretation.

3.5. Conclusions on Control

The discussion in the preceding chapters has been about the use of corporate form and control in a corporation. It was determined that, using corporate group structure, intercorporate relations or shareholders control all means using the corporate form. In addition, all of these forms of use require controlling the corporation. Control was discovered to be a key element in piercing decisions, even if the used aspect is group structure or intercorporate relations. The next step was to determine who holds control in a corporation, whether by share ownership, management positions, contracts and actual control even without a formal relationship to the corporation.

594 See *Huhtamäki* 1999 at 144 footnote 12. He highlights the economic entity as a justification for piercing. If the corporations in the KKO 1997:17 had formed a single economic unit, veil piercing would have been possible.

Cf. *Huttunen* 2007 at 138. He sees that, in the KKO 1997:17 decision, the Supreme Court expressly denied that share ownership could allow the court to consider the owner of shares as the owner of the corporation's property. He concludes that the case offers no concrete material from which to deduce the possibility of piercing the veil.

Cf. *Kolehmainen* 2009 at 613. He interprets the case so that piercing was not accepted because the 63.4% vote was not a high enough level of control.

595 Though, for example, in a Swedish committee memo, veil piercing has been thought possible even when the company has many shareholders. See SOU 1987:59 at 103–104 and NJA 1947 s. 647. In Swedish literature, this has been further analyzed to mean that piercing is possible when there are one or few shareholders. See *Nial – Johansson* 1998 at 228 and *Nerep* 2003 at 26.

If the formal control position does not match the reality, then the one who actually holds control is relevant for veil piercing.

In veil piercing case law, a certain level of control has been deemed necessary for piercing to apply. In piercing case law, control has been founded on a combination of share ownership and management positions. In KKO 1996:2, a straw man was found and the control requirement for piercing was fulfilled by *de facto* control combined with some contractual rights the controller had been given. In KKO 1997:17, it was silently assumed that 66.7% ownership would constitute control. Control in a corporation is elusive, and the multiple methods of dividing or allocating that control makes the assessment case-specific.

One thing is absolutely certain, though: control alone never justifies piercing. I did address the totality of the elements of the piercing test and how they can be used to support each other when assessing the evidence. I must remind at this point that control is more easily shown than improper behavior. Due to control being ordinary in corporations and common in one-man corporations, it is likely that control is present and provable much more often than the other requirements. As such, it would seem distorted to use the control factor to compensate for the lack of evidence of the others. Still, strong evidence of one person dominating the corporation can, in some cases, show that it is more likely that the use was improper. One should exercise caution when compensating the impropriety requirement with control.

4. Requirement of Improper Behavior

4.1. Introduction

The requirement of improper behavior consists of two parts, both of which are derived from the KKO 2015:17 decision. These parts are *artificial* and *reprehensible* use of corporate form. In KKO 2015:17, the presence of both was required in order to pierce the veil. The construction in this work honors the distinction made. Artificial use in a non-reprehensible manner is not deserving of condemnation. One can use a corporation for whatever purpose one wishes: business or other. Artificiality just means that the corporation is not used how the legislator intended it to be used. Even if corporations are commonly used in one way, it does not mean that the use is not artificial. Only the legislator can modify what artificiality includes. A separate issue is that artificial use that causes damage to another likely fulfills the requirement of reprehensibility. Reprehensible use follows the formal, rules but the results do not seem acceptable. It is condemnable as such, even though the way the corporation is used falls within the wording of the norms while failing to uphold their spirit. Case law can deem the use acceptable or non-reprehensible but cannot make the use not artificial, though case law acceptance is enough to prevent veil piercing as reprehensibility is amiss.

The division into artificiality and reprehensibility is not the only potential choice. In the United States, *Cathy Krendl* and *James Krendl* have suggested five forms of conduct that fulfill the impropriety requirement of veil piercing there: (1) violations of public policy, (2) misrepresentation, (3) lack of economic substance, (4) shareholder domination or direct participation in the wrongful conduct, and (5) evasion of legal obligations through the use of a corporate entity.⁵⁹⁶ The glaring difference in approach is that there is no requirement of artificiality in the piercing tests. They focus on domination over the corporation, i.e., the lack of independence of the corporation, and that, combined with one of the listed results, satisfies the piercing test. It would thus seem that the Finnish doctrine is more strict and predictable. As discussed in the previous section, control is part of the Finnish test but not as heavily as in the US, where excessive control combined with an inequitable result is often enough to justify veil piercing.

The US doctrines are capable of accounting for elements that are discussed under the artificiality part of the Finnish doctrine. These elements appear under the domination or the wrongful conduct part. In part, they create the inequitable situation. Another key difference is that the separation between reprehensibility and results in the Finnish doctrine does not exist in the US doctrine. Following the formulation by the Krendls' evasion of an obligation or public policy are part of the impropriety whereas in the Finnish doctrine they are listed as the results of improper behavior. But, as we learned in II.3. of this work about the prohibition of abuse of rights, the inequitable result and intent to achieve them together would enable disregarding the arrangement. This leaves us in an interesting situation, where the background theory for the Finnish doctrine corresponds better with the US piercing doctrine than the actual piercing test in KKO 2015:17. As artificiality is an explicitly stated part of the piercing test, this makes the US doctrine less useful as a comparative target when discussing artificiality and reprehensibility.

Only when both artificiality and reprehensibility are present in the same case, the corporate veil can be pierced.⁵⁹⁷ The assessment thus has an objective criterion (artificiality) and a more moral criterion (reprehensibility). Usually, these two are inseparable. The morally condemnable use is rarely within the intended purpose of an institution. The relationship does not hold as strongly the other way around,

⁵⁹⁶ See *Krendl – Krendl* 1972 at 29–43. See also *Powel* 1931 at §13. A similar but simpler test was proposed by *Marcantel* (2011 at 215–230). His test includes (1) an injustice requirement that can be achieved through a showing of fraud, misrepresentation, or undercapitalization; (2) a unity requirement; (3) a causation requirement; and (4) an insolvency requirement.

⁵⁹⁷ Similarly *Pönkä* 2012 at 233–234 and *Linna* 2004 at 631–632.

though. Use that is not within the intended purpose of the institution is not automatically condemnable. This, in turn, means that the reprehensibility criterion will most likely become decisive for veil piercing. The problem lies in how to identify the moral depreciation that plays a relevant role in a juridical decision. I have looked into this in II.3. of this work when discussing the prohibition of abuse of rights. The discussion in this chapter looks more closely into the practical aspects of showing reprehensibility. I will start with an analysis of the nature of artificiality. The attempt is to find a definition for artificiality and then determine what kind of corporate use is artificial. After that, the text delves into the jungle that is reprehensibility.

4.2. Artificial Manner

4.2.1. Defining Artificiality

Artificiality is found when the corporate use does not match these intended uses. Artificiality has a well-defined structure in artificial property arrangements and in tax avoidance. These two doctrines serve as the starting point for the examination here, where the attempt is to define what artificial use is and how it can be detected and determined in legal decision-making.

On the international stage, Finland is rather unique in demanding artificiality as part of veil piercing. Perhaps this comes from the long tradition of tax evasion norms construed around the concept and their offspring, the artificial property arrangement norm in the Enforcement Code. Internationally, artificiality is only a side note of control⁵⁹⁸ or some supportive consideration. For example, the US piercing doctrines usually cite some injustice or inequitable result.⁵⁹⁹ The UK piercing doctrine revolves around the evasion of existing obligations by using a corporation.⁶⁰⁰ There seem to be no additional requirements for how the corporation is used, but piercing based on injustices alone is rather vehemently opposed in England.⁶⁰¹

In Sweden, one longstanding criterion in the veil piercing assessment is the dependence—*osjälvständighet*—of the corporation. This means that the corporate operation is indistinguishable from the shareholders' own operation and thus fulfills the shareholders' interests directly rather than through generating profit within the corporation.⁶⁰² *Krister Moberg* has understood

598 For example, the analysis on whether the corporation has seized to have a separate existence.

599 See *Hamilton – Booth* 2006 at 400 and *Gallagher – Ziegler* 1990 at 300–302.

600 See *Prest v. Petrodel Resources Ltd* (2013) at 35.

601 See *Adams v. Cape Industries Plc* (1991) and *Mujib* 2018. Cf. *Gallagher – Ziegler* 1990.

602 See NJA 1947 s. 647. In the literature, see *Hellner* 1964 at 166, SOU 1987:59 at 132, *Moberg* 1998 at 76 and *Stattin* 2008 at 446–447. For a critical view, see *Nerep* 2015 at 28–29.

this to mean that the business purpose of the corporation is not independent of the shareholders.⁶⁰³ This opinion was also expressed in the NJA 1992 s. 375 decision, where the corporation's business purpose was interpreted as an element against piercing liability. The *betalningsansvarskommitté* saw the criterion differently. It rejected the dependence assessment as a requisite of piercing and instead saw its meaning when assessing whether the results are unacceptable. The most convincing argument was the one-man company, in which the dependence would be a moot criterion.⁶⁰⁴

The Swedish term does not exactly match the artificiality as laid out in the Finnish doctrine, but some similarities are apparent. The corporation as a separate legal person is the formal legal status of the arrangement. Still, the corporation is not independent in the sense that its business purpose is strictly to serve the interests of the shareholder not in the manner specified in Company Act, i.e., generating profits within the company. Arguably, through some strange mental acrobatics, this situation somewhat matches the concept of artificiality. The non-independent corporate use does not match the intended purpose of the corporation, which could be understood as independent business and profit generation within the corporate operations. Not much material in this matter is utilizable from Sweden, as the differences are apparent. On the appellate court level, Sweden has one case that directly mentions using the corporation for purposes other than those behind adopting limited liability.⁶⁰⁵ This matches the artificiality as understood in this work and mostly shows that the idea is not unheard of in Sweden, either.

In the United Kingdom, the courts rarely question veil piercing when a sham corporation is involved.⁶⁰⁶ The sham corporation itself is rather hard to define; it could be considered a corporation intended to give third parties or the court the appearance of creating legal rights and obligations between the parties that are different from the actual intended legal rights and obligations (if any). The problem with this definition is the strict adherence to the *Salomon* principle in the UK. *Robert Miles* and *Eleanor Holland* elaborate on this problem: “[I]t is meaningless in this context to talk of a ‘sham company’: it is vital to the success of a scheme that employs the corporate form that a real company is properly incorporated; otherwise, the scheming party would not be able to avail him- or herself of the principle of separate legal personality in order to achieve his or her purpose.”⁶⁰⁷ This means that when the corporation

603 *Moberg* 1998 at 76–77.

604 See SOU 1987:59 at 132. See also *Nerep* 2015 at 28–29 accepting the committee's arguments.

605 See Svea hovrätt, No. T 7360-14 as reported by *Brandell* 2018 at 7.

606 *Adams v. Cape Industries Plc* (1990).

607 *Miles – Holland* 2013 at 206 and the case law they cite in footnote 53. For additional criticism, see *Moore* 2006 at 195.

is incorporated properly, it is real and not a sham. At first hand, the definition of sham could be interpreted to include some elements of artificiality, the disparity between formal appearance and reality being the commonality. Unfortunately, the strictly formal interpretation makes the concept moot on a comparative perspective.

The United Kingdom case law, though, has addressed similar issues. In *Chandler v. Cape Plc* (2012), the court did extensively look into the relationship between the parent and the subsidiary. The court found that the subsidiary remained the owner of its own assets and handled its own sales and dealings with third parties. The case was eventually decided on grounds other than piercing, but the parent was held liable for safety hazards in the subsidiary's operation. One factor that supported extending the liability was that the businesses of the parent and subsidiary were the same in a relevant respect. One should not draw conclusions too extensively from this, though, as extending the liability required three other factors related to the parent's knowledge of safety hazards and the subsidiary's right to rely on the parent to act based on its superior knowledge on the issue. The case remains interesting mostly because it gives significance to the similarity of the businesses of formally separate entities when extending liability beyond the formal outlook. Much of the same elements appeared in the KKO 2015:17 decision.

In the context of artificial property arrangements and tax avoidance, artificiality means the disparity of a given legal form and the economic reality of the situation. The arrangement is given some juridical form in order to create some legal effects beneficial to the creator, even though the arrangement in reality matches some other juridical form or matches no form. In the preparatory works for Enforcement Code 4:14, a clear stance on artificiality is taken. Legal institutions are normally perfectly acceptable devices created to serve certain purposes. When these devices are used to circumvent obligations, they need to be met with different reactions and attitude.⁶⁰⁸ The same argument could be applied to piercing. If a corporate arrangement's economic reality does not match the form it has been given, it becomes possible by piercing to apply the actual matching form to the arrangement, even if it is detrimental to the arrangers.⁶⁰⁹

Artificiality is closely related to fake legal actions. Fake legal acts are not binding and are invalid by nature. Although the Contracts Act 34 § does specify that fake legal actions can be binding if the one receiving rights from said action was *bona fide*. These actions are made to avoid the applicability

608 See HE 275/1998 vp. at 14.

609 See *Savela* 2015 at 405. Similarly, see *Vahtera* 2018 at 265.

of some legal norm. For example, one person sells their house to another to prevent it from being auctioned away for the debts. What makes these fake is that there is no actual transaction happening. The parties never intended to perform the legal action. They only intended it to exist in form, not in reality. There was no real intent to cause the legal consequences. In an artificial arrangement, the intention does exist. A legal action is actually performed in form and in reality. The totality of the arrangement, however, remains such that the actual effects of the arrangement do not match the effects the form was meant to represent.

Kari S. Tikka has construed a remarkably clear formulation in order to determine the applicability of the general norm in tax avoidance situations. This formulation first determines artificiality. The legal form of an action or a situation is X, and the requirements for using X are met. If X does not match the actual nature or purpose of the arrangement, the general norm is applicable. X does not match the actual nature or purpose of the arrangement if the economic realities X usually refers to are amiss. Then the general norm is used as a remedy. In artificial situations, the one making the legal decision would be allowed to use the general norm to change the description of the legal form. The arrangement is treated as if the correct form were used and the actual form is replaced. When determining taxation, the arrangement is given a fictive form, *per se*, that matches its economic reality.⁶¹⁰ In veil piercing, this is not enough. The arrangement does not necessarily have a correct form. There is no need to dismiss the formulation, though, as the rest of it is perfectly applicable.

Help could be derived from another excellent formulation. Pöyhönen defines an artificial arrangement as a permitted legal action that does not cause changes in the starting situation when examined from the viewpoint of property law.⁶¹¹ He proceeds to justify remedying these situations by allowing an expansive interpretation of the provision banning fake legal actions and interpreting it in light of the prohibition of the abuse of rights. The actions are not fake since the parties intended a legal consequence to be created. The consequence itself is not acceptable and should not enjoy legal protection.⁶¹² The view adopted by Pöyhönen relies on expansive interpretation since property law has no general norm allowing the disregard. Case law acceptance of piercing doctrine somewhat patches this deficiency when the corporate form is considered.

610 *Tikka* 1972 at 215. Similarly *Knuutinen* 2009 at 53–67 and 195.

See also *Leppänen* 1991 at 282 and *Huhtamäki* 1999 at 144, who both place significance on economic wholes. When two formally separate subjects in reality make up an economic whole, upholding the separateness does not seem justified.

611 *Pöyhönen* 2001 at 313.

612 See *Pöyhönen* 2001 at 313.

The formulations of Tikka and Pöyhönen are similar. Both address formal changes when the reality does not change.⁶¹³ What Pöyhönen adds is the legal principle of the prohibition of abuse of rights as a justification of intervention. Veil piercing has no general norm laid out in legislation. The formulations are easy to place on veil piercing. The formal requirements of corporate form are easily fulfilled. If the economic realities a corporation usually entail are not present, veil piercing could be applied. Veil piercing needs to derive justification from case law and legal principles, such as the prohibition of abuse of rights and fake legal actions. The disparity of legal form and economic reality form the basis for artificiality—the economic reality of the case does not match the legal form it is given.

Yet the view could be problematic. The tax avoidance norm usually addresses the disparity of income as understood by tax laws and income as understood by economic theory. The disparity is easy to detect as the economic income concept is clearly defined. When examining veil piercing, the addressed disparity is between the concepts of a corporation as it is present in the law and the economic content of a corporation. The corporation is entirely a legal fiction and does not have an independent economic reality. The economic properties of the corporation are those given to it in law. Even in the most aggravated corporate abuse situation, there is no disparity between the economic content of the corporation and the Company Act content of the concept. Instead, we need to look at the economic content the Company Act was meant to create or the economic content it usually has. If the economic reality does not match this content, the use is artificial. Following the division made by *Reijo Knuutinen*: the disparity is between the formulation of the text of the law and the *ratio* behind the law. The formulation fails to uphold the purpose behind it.⁶¹⁴

In Sweden, the emphasis is on the abuse of the corporate form for purposes other than those that were intended to be achieved with limited liability.⁶¹⁵

“Den verksamhet som bedrivits har således inte varit någon sådan egentlig näringsverksamhet i omsättningens intresse som aktiebolaget som bolagsform är tänkt att möjliggöra.”⁶¹⁶ Although it could be noted that this formulation says the same thing twice, it should be praised for its clarity. The formulation

613 However, their meter for measuring the reality differs. The model of Karhu views it through concepts of law, whereas Tikka observes the economic rationalities of business. The difference could be explained with the nature of tax law as dependent on those rationalities.

614 See *Knuutinen* 2009 at 53–61. See also pp. 134–136 of the same work about synthetic and constructive ownership.

615 See NJA 2014 s. 877 at 12. För att en ansvarsgenombrottsituation ska anses föreligga bör det krävas att det sätt på vilket ett bolags verksamhet har bedrivits framstår som ett tydligt fall av missbruk av bolagsformen för andra ändamål än de som motiverat det begränsade ekonomiska ansvar som bolagsformen erbjuder.

616 NJA 2014 s. 877 at 14.

says nothing of artificial use but contains the same definition of artificiality I arrived at in my analysis of the Finnish piercing doctrine. If the above analysis is accepted, then the Finnish and Swedish doctrines are the same in this aspect, albeit the Finnish Supreme Court, for some reason, has decided to make the situation more cryptic.

Veil piercing has occasionally been explained by combining economic ownership with formal ownership, and the property of the corporation is deemed to be the property of the shareholder.⁶¹⁷ This view comes close to the *beneficial owner* concept⁶¹⁸ used in taxation in common law countries. Both of these are constructions used to describe the economic reality, and as such, they can be placed in the aforementioned formulations. However, I will not use the beneficial owner concept further in this work.

4.2.2. The Intended Purpose of the Corporation

What, then, is the intended purpose of the corporate institution? What is the economic reality the corporate form is supposed to represent? The answer could be derived from either the societal background for adopting the institution or the Company Act–defined purpose. The prior could be called the purpose and values the institution has been created to serve. The latter could be called the purpose of a single company. It is important to remember that corporate form, and therefore limited liability and separate personality, are nothing but tools to achieving these purposes.

Beginning with the societal values of the institution, Tammi-Salminen names the intended purpose of the corporation as the promotion of production, trade and lawful business. Veil piercing applies when the corporation has been used in a manner contradictory to its intended purpose and as a device to avoid liability. Even if the actions of the corporation do serve a business purpose, veil piercing is not excluded if the actions are not honest trade and the corporation has been used only to pursue self-interest at the expense of others.⁶¹⁹ No doubt, production, trade and lawful business are the values usually promoted by corporate form. The corporation is not meant as a wealth protection device or as a device to enjoy some rights the legal system protects.⁶²⁰

617 Tammi-Salminen 2001 at 296–297.

618 About the beneficial owner, see Knuutinen 2009 at 128–134.

619 Tammi-Salminen 2001 at 290. Similarly in Sweden, see Andersson 2014 at 1. See also Stjernqvist 1950 at 84, who called these corporate arrangements *bristfälliga firmaunderlag*, defective enterprises or enterprises with faulty foundations. Later decisions involving these arrangements were renamed as veil piercing decisions. The original name is somewhat fitting and tells that somehow, these corporations are not operating how a corporation should.

620 Similarly, see Pöyhönen 2000 at 176 and Tjio 2014 at 4.

This connection is well established in the United States. Cheng crystallizes this view: “Limited liability itself emerged in the nineteenth century as an economic policy tool to promote industrialization. As the capital need of businesses grew, state legislatures were under pressure to introduce limited liability to help corporations attract investments from passive shareholders. Limited liability was first adopted in quick succession by the northeastern states, which faced regulatory competition with one another and did not want to lose businesses to other states.”⁶²¹ Veil piercing can be understood as the tool for ensuring the fair use of the corporate form for this purpose.⁶²² Policy considerations in veil piercing cases are quite common.⁶²³ Having said this, the US courts seem to have no problem piercing the veil even if the corporations in question had an actual business as long as the piercing test is satisfied.⁶²⁴ Still, the actual business purpose behind a corporation’s actions speaks against piercing.⁶²⁵

The Swedish situation is discernable from the NJA 2014 s. 877 decision citing preparatory works to define the intended purpose of the corporations as “Aktiebolagsformen ger aktieägarna möjlighet att driva verksamhet utan att riskera mera än det ursprungligen satsade och tillskjutna kapitalet.”⁶²⁶ Translated, this means that the company form gives the shareholders the possibility to *operate a business* with liability limited to the capital input. The corporation institution is meant to facilitate business.

In the UK, the courts are vehemently opposed to piercing the veil of any company with active business. These *bona fide* companies have business operations themselves and do not act as mere shells.⁶²⁷ This would suggest a similar view of the corporate purpose when piercing the veil in the UK, though express reference rarely appears. In *Rainham Chemical Works v. Belvedere Fish Guano Co* (1921), Lord Buckmaster stated as the objective of limited liability that enterprise and adventure be encouraged. He added that the corporation

621 See *Cheng* 2010 at 522 and those cited therein.

622 *Georgakopolous* 2007 at abstract.

623 See, for example, the influential decision in *Anderson v. Abbott* (1944) at 363. See also *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (1983) at part III, which discusses the nature of government instrumentalities. In the literature, see *Halabi* 2015 at 1011. See also the alleged first veil piercing case *Bank of Deveaux v. United States* (1809) and *I. Maurice Wormser’s* analysis on case law at the beginning of the 20th century (*Wormser* 1912).

624 See *Cheng* 2011 at 17.

625 *Evans v. Multicon Construction Corp.* (1991) at 735, stating that benefit gained by individual defendants was a legitimate business purpose and therefore a factor against veil piercing. See also *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat* (1999), in which the undercapitalization of a company was justified due to taxation reasons supporting the business.

626 Prop. 2004/05:85 at 196.

627 For a survey of UK decisions until 2010, see *Cheng* 2011 at 16. See also Lord Justice Dillon in *Nicholas v. Nicholas* (1984), citing business reasons as a preventive of piercing.

should act as an independent trading unit and not solely on behalf of the people by whom it has been called into existence.⁶²⁸ Additionally, the UK courts are reluctant to include any sort of policy considerations in their argumentation,⁶²⁹ thus further obfuscating whether fulfilling the intended purpose of the corporate institution opposes piercing.

In the United Kingdom legal literature, *Tan Cheng-Han* has expressed an opinion remarkably similar to the one presented in this work. He, too, emphasizes the societal purpose behind the company and the policy goals the institution is meant to facilitate. The *raison d'être* was to allow companies to be used as vehicles for legitimate human enterprise and endeavor, particularly where large amounts of capital were required. Companies were never intended as vehicles that incorporators could use to take unfair advantage of third parties. This sort of use constitutes abuse of the corporate form. The scope of corporate separate personality must be consistent with the overall goals of corporate law, which are intended to benefit society and must therefore give way where it is clear that society's interests will not be served.⁶³⁰ The opinion of Tan remains rare in English legal literature, and similar views have not been cited in case law. Still, it is heartening to note a familiar view, even if it is the minority at the moment.

This societal purpose view on corporate purpose somewhat conflicts with the other definition of corporate purpose. Company Act 1:5 reads that *the purpose of a company is to generate profit for the shareholders*.⁶³¹ Company value transfers are legal (Company Act 13:1.3), and the management's conduct is diligent (Company Act 1:8) if the actions are made to further this purpose. Any action that furthers the purpose of the corporation is a legitimate business purpose in the Company Act sense. The default situation set in Company Act is, thus, that any action that furthers the corporation's ability to generate profit for the shareholders has a business purpose.⁶³² Thus, any action that either diminishes costs or enables profit has a business purpose.

Arguably, fulfilling this purpose also fulfills the societal purpose of promoting trade and production. In many situations, however, these two definitions could conflict, for example, when an existing business of a corporation is divided into two different entities to continue the business operations as a whole. In such a situation,

628 At 475. The court did not pierce in the case, as the corporation was found to be an independent trading unit. See also *Moore* 2006 at 200–201 and *Cheng* 2011 at 23.

629 See *Cheng* 2011 at 14.

630 *Tan* 2015 at 22 and 29–31.

631 The manner in which profit generation is defined does not matter here. The result is the same whether we adopt shareholder value maximization, enlightened value maximization or triple bottom line approach.

632 See, for example, *Mähönen – Villa* 2015 at 375.

the division does not further the societal purpose. The business operation of the original corporation already fulfilled this purpose. The division no doubt furthers the Company Act–defined purpose, though. If corporate purpose is defined in this fashion, it could in fact incentivize the corporate actors to make a risk separation arrangement, which in turn could be undesirable for the society. These arrangements no doubt generate benefits for the shareholders.

Pönkä discusses veil piercing and notes that the purpose of the active corporations does not always match the purposes of the Company Act.⁶³³ He does not suggest that veil piercing should be denied when the company use does not match the purposes of the Company Act. This observation springs the need to further elaborate that the acceptability of company use cannot be determined by how the companies are used. It is entirely possible that a common practice is abusive and should be neglected. If the practice has been evaluated against the norms of the legal system and is found acceptable, then this practice is naturally acceptable.

To avoid this sort of incentive, let us recall the argumentation in tax avoidance situations. The tax benefits of an arrangement that has been formulated to create these benefits do not legitimize the arrangement. Paying less tax is beneficial to the company and is therefore a legitimate business reason in the sense of Company Act. The tax avoidance norm, however, evaluates the abuse of tax norms, so the fact that the arrangement is beneficial for the business cannot serve to legitimize the arrangement. The same argumentation could be applied in arrangements where separate personality and limited liability are considered. When assessing whether using them constitutes abuse, the fact that the use is beneficial to the company cannot legitimize the arrangement, though in a definitive sense, the arrangement does have a business purpose.

Accepting this view would remove the undesired incentive to make risk separation arrangements for the sake of separation alone. In veil piercing, the Company Act–defined purpose can no doubt be accepted. The purpose of the company is to generate profits for the shareholders. Fulfilling this purpose constitutes a business reason. This purpose in a default case also fulfills the societal purpose of the corporate institution. Veil piercing is an abuse norm, though. Thus, *the business purpose created by abuse should not be considered a legitimizing business purpose. In order not to be considered artificial, the corporate arrangement needs to have a business purpose other than the separate personality, limited liability and the benefits they create for the shareholders.* If such purpose exists, the use of the corporate institution also fulfills the societal purpose of the company, as it generates new business activity.

633 See Pönkä 2008 at 323.

At this point, I should note that this interpretation is based on an analogous argument based on the tax evasion norm. With tax evasion, there is a specific section of written law that validates the view. Veil piercing, however, is not only based on mere case law, but adopting this sort of view also directly contradicts Company Act Chapter 1, Section 2 as well as freedom of trade. I wish to give more context to this interpretation so as to not have it defeated by a mere citation of Company Act or freedom of trade. The interpretation applies to veil piercing situations only. Even within the veil piercing situations, that view is used only to show one of the requirements of veil piercing, that of artificiality. In addition to artificiality, the one claiming veil piercing still needs to show reprehensibility. Artificial use does not constitute abuse, though combined with other elements it might. The contradictions with written law thus appear only in a limited context and as a small part of the complex assessment process.

Bainbridge also emphasizes the fraudulent conduct as a requirement for piercing: “There is nothing intrinsically fraudulent about deciding to incorporate or about dividing a single enterprise into multiple corporations, *even when done solely to get the benefit of limited liability*. Both possibilities are an unavoidable consequence of the statutory grant of limited liability to all corporations (emphasis here).”⁶³⁴ The conduct might be artificial when done solely to get the benefits of limited liability, but it is not fraudulent or reprehensible in itself.

This splits the artificiality assessment into two paths.⁶³⁵ One is where the actions of the corporation have no acceptable business purpose at all, meaning the corporate existence is completely artificial. This would include situations where the corporate existence serves only the non-legitimizing business purpose of evading an obligation, which makes veil piercing more likely. The same treatment should be extended to situations in which the perceived legitimate purpose is later denied, leaving the corporate existence wholly artificial. The second path is where the corporation practices actual business, and the operations have a legitimizing business purpose. In these cases, piercing could be used to target some specific evaded obligation or circumstance if it has no connection to the corporate operations. Alternatively, the legitimizing purpose can be so insignificant in comparison to the illegitimate motives of the arrangement that piercing could be accepted despite the redeeming qualities.

The solution for balancing the two could be sought from the tax avoidance norm. Artificiality becomes a balancing act where the illegitimate benefits and legitimate

634 Bainbridge 2000 at 6. See also Gelb 1982 at 1–2 and the cases he cites: *Gartner v. Snyder* (1979) and *Arnold v. Phillips* (1941).

635 Similarly in artificial property arrangements, see *Linna – Leppänen* 2015 at 162–164.

business reasons are weighed against each other. The claimant demanding piercing needs to show the unusual nature of the arrangement and its resulting illegitimate benefits to indicate artificiality, whereas the defendant can then counter by showing the legitimate business reasons.⁶³⁶ Should the illegitimate benefits outweigh the business reasons, the arrangement is deemed artificial.⁶³⁷ The existence of business reasons does not prevent artificiality if they are minor compared to the illegitimate benefits.⁶³⁸ Especially if the practiced business undergoes no real changes while accruing those benefits, the arrangement is easily artificial.⁶³⁹ In other words, if the business arrangement is operated just as it was before the arrangement was undertaken, and the only change is the separation of negative and positive risks—the chances for benefits and liabilities—due to separate personality, the arrangement is artificial.

The KKO 2015:17 case acts as an example. Arctecho had a business purpose, but the business was deemed reasonable only due to the avoidance of remunerations. Verkkokauppa had acted in its own interest at the expense of Teosto as a creditor.⁶⁴⁰ The business was not honest trade, but rather it was abusing the separate personality to gain a competitive edge based on aggressive interpretation of the law. This created a negative risk that this aggressive interpretation would eventually be denied. This risk was isolated into a separate entity. In a purely business sense, the operations were sensible. In legal procedures, however, when the sensible business reason behind it was deemed dishonest, the whole division lost its legitimate basis.

In the KKO 2015:17 case, Verkkokauppa had taken one of its key business functions and transferred it to an Estonian subsidiary. During the proceedings, Verkkokauppa had elaborated that the transfer had been made because of the corporate-friendly atmosphere, less taxation and lower costs in Estonia. The Supreme Court deemed that these reasons did not match the reality, as Verkkokauppa failed to show the given reasons to be true. Failure resulted, in part, from the fact that the subsidiary was shut down soon after the remunerations were demanded. The existence of Arctecho was deemed reasonable only because, for a time, it allowed Verkkokauppa to not pay the remunerations.

It is interesting to think whether Verkkokauppa would have been held liable had it not shut Arctecho down after the remunerations were demanded. Verkkokauppa essentially made it impossible to collect the neglected payments. Had Arctecho

636 For this opinion in tax avoidance, see *Mehtonen* 2005 at 147–148.

637 It is possible but not necessary to use numerical values derived from accounting in this weighing. They should not be given exclusive meaning, though, as veil piercing is an overall assessment.

638 For this opinion in tax avoidance, see KHO 2014:66 and *Myrsky – Rabinä* 2015 s. 351.

639 For this opinion in tax avoidance, see *Ryynänen* 2000 at 117–118. See also KHO 1982 B II 571, where tax avoidance was found since the CEO's position had not really changed after the arrangements in methods of compensation. Similar in property law, see *Pöyhönen* 2001 at 313.

640 Or the artists for whose benefit the remunerations are collected.

continued to exist, there would have been an active business liable for the remunerations, and the business could have changed its operations to comply with its obligation to pay. This would have supported the argument that there were actual business reasons behind the division. Arctecho would still have been liable for the neglected payments, but Verkkokauppa probably would have avoided liability.

In KKO 2017:94, the Supreme Court of Finland also emphasized the lack of genuine business reasons behind the division of the business. The existing business had been divided into two corporations. Not only this, the business operation continued unchanged even after the transfer. The lack of business reasons for such division was interpreted to show that the intention behind the arrangement was to circumvent the effects of bankruptcy. This would tie the artificiality and reprehensibility arguments more closely together. Alternatively, it would emphasize the significance of business reasons other than liability limitation to a greater extent.

Piercing cases also pay attention to some typical factors usually present in a corporation, and the deviation from them supports piercing.⁶⁴¹ These deviations potentially show that the corporation is not used according to the intended purpose of the institution, i.e., honest commerce. It should be remembered, though, that even if some use is commonplace, it does not mean that it is acceptable. In the KKO 1999:162 decision, the Supreme Court further argued against liability by noting that the relationship of the parties was not even claimed to be anything more than a normal contract for repair work. This can be interpreted to mean that departing from normal and accepted practices supports liability. Similarly, in KKO 2006:45, The Supreme Court noted the unusual conditions of a rent agreement. The decision in KKO 2011:62 assessed whether the business risk was divided among the actors in an unusual manner. In KKO 2015:17, attention was given to whether the subsidiary contracted and operated independently from its controllers.

Similar considerations have arisen in England also. In *Smith, Stone and Knight Ltd. v. City of Birmingham* (1939), the court sought to determine whether the subsidiary was the parent's agent. In this determination, it was important to detect whether the subsidiary had its own business or whether it only conducted the parent's business. The relevant factors in answering this were allocation of profits, origin of capital, rights to the appointment of directors, the subsidiary's autonomy and self-determination in decision-making, as well as whether the subsidiary did anything for itself.⁶⁴² The court determined the subsidiary an agent of the parent and held the parent liable. The decision did not involve similar consideration of whether there were other business reasons besides those of the parent. It also did not consider veil

641 See *Huttunen* 1963 at 199.

642 See also *Kershaw* 2009 at 58–60.

piercing but only sought to answer a similar question. Similar considerations have appeared in later veil piercing case law. The decision does not offer much new or helpful interpretative influence for the Finnish doctrine, though, as the KKO 2015:17 decision already seems to make the analysis slightly more delicate. The main reason for describing this English decision here is thus the confirmation that similar issues have also appeared abroad.⁶⁴³

In the United Kingdom's legal literature, *Marc Moore* has suggested placing emphasis on whether the controlled corporation promotes a genuine purpose of the business it is formally running. This genuine purpose may be defined as a strategy that determines the general direction of the business, the existence of which both precedes and also exists independently of the specific issue that gave rise to the dispute at hand.⁶⁴⁴ The reason I present this opinion is the recognition of the possible connection between the dispute at hand and the business sought. It is possible that the controlled corporation runs a genuine business, but the entire business is the cause of the damage. Then it is necessary to determine whether the business should be allowed to operate at all. If the entire business purpose is faulty and therefore operated through a controlled corporation, then it would be questionable to cite that business purpose as a legitimization of the arrangement. The legitimizing business purpose needs to arise independently of the conduct leading to the claim.

This opinion is easily compatible with the KKO 2015:17 decision in which the subsidiary was operating a business whose profitability was based on the lack of remunerations. The non-payment of these remunerations was the cause of the dispute at hand. Accordingly, the Finnish Supreme Court required a business purpose for running the operation through a subsidiary using something other than the savings from not paying the remunerations.

4.2.3. Conclusions on Artificiality

I have defined artificiality here based on the analogous doctrines of artificial property arrangements and tax avoidance. Artificial use is using the corporation in a manner that does not promote honest business and trade. According to Company Act the defined purpose of a corporation is to generate profits to the shareholders. Thus, anything beneficial to that group would constitute business purpose, preventing the founding of artificiality. When assessing whether using limited liability or separate personality constitutes abuse, the fact that the use is beneficial to the company cannot legitimize the arrangement, even though the arrangement does have a

643 See also chapter V.4.2.1. of this work on the Swedish concept of *osjäluständighet*.

644 *Moore* 2006 at 199. For criticism, see *Kershaw* 2009 at 77. He is of the opinion that Moore's formulation of genuine business purpose does not capture the circumstances in which the courts have pierced the veil.

business purpose when it is beneficial in a definitive sense. Showing artificiality thus essentially requires an evaluation of whether the corporation has any business activity. If the company has no business whatsoever, the use of such a corporation is always artificial. Similarly, if the business reason is founded solely on a model that is not lawful, then the use is artificial. In these two situations, should the corporation also have a business purpose, piercing becomes a balancing act as to whether the business purposes are significant enough compared to the artificial use. Alternatively, the situation could allow for piercing if the corporate use, under which the piercing claim is made, has no connection to the business itself.

4.3. Reprehensible Manner

4.3.1. Vague Condemnation or Something Objective?

Veil piercing requires reprehensibility, which is, in essence, a moral condemnation. As such, it is hard to clearly and objectively state that is acceptable in legal argumentation. Ultimately, this cannot be solved, as some degree of subjective view is always going to be present in a juridical decision.⁶⁴⁵ It is again time to recollect the definition for prohibition of the abuse of rights that I deduced in II.3.2.2. *The effects of a legal action can be denied if those actions are taken with either unacceptable motives or the consequences prove unacceptable. Additionally, the denial requires that the use of the legal action does not match the intended purpose of the utilized legal norm, i.e., the use is artificial.* When the corporate form is abused, the controller claims limited liability protection or separate personality, even though the purpose of neither is fulfilled.⁶⁴⁶ I discussed this artificiality part of the test in the previous chapter. Two patterns for assessing what is unacceptable emerge from this principle: the consequences and motives. These two are perhaps the key methods of showing the reprehensibility requirement. Most of the analysis here will center on these two factors. I have deduced four patterns of more objective evaluation for the piercing assessment:

Unlike some other sections of this work, a more comprehensive comparative look into this issue seems in order here. The purpose of this look is to show that the piercing test involves rather subjective elements in all the compared systems. An entirely objective piercing test might even be impossible to achieve.

In the United States, the courts applying the veil piercing doctrine have been criticized for using loose and unpredictable metaphors to hide some intuitive moral

645 Some authors have thought it impossible to derive general rules for piercing the veil that are applicable to all veil piercing situations. See *Huttunen* 1963 at 172 and *Werlauff* 1991 at 31.

646 See *Hemmo* 2003 at 57. Using the corporation for purposes not matching the normal or acceptable practices constitutes abuse and supports veil piercing.

condemnation.⁶⁴⁷ The piercing tests applied there usually cite some injustice or inequitable result as the basis for veil piercing. Referring to abuse of the corporate form is rare, but it does appear.⁶⁴⁸ Still, it should be noted that it might be impossible to actually determine these concepts.⁶⁴⁹ Powell has attempted to categorize these considerations, but the results are still vague. His categories are (1) actual fraud; (2) violation of a statute; (3) stripping the subsidiary of its assets; (4) misrepresentation; (5) estoppel; (6) torts; and (7) other cases of wrong or injustice.⁶⁵⁰ Many of these forms of conduct are already regulated in law and, other than the last one, they are objective factors that are a result of the conduct.

In Powell's test domination of a corporation, one of these results is enough to pierce the veil. The Finnish legal system has utilized criteria 2 and 4 as a basis for liability but only 2 in piercing cases as misrepresentation has its own doctrine.⁶⁵¹ Fraud is not discussed here, asset stripping is combatted with statutory tools and, to us, estoppel is a foreign concept in veil piercing. Tort creditors are treated more favorably when piercing, though something more than domination and tort damage is still required. Other wrongs and injustices do fit the wording in the KKO 2015:17 piercing test. The Powell test does offer a more predictable standard for veil piercing, though the exceptions it makes to principles of limited liability and separate personality are quite extensive, and perhaps that is why they should be resisted. Some courts in the US refer to frauding creditors as a basis for piercing. An often-cited phrasing is that "some element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest must be present in order to disregard the corporate fiction."⁶⁵² Fraud, in turn, may arise in a variety of different contexts, including lies or misrepresentations about the purpose of the entity, its capital, debts, assets, independence, the identity of its representatives, or regarding other representations made to third parties.⁶⁵³ Millon goes further and names fraud in the courts' reasonings as a synonym of unfairness or injustice.⁶⁵⁴

The United States veil piercing case law does sometimes mention abuse or abusive behavior. No direct mentions of prohibition of the abuse of rights are made, though. Instead, some references to good faith and fairness appear. The desired conduct facilitated by veil piercing "comes down to a question of good faith and honesty in the use of corporate privilege for legitimate ends."⁶⁵⁵ Alternatively, veil piercing applies

647 See *Millon* 2007 at 18.

648 See, for example, *Miles v. CEC Homes, Inc.* (1988) at 1025.

649 See *Millon* 2007 at 24 and *Bainbridge* 2000 at abstract.

650 *Powell* 1931 at 6 §. See also *Cheng* 2010 at 505.

651 KKO 1958 II 43 and KKO 1991:186.

652 *American Trading & Production Corp. v. Fischbach & Moore, Inc.* (1970). Cited in, for example, *Sea-land Services, Inc. v. Pepper Source* (1991).

653 *Figuroa* 2012 at 713–714.

654 See *Millon* 2010 at 22.

655 *Ballantine* 1925 at 19.

“when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime.”⁶⁵⁶ At first glance, the approach seems different, and undeniably, the US formulation is more specific. Still, the underlying idea, especially in the second citation, is similar to the prohibition of abuse of rights: one possibility or right provided in legislation (here legal entity) cannot be used to defeat certain other rights or possibilities protected by the legal system. In the literature, Macey and Mitts arrive at the conclusion that one of the appropriate reasons to pierce the veil is to achieve the purpose of a regulatory or statutory scheme.⁶⁵⁷ Although not expressly adopted, the US holds some similar elements to the abuse of rights view of piercing.

Citing some injustice or unacceptable result is not common in the United Kingdom. Some courts have pierced the veil when justice so requires, but these decisions are highly exceptional and often explainable through other legal constructions.⁶⁵⁸ In one case, the court even took into account the fact that the claimant could have sought the claim through bankruptcy, but the extensive cost of that route and the fact that the legal aid board funded the claimant supported veil piercing instead.⁶⁵⁹ Simultaneously, there are authoritative veil piercing cases where liability based on injustices is expressly denied.⁶⁶⁰ *Edwin Mujih* takes this to mean that justice considerations are making their way into the decisions about liability, but not those using the veil piercing doctrine.⁶⁶¹ In *Adams v. Cape Industries Plc* (1990), Lord Justice Slade denied that a court could pierce the veil because it considers justice to require doing so.⁶⁶² *Adams* is the leading case in this regard, and its argument was repeated in *Prest v. Petrodel Resources Ltd* (2013). This would make the UK doctrine more objective in its application.

The Swedish piercing doctrine is often argued to require some inappropriateness or unacceptable result: *otillbörlighet*. This criterion is rather cryptic and has no established definition. Its role and significance are likewise unclear and criticized.⁶⁶³ Stattin presents three possible interpretations for the concept: the high negative risks of the operation, deviation from the ordinary operation of a company and

656 *United States v. Milwaukee Refrigerator Transit Co.* (1905).

657 *Macey – Mitts* 2014 at 115–123. For the same conclusion, see *Sparkman* 2016 at 423.

658 See *Creasey v. Breachwood Motors* (1939), *Nyombi* 2014 at 72–73 and *Mujih* 2018 at 390 and 393. See also *Re H* (Restraint Order: Realizable Property) (1996), where the court lifted the corporate veil merely to impose justice because the inability to lift the veil would have allowed the defendants to benefit from the tax evasion. In *Re a Company* (1985), the Court of Appeals stated that “the court will use its powers to pierce the corporate veil if it is necessary to achieve justice.”

659 *Creasey v. Breachwood Motors Ltd* (1992).

660 *Adams v. Cape Industries Plc* (1991), *Chandler v. Cape Plc* (2012) and *Thompson v. The Renwick Group Plc* (2014).

661 See *Mujih* 2018 at 393.

662 See also *Miles – Holland* 2013 at 201, discussing the negative effects of piercing based on equity.

663 See Prop. 1990/91:198 at 43.

procedures that seem to evade some legal provision.⁶⁶⁴ His concepts somewhat match the ones presented here. A high negative risk operation resembles the criterion of the systematic and unconcerned operation for personal gain discussed in V.6.4. The other two seem more problematic, though. The deviation could be compatible with the artificiality criterion adopted in this work. According to the Finnish doctrine, evasion of a provision is one of the results justifying piercing, and it would seem strange to attempt to define reprehensibility through that. The Swedish system seems to offer little if any insight in this regard.

It would seem that every compared jurisdiction involves some vague considerations of moral condemnation, either in the form of condemnation, injustice, equity or inappropriate behavior. Every jurisdiction also contains attempts at explaining this criterion through objective means. I will undertake that endeavor here for the Finnish piercing doctrine. I fear that making the assessment objective is impossible, and we will have to do with some principal statement. The court in *Pepper v. Litton* (1939) gives this amazing statement: “He [the controller] cannot, by the use of the corporate device, avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors, no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements.”⁶⁶⁵ It does not provide objective, predictable or practical guidelines, but in my opinion, it is able to crystallize what is reprehensible in corporate abuse.

4.3.2. Unacceptable Consequences

4.3.2.1. Excessive or Undue Damage

Approaching unacceptable consequences inalienably involves some subjective view, as explained earlier. Still, the certainty and predictability of this could be improved through a more objective framework to guide that subjective condemnation. I would start building this framework based on the formulation provided by Pöyhönen: a person seeks to realize her right under circumstances in which the essential purpose of said right does not realize, *while at the same time, the rights of some party affected by the realization would be excessively or unduly damaged.*⁶⁶⁶ Using this definition first requires the use to be artificial. Unacceptable consequences are defined through the artificiality. The artificiality of the use makes the conduct less worthy of protection. This will tie the assessment of artificiality and reprehensibility together in a manner

⁶⁶⁴ See *Stattin* 2008 at 449–450.

⁶⁶⁵ *Pepper v. Litton* (1939) at 311.

⁶⁶⁶ See *Pöyhönen* 2000 at 86–87. For a similar definition, see *Pönkä* 2012 at 233–234.

that prevents their assessment separately. Both are required to pierce and one cannot exist without the other.

When the corporate form is abused, the controller claims limited liability protection or separate personality, even though the purpose of neither is fulfilled.⁶⁶⁷ This causes the creditor to be unable to get a payment for the debt. Following the definition Pöyhönen provided, abuse of the corporate form means using the corporate form to gain a benefit that cannot normally be acquired from the business while simultaneously causing excessive or undue damage to others.⁶⁶⁸ This is a rather abstract view still. It seems clear that we need to assess the excessive or undue criteria in relation to the artificiality. Either the damage amount is too much in relation to it or the damage is too unpredictable and unfounded in relation to it.

The analysis of these criteria in relation to artificiality should start from the corporate reality. Using the corporate form does create the benefit of limited liability, and it is one of the common reasons to choose the form. Something is needed to discern the abusive use of limitation from the non-abusive. The conduct is most obviously abuse when the sole purpose of using the corporate form is to acquire such a benefit.⁶⁶⁹ There is no trace of the purpose of honest commerce, and the corporation has no business of its own. When the corporation exists only for the limitation of liability that causes damage to creditors and the corporation does not practice business, it is abusive. In more abstract terms, the complete artificiality of the corporate existence without any business purpose other than limited liability will make the threshold of damage lower—lesser damage is then more likely excess or undue.

This view remains rather problematic. It emphasizes the artificiality part of the test, i.e., realizing one's right under circumstances in which the essential purpose of said right does not realize. The interpretation of excessive or undue damage remains ambiguous, and the only concrete aspect of it is its relation to artificiality. One aspect of the intended purpose of the corporate form is in the division of business risk between stakeholders. If we rely too much on the simplified formula of "artificiality and damages equaling abuse," we ignore this key aspect of corporate existence. If the intended use is to divide the burden of risk, at which point is the division abuse? An attractive solution would be to deem all damage excessive and undue if use of the corporate form does not match the intended purpose of the institution.

Assessment becomes more difficult when the corporation practices acceptable business operations alongside the illegitimate purpose. Then the corporation does

667 See *Hemmo* 2003 at 57. Using the corporation for purposes not matching the normal or acceptable practices constitutes abuse and supports veil piercing.

668 See *Pöyhönen* 2000 at 86–87.

669 See *KKO* 2011:68 at 17. See also *KKO* 2015:17 where the Supreme Court gives emphasis on whether operating the business through a subsidiary had sensible business reasons other than the advantage derived from neglecting remunerations.

somewhat serve the intended purpose of the institution—the essential purpose is somewhat realized. This does not automatically exclude veil piercing. Providing that the operations are distinct and separable, veil piercing liability may still be applicable. The conduct might still be abuse, even if it is not entirely abuse. The effects of piercing can be limited to the illegitimate part of the business.⁶⁷⁰ For example, the assessment of the KKO 2015:17 decision would have been very different if Arctecho had amassed credit from suppliers or employees in addition to the neglected remunerations and those creditors had demanded piercing. It is entirely possible to act honestly toward one creditor and dishonestly toward another.

This sort of issue was assessed in the artificial property arrangements context in the Helsinki Appellate Court judgment 22.9.2017 no. 1134. In the case, a construction company had purchased a camper van. The company claimed it was used as a resting facility for the inspector, who was the debtor in the case. The company was owned by the spouse of the debtor. The bailiff claimed the van ownership was, in reality, an artificial arrangement to prevent attachment of the property to the debtor. The construction company was a legitimate business, but the court still allowed attachment of company property. The specific illegitimate arrangement was disregarded, though the entire company was not disregarded. Only the property with no connection to the business purpose could be attached in the case.

In the US, this idea is visible in the *In re Turner* (2005) decision. The court stated: “However, an entity or series of entities may not be created with no business purpose and personal assets transferred to them with no relationship to any business purpose, simply as a means of shielding them from creditors.” Business purpose acts as legitimizing factors and the property held by the corporation needs to have a connection to the business purpose.

The situation could be solved as in a tax evasion case, in which the legitimate business reasons are weighed against the tax benefits provided by the arrangements. Similarly, if the legitimate gains outweigh the illegitimate ones, piercing should be denied. The problem is the weighing. Some monetary values could be derived from accounting, though that is not mandatory. In tax evasion, if the legitimate gains are minor compared to the tax benefits, the arrangement is tax evasion. This provides a problematic threshold for the weighing. The legitimate gains do not need to be greater than the illegitimate ones; they only need to be sufficiently significant not to be considered minor. The level of the legitimate gains remains ambiguous, though case law thus far has only awarded piercing when there was no legitimate purpose at

⁶⁷⁰ See *Helsinki Appellate Court* 22.9.2017 no. 1134 and *Linna – Leppänen* 2015 at 162–163.

all⁶⁷¹ or when the illegitimate gain was one of the apparent reasons⁶⁷² or the primary reason⁶⁷³ for the arrangement.

These thresholds could be given numerical values. The values are only tools to help better understand the matter, and no significance should be given to the numerical values deciding whether to pierce. Clearly, when there is no other reason for the arrangement, piercing can apply (0%). Some legitimate reasons do not prevent piercing (<30%). If the legitimate reasons form the main reason for the arrangement, piercing should be denied (>50%). The ambiguity remains in the 30–50% range.

Tammi-Salminen bases veil piercing on the abuse of the corporate form. The objectively discernable facts that support veil piercing⁶⁷⁴ combined with another legal norm demanding the disregard of the corporate form implicate that abuse is present. She views piercing as preventing the externalities caused by the abuse of corporate form.⁶⁷⁵ This model is simplified in detecting abuse. It offers a wide approach for detecting situations of abuse. Guidance as to when the abuse is serious enough to pierce the veil needs further thought, though. The approach suffers from the same ambiguities I have discussed in this chapter.

When assessing reprehensibility through unacceptable consequences, the personal opinion about the actions taken should not matter. The operations can constitute abuse even if the actor thinks the actions are legitimate and abides by the customs of decency.⁶⁷⁶ The actor can even think that their conduct is beneficial to all parties involved. In addition, veil piercing does not require that the actions were intended to achieve the detrimental results; the actualization of those results is enough.⁶⁷⁷ Despite this, the reprehensibility of the corporate use is easier to show if intent or negligence is present. I will discuss this soon in V.4.3.3.

4.3.2.2. Unacceptable Ramifications

Another way to approach the unacceptable consequences would be to assess the consequences of legitimizing the examined conduct through a judgment discarding liability. The Finnish legal system allows for the practical ramifications to affect the court's decision when stronger sources of law prove indeterminate. Previous

671 KKO 2015:17.

672 KKO 1996:2.

673 C-425/06 *Part Service*, applying the EU law prohibition of the abuse of rights in a tax law context.

674 I.e., lack of capital, dependent management.

675 *Tammi-Salminen* 2001 at 292–293.

676 *Tammi-Salminen* 2001 at 293.

677 *Tammi-Salminen* 2001 at 293 and *Toiviainen* 1995 at 284. *Toiviainen* writes that veil piercing does not require intent or negligence, nor does it require the intent to damage or benefit from the actions.

judgments can determine what kind of conduct is accepted in the society. Thus, no judgment should be made where the conduct would, in fact, be detrimental to the society; not piercing the veil could sometimes create detrimental influence. As cases are different from each other, the ramifications are highly case-specific. A common factor could be that the conduct, if legitimized, would allow practices where a third party is left to pay the expenses of the business.

This sort of argumentation has been brought up against veil piercing. *Stephen Bainbridge* has called for the abolishment of the doctrine based on his observation that “[t]he standards by which veil piercing is effected are vague, leaving judges great discretion. The result has been uncertainty and lack of predictability, increasing transaction costs for small businesses. At the same time, however, there is no evidence that veil piercing has been rigorously applied to effect socially beneficial policy outcomes. Judges typically seem to be concerned more with the facts and equities of the specific case at bar than with the implications of personal shareholder liability for society at large. Veil piercing thus has costs, but no social pay-off.”⁶⁷⁸ His position seems strange to me, as he requires evidence only of the social pay-offs and the existence of costs is accepted without reasoning. Still, the costs seem self-evident in theory, whereas the social pay-offs seem vague, case-specific and undefined. In essence, his argument is of practical ramifications, and his critique is that the courts do not take them into account enough. His opinion is that the practical and policy considerations favor denying veil piercing. *Millon* has presented a different kind of analysis that further specifies the social costs and arrives at the opposite conclusion.⁶⁷⁹

Timo Kaisanlahti presents a practical argument based on one wage security case. He argues that if the veil had not been pierced, the business practitioners would have been given an incentive detrimental to the national economy. It would have become profitable to found sibling corporations, whose employees would then work formally for one corporation but, in reality, for the benefit of another. Should the employer go bankrupt, the employees and the corporation receiving the benefits could secure the employees’ livelihood by loaning them money until they receive payment from wage security.⁶⁸⁰ The only one losing in this arrangement is the State since it pays the wages. Allowing this behavior would constitute a state subsidy for business practitioners not discussed or approved in the parliament. The same

678 *Bainbridge* 2000 at 3–4. Similarly calling for abolishment, *Huss* 2001 at 96. She views some aspects worth saving and codifying in legislation, though.

679 See *Millon* 2007, especially at 1358–1360.

680 See *Kaisanlahti* 1996 at 247.

argumentation can be applied to the KKO 2015:17 case. If the court had allowed the conduct, it would have created an incentive to sell devices under a subsidiary's name and neglect the remunerations, all the while siphoning the profits. This sort of incentive would be harmful, and a ramifications perspective in this manner can be used to show unacceptable consequences.

4.3.3. Unacceptable Motives

4.3.3.1. Intent to Damage and Personal Benefit

The second possibility in the prohibition of abuse principle was the unacceptable motives. In all simplicity, this means the motives behind why the corporate form was used the way it was. The moral condemnation is about the acceptability of those motives. This naturally requires assessing the result of the use of the corporate form. Deeming the motives unacceptable is an assessment of establishing what the arrangers attempted to achieve and whether that achievement is acceptable. The assessment is twofold. Now, logically, this creates many commonalities with unacceptable consequences. If we still need to show the unacceptability of the consequences, what additional value is there to establish the motivation? Alternatively, should a double criterion of motive and unacceptable consequence be required?

At this point, it is useful to concede the ambiguities of the unacceptable consequences criterion. It is not capable of producing very predictable or accurate results, as the unacceptability is hard to define. If the consequences are not obviously unacceptable, perhaps the motive to achieve something like that could complement the assessment. Regardless of these logical inconsistencies, veil piercing case law has rather successfully applied them in unison. In many decisions, the motives behind the arrangement have been deemed important. Without a formal address, these decisions have simultaneously discussed what constitutes unacceptable consequences. They could be shown without intention, but unacceptable intention cannot exist without the consequences. Unacceptable consequences alone are less prone to moral condemnation, which is the key element that discussing motives brings to the assessment.

The KKO 2015:17 decision does address this issue directly. The Supreme Court finds in its examination that the fundamental purpose of founding Artecho was to avoid paying remunerations.⁶⁸¹ Still, it cannot be deduced that the intention was to *illegitimately* damage creditors or evade a legal norm. Undeniably, this was the consequence. The intention was to pay less by taking advantage of a legal loophole Verkkokauppa thought existed. This aggressive interpretation of the loophole was denied, though. An aggressive interpretation of the law, combined with a corporate arrangement that isolates the negative risk of that interpretation later being denied

681 KKO 2015:17 at 31.

to another entity, can be interpreted as an intent to harm if the interpretation of the statute was aggressive enough and likely to fail. The motive was deemed to be benefit at the expense of the remuneration creditors.

In KKO 2017:94, the assessment was similar. The Supreme Court found the corporate use to be artificial and lacking in business reasons. This hinted that the arrangement was undertaken as a method to avoid employee-related expenses in a potential insolvency situation and to isolate business assets into another entity outside the creditors' reach.⁶⁸² The motive was solely to limit liability at the expense of others and for personal benefit.

A more direct approach was taken in the KKO 1996:2 decision. The Supreme Court explicitly states that the arrangement was made so that the business could benefit from the pay security legislation that was crafted for the protection of its employees. This was deduced from the circumstances of the arrangement, such as the sale of business to a close party; contractually transferring control of the business back to the original entrepreneur, the same employees were hired for the new business, and an announcement was made to customers stating that the business will continue mostly as it was. The intent was to benefit at the expense of the pay security authority by making it a creditor of an insolvent enterprise.

I would conclude that the controller's motive to achieve personal benefits combined with the results described in the piercing test—damaging creditors or evading a provision—should be considered reprehensible by default.⁶⁸³ Motive should not be viewed as a necessity for piercing; it is but one way of showing the reprehensibility.⁶⁸⁴ Showing motives is extremely vexing, though, if not impossible. One's subjective mindset at any given time can hardly be measured and observed, but certain objective traces ought to remain. Motives can be shown through elimination. If the arrangement can be explained as reasonable only or mainly with the avoidance of liability and at the same time the controller has not acted in good faith toward creditors and third parties, the controller's intent to harm creditors can be derived.⁶⁸⁵ This seems to be the path the Supreme Court is on.

682 KKO 2017:94 at 21. See also KKO 2018:20, where the genuine nature of the business reasons behind the arrangement were especially significant.

683 See also *Villa* 1997 at 377. He accepts piercing when the corporate form has been used only to avoid shareholder's liability or when the subsidiary has acted solely in the interests of the parent. He also mentions a category of other clear forms of abuse, which is left with no clarification.

See also *Kolehmainen* 2009 at 614. He deems it possible to show improper behavior by proving that the one held liable was aware that the arrangement violates the rights of others. His analysis is focused on piercing in preinheritance situations, but the same idea remains valid even if removed from the context. Also, note the Directive (EU) 2019/1023 article 19 laying out requirements for the management to account for the interests of creditors and other stakeholders.

684 See *Mähönen – Villa* 2015 at 408. They conclude that the intent to damage creditors cannot with certainty be seen as necessary for piercing. They do, however, recognize it as significant for piercing.

685 In a taxation context, see *Tikka* 1972 at 295. See also *Knuutinen* 2009 a 195–196.

At this point, it seems rather strict to deem the motive for limiting liability unacceptable. Every decision to found a corporation is always an intentional attempt to limit one's own liability—and this means gaining a benefit. It also always logically follows that the limitation is at the expense of some other person. This is an abstract motive behind the arrangement. Based on the motives established in case law, it seems necessary to limit the motives to enable piercing. *The motive needs to be tied to a specific, known and predictable enough result of damage and benefits* even if the realization is not certain. The abstract motive does not enable piercing. The predictability of some liability is addressed in V.6.3.4. of this work discussing inadequate resourcing.

It should also be noted that the Supreme Court has emphasized the significance of legitimate business reasons in all the recent veil piercing decisions. Even if a specific, known and predictable liability is limited through corporate arrangements, having business reasons other than that limitation should prevent piercing, at the least when those reasons are significant enough compared to the illegitimate avoidance. Simplified to a high degree, the difference between abstract and specific motive is whether the arranger knows the circumstances he is taking advantage of well enough and whether the arrangement is only directed at that one advantage.

Supporting arguments for the significance of motives can be derived from Enforcement Code 4:14, artificial arrangements. The application of the provision in the Enforcement Code specifically requires that the arrangement was initiated with the intent to avoid attachment or to damage a creditor.⁶⁸⁶ Additionally, the preparatory works for the Enforcement Code mention the timing of property transfers as a telltale sign of intent to escape attachment. If the arrangement is formed close to the enforcement procedure, it is more likely artificial. The same is true if the arrangement is devised when the debtor is overly indebted or nears insolvency.⁶⁸⁷ However, if the arrangement has long been in the making and only the final steps are taken right before the proceedings, the timing should not be given as much significance. No doubt these are lessons that are applicable to the assessment of motives in the veil piercing context also.

686 Similar condemnation can be found in the Act on the Adjustment of the Debts of a Private Individual Section 10 Subsection 4, where debt adjustment is denied if the debtor worsened their financial standing when the financial troubles were apparent or already manifested. See HE 180/1996 at 21–22, where it is further specified that Subsection 4 targets asset transfers or arrangements where the debtor retains a high standard of living by utilizing an intermediary or enriching a close party while simultaneously minimizing the payments the creditors receive. The intent to benefit at the expense of the creditors is condemned in this context also. This further validates the condemnation and makes its adoption in further doctrines, such as veil piercing, more justified.

687 See HE 275/1998 vp. at 14. See also HE 102/1990 vp. at 48, the preparatory work for the Asset Recovery Act, stating the same thing: when the legal action is taken close to insolvency, it is more likely made with harmful intentions.

In Sweden, intention is relevant. The NJA 2014 s. 877 decision found that the purpose of the arrangement was just to circumvent the trial cost allocation rules. Piercing is possible when someone uses the corporate form to minimize compensation risk,⁶⁸⁸ although in a strict literal sense, this does not require the intent to do so; only using the form and ending up with minimized compensation risk, the literature has interpreted it in this sense.⁶⁸⁹ Similarly, in the old suggested piercing legislation, if the inability to meet obligations was due to the exercise of the shareholder's influence, the shareholders would be held jointly liable.⁶⁹⁰ There are also cases where the courts did not require any subjective element to pierce the veil.⁶⁹¹ If any conclusion can be drawn, it is that showing intent is not a requirement of veil piercing in Sweden⁶⁹² but can certainly support the piercing claim. This is the same conclusion I have reached in my analysis of the Finnish piercing doctrine in this work, although in Finland, the intent seems to hold a more prominent position. In the Swedish literature, though, a differing opinion of this has appeared. Moberg finds no support for the subjective element as a requirement for piercing and deems the Swedish doctrine entirely objective. He goes on to explain the case law, citing disloyalty as a requirement for some form of causality instead.⁶⁹³ If this strict opinion of Moberg's is accepted, the Finnish and Swedish doctrines deviate greatly from one another on this issue.

In the Swedish literature, there is often a mention of *illojalitet* or *otillbörlighet*, disloyalty or unfairness.⁶⁹⁴ This conduct could be defined as a planned attempt to minimize the assets available for creditors in insolvency and halt its capital accumulation.⁶⁹⁵ This definition comes close to the motive concept in the Finnish piercing doctrine. A more recent analysis on the concept found no applicable uses for the concept and instead blamed its existence on an insufficient understanding of creditor protection norms in Company Act.⁶⁹⁶ In case law, the concept of disloyalty is mentioned but not exactly prominent.⁶⁹⁷ One appellate court decision seems to suggest that if the creditors are under the impression that some third party will pay the debt if necessary, the conduct is disloyal if that third party does not intend

688 RH 2011:24. See also SOU 1987:59 at 111.

689 See *Andersson* 2014 at 2.

690 SOU 1987:59 at 128.

691 See Västra Sverige Appellate Court T 272/89 and Skåne och Blekinge Appellate Court T 205/86. See also *Nerep* 2015 at 24 and *Brandell* 2018 at 12.

692 *Nerep* 2015 at 31–32. Similarly in Denmark, see *Werlauf* 1991 at 126.

693 *Moberg* 1998 at 79.

694 See *Nial* 1985 at 218, *Stattin* 208 at 449–450 and *Nerep* 2015 at 30–33.

695 SOU 1987:59 at 13, *Moberg* 1998 at 78–80.

696 See *Nerep* at 30–32.

697 For analysis on the case law, see *Moberg* 1998 at 78–79.

to do so.⁶⁹⁸ This construction is rather cryptic, though, and such cases are better resolved by examination when there is reason enough to have such an impression and place liability on the protected impression alone, which the Supreme Court eventually did.

In comparison to the United States, the intent to avoid paying creditors is one way to show the injustice requirement of veil piercing. The intention is perhaps not so dominant as in Finland, as other routes to injustice do exist.⁶⁹⁹ The court in *Sea-land Services, Inc. v. Pepper Source* (1991)⁷⁰⁰ does discuss intention as a way of showing the Van Dorn piercing test:⁷⁰¹ “an intent to defraud creditors would surely play a part if established, the Illinois test does not require proof of such intent.” In other instances, piercing has been applied, based loosely on a few objective factors like not following corporate formalities and inadequate capitalization after which the court simply deduces something like the following: “Sole shareholder gave no explanation or justification for the existence of the corporation as the intermediary between the corporation and the creditor. The sole shareholder was obviously trying to limit his liability and the liability of the corporation by setting up a paper curtain constructed of nothing more than certificate of incorporation.”⁷⁰² This clearly would indicate that the assumption of unacceptable intentions behind the arrangement had been reached, and in the absence of evidence toward the contrary, the court pierced the veil. The decision makes the assumption quite hastily based on a few facts, which the contract creditor would have become aware of had he investigated.⁷⁰³ Still, even if the decision revolved around these objective factors, they were used to establish the illegitimate intention in order to justify veil piercing—perhaps incorrectly since it can be argued that the creditor knowingly and voluntarily took the risk.

In more recent case law, the fraudulent intention or fraudulent purpose of operation has garnered more support as a factor justifying veil piercing.⁷⁰⁴ Intention was expressly discussed, for example, in *Stone v. Frederick Hobby*

698 See Appellate Court in NJA 1982 s. 244.

699 See part V.4.3. of this work and *Powell* 1936.

700 See also *Consolidated Sun Ray, Inc. v. Oppenstein* (1964), where the purpose for dominating the subsidiary was deemed decisive for veil piercing. See also *Milk v. Total Pay and HR Solutions, Inc.* (2006), in which the court required intent to avoid future debts as justification for piercing. Additionally *Insituform Technologies, LLC v. Cosmic TopHat, LLC* (2013).

701 An Illinois-specific piercing test that follows the instrumentality archetype. See *Van Dorn Co. v. Future Chemical and Oil Corp.* (1985).

702 See, for example, *Kinney Shoe Corp. v. Polan* (1991) at 213.

703 *Bainbridge* 2000 at 52.

704 As evidenced by *Sparkman's* (2016 at 417–423) analysis. See also the cases cited therein and *Butler v. Adoption Media, LLC* (2007). The piercing claim was denied in *Janos v. Murduk* (1996) when scienter was not proven.

Associates II (2001).⁷⁰⁵ In it, the court based its decision on the construed intent of the individual defendants to use the limited liability company as a shield in order to avoid responsibility for contractual obligations owed to the plaintiffs. In numerous cases,⁷⁰⁶ the courts did conclude that wrongful intent or bad faith need not be shown to pierce the veil, but an inequitable result is enough—a breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, violate confidence, or injure public interests.⁷⁰⁷ Liability could thus follow even without the inappropriate intention as long as some relevant injustice has been created.⁷⁰⁸ This does not rule out intention as justification for piercing.

In the literature, intention is rarely discussed. *Millon* does suggest, though, that shareholders be held liable for performing activities that are likely to harm others but deciding as a matter of policy to make no provision for compensation knowing that the corporation will be unable to satisfy a claim brought by an injured party and intending to hide behind the limited liability shield.⁷⁰⁹

In the United Kingdom, the intentions behind the corporate arrangement have been taken as significant.⁷¹⁰ In *Adams v. Cape Industries Plc* (1991), the court held that piercing is possible when the corporation is a sham.⁷¹¹ A sham means acts done executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.⁷¹² The company need not be set up for the purpose of evasion (though that is often the case); it suffices if it is being used for evasion at the time of the transactions.⁷¹³ This definition corresponds to the definition of fake legal actions in Finland. It places high significance on the parties’ intentions and the legal consequences

705 See also *Butler v. Adoption Media, LLC* (2007) at 1068 and 1071 as well as *FILO America v. Olhoss Trading Co. LLC* (2004) at 1269–1270 and *Sparkman* 2016 at 420.

706 See, for example, *Martin v. Freeman* (2012) at 14 and *Castleberry v. Branscum* (1986) at 272–273 and those cited therein.

707 See *Archer v. Griffith* (1964) at 740, discussing constructive fraud. Connecting constructive fraud to veil piercing and intent to defraud, see *Castleberry v. Branscum* (1986) at 273.

708 This is an undesirable consequence, and improper purpose should be required. See *Krendl – Krendl* 1978 at 18.

709 *Millon* 2007 at 1374.

710 In *Re Darby* (1911) at 95 and 100, *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co Ltd* (1921) at 476, *Gilford Motor Co Ltd v. Horne* (1933) at 943 and 955–956, *In Re F.G. Films* (1953) and *Creasey v. Breachwood Motors Ltd* (1992) at 647. See even *Adams v. Cape Industries Plc* (1991).

711 See also *Gilford Motor Co Ltd v. Horne* (1933).

712 *Snook v. London and West Riding Investments Ltd* (1967).

713 *Ben Hashem v. Ali Shayif* (2009) at 164–165. See also *Hannigan* 2013 at 20 and those cited therein.

they intended to create. That is problematic, though, as in existing piercing case law, the legal relationships have been deemed as “intended to be created as they were,” making the sham construction problematic.⁷¹⁴ Although this is not capable of explaining the piercing cases as intended, it does highlight the deceptive intent of the controllers as justification.

Cheng has compared the US and UK doctrines of veil piercing and arrived at this conclusion: “If the question is whether the separate legal personality of a corporation should be set aside, it is difficult to avoid assessments of its economic substance and *the propriety of the purpose for which the corporation is used* (emphasis here).”⁷¹⁵ *Brenda Hannigan* has performed an analysis of case law preceding the *Prest* decision. She also arrived at the conclusion that piercing is possible when there is a deliberate evasion of rights or frustration of remedies by an interposing company.⁷¹⁶ Case law shows a similar deduction as the Finnish KKO 2015:17 decision: the corporate use was merely for that purpose and no other.⁷¹⁷ Not all decisions share this view, though. Even further, fraudulent trading law lessens the significance of intention as a criterion in the UK piercing doctrine. These rules apply to any person who has knowingly carried on a business with “intent to defraud” or for a “fraudulent purpose.” The significance of purposes has risen recently, though.⁷¹⁸

In the literature, some guidelines to assess the unacceptable motives have been presented. *Ari Huhtamäki* has a strong opinion of offshore companies. The purpose of founding the corporation should be taken into account when piercing. He argues that if the founding of an offshore company cannot be explained to have a business purpose, it can almost be assumed that the purpose was to damage the creditors or other parties able to make a claim. This is especially so if the company takes part in risky entrepreneurial activity. He bases this assumption on the prohibitive stance that legislation and jurisprudence have taken against offshore companies in the areas of taxation and enforcement.⁷¹⁹ This is too strong an assumption when veil piercing is considered. Veil piercing is a rather extreme remedy, a *contra legem* decision made *in casu* when the facts of the case demand it. It would be inappropriate to adopt assumptions based on such an assessment. The offshore location is a critical red flag, though, and should raise suspicion—not assuming abuse. Instead of assumption,

714 Similarly *Kershaw* 2009 at 56–57.

715 Cheng 2011 at 56.

716 See *Hannigan* 2013 at 19 and Lord Sumption in *Prest v. Petrodel Resources Ltd* at 35.

717 See *Gilford Motor Company v. Horne* (1933), *Jones v. Lipman* (1962) and *Gencor ACP Ltd v. Dalby* (2000).

718 See *VTB Capital Plc v Nutritek International Corp* (2012) at 80 and *Prest v. Petrodel Resources* (2013) at 18 and 89.

719 *Huhtamäki* 1999 at 151.

this factor could be used when proving dishonest intention. Offshore companies are typically used as Huhtamäki elaborates. Assumption essentially means a burden of proof reversal in a trial. This work has adopted the view that veil piercing is assessed as creditor-specific. The intent to damage would thus be creditor-specific also. It is entirely possible that the offshore company was founded with the intent to avoid taxes or enforcement. This does not mean that the intention is to damage the employees, for example. For the burden of proof reversal, some connection between the use of an offshore company and the creditor claiming veil piercing seems necessary. It is clear that with offshore companies, it is easier to damage creditors, so the requirement for the additional connection should be more lax. The use of offshore companies is thus not far from showing the reversal in itself. It is almost an assumption in piercing cases.

Unacceptable motives could potentially be founded on neglecting actions in the duty of loyalty demands. The institution of corporations lays a special negative risk on the creditors. The controllers of the corporation are able to utilize limited liability to the detriment of the creditors. The prohibition of abuse of rights should place the duty of loyalty upon the controllers;⁷²⁰ as they are not in a direct relationship with the aggrieved parties, the duty of loyalty should be based on the indirect relation they have. As the controller of the corporation is able to decide on corporate actions, she is able to alter the relationship between the corporation and the creditor. The controller possesses power over the relationship, though she is not a party to it. The duty of loyalty must be derived from the controller's power. They are not to use their control in such a way that it becomes impossible for a creditor to receive payment. Such behavior is disloyal and can fulfill the reprehensible manner requirement.⁷²¹ Basing unacceptable motives on this would require that the controller was aware or should have been aware of what the duty of loyalty demands, and she knowingly went against that.

4.3.3.2. Systematic and Unconcerned Operations to Accumulate Personal Gain

The previously discussed unacceptable motive was about the direct intent to benefit at the expense of a specific, known and predictable creditor. Some condemnations

720 The duty of loyalty is a separate legal principle. It is, however, closely related to the prohibition of abuse of rights. See *Hemmo* 2003 at 56. See also *Pönkä* 2012 at 234–235.

721 See *Toiviainen* 1995 at 280 footnote 73. He is of the opinion that piercing can result from abusing limited liability so that the shareholder's acts are against the law or disloyal. See also *Pönkä* 2012 at 234–235 and *Mähönen – Villa* 2015 at 411–412.

In addition, see SOU 1987:59 at 111: "... bolag som spelar med öppna kort och ger presumptiva borgenärer ärligä beskedd om sin ekonomiska ställning, riskfyllda åtaganden, ägarförhållanden etc. inte med samma fog kan anklagas för att otillbörligt ha åsidosatts borgenärernas intressen." See also *Kaisanlahti* 1996 at 237. The corporation has the best knowledge of its economic standing and should thus be given the incentive to disclose that information to the contractual partner. The threat of veil piercing could be enough of an incentive.

in written law offer support for holding the more generally minded practices as unacceptable. The argument is that systematic and unconcerned operation for personal gain can constitute an unacceptable motive, even when the target is not specific, known and predictable. Several laws condemn transactions performed within the sphere of economic unity to the detriment of third parties as well as abusive and unfair practices in business. These condemnations have been made to protect interests that were thought to be significant enough to limit the freedom of business and contract. For example, asset recovery protects the creditors' equality in bankruptcy. Perhaps the KKO 2015:17 decision made it clear that such condemnation can be made to protect creditors from the abuse of corporate form. Typical reprehensible actions include, but are not limited to, systematically draining funds from a corporation to lessen the assets available to creditors in bankruptcy or dismantling; purposeful weakening of the corporation's viability to conduct business; and having a detrimental influence on the corporation's equity capital. These are forms of conduct that are typically efficiently remedied with statutory doctrines such as unlawful distribution (Company Act 13:1), liability in damages (Company Act 22:1), asset recovery and debtor's dishonesty (CC 39:1).

In other statutes, certain types of entrepreneurial activities have faced moral condemnation. The preparatory works discussing the ban of business operations condemn conduct that is grossly improper toward creditors, for example, draining the corporation of funds, accruing more debt so as to diminish the creditor's chance for satisfaction, continuing inviable business with borrowed funds mostly to obtain personal benefits or dividing operations into several formally separate entities.⁷²² These correspond a great deal with debtor's dishonesty. Operating a high-risk business and the realization of the negative aspect of risk alone are not enough to receive a ban, but the conduct needs to be improper, i.e., not according to the law or fair business practice. This sort of business has been linked with business in leveraged finance.⁷²³ The conduct is to be appraised with overall assessment, and those who have operated systematically and are unconcerned of others to accumulate personal economic gain will be banned from business. Unfortunately, bans have rarely been sentenced without finding criminal liability,⁷²⁴ so there is little material from which to deduce how far the moral condemnation reaches beyond criminal conduct.

The same condemnation can be found in the Act on the Adjustment of the Debts of a Private Individual Section 10 Subsection 3. The debtor is denied debt adjustment if there are significant liabilities arising from the pursuit of a business where 1) the

722 See HE 29/1985 vp. at 9–10.

723 See HE 183/1992 vp. at 50.

724 See *Tolvanen* 2008 at 486 and those cited therein. There are no Supreme Court decisions on the matter that do not involve criminal acts. See also *Linna* 2010 at 194, though she addresses only the unlawful conduct part of the provision, not the improper conduct toward creditors.

creditors have been dealt with in a grossly improper manner; 2) essential statutory obligations have been neglected; or 3) the objectives have been primarily speculative. The preparatory works of the section define this sort of business as the sort that would justify the ban of business operations. This further solidifies the condemnation of the activities resulting in a ban, lending more support for the adoption in veil piercing.⁷²⁵ These considerations can be crystallized: a *systematically construed disparity in the allocation of negative and positive risks resulting in personal benefit at the expense of others* should be enough to satisfy the reprehensibility requirement of piercing. This construing can be achieved in multiple ways, for example, neglecting mandatory payments, siphoning assets or performing highly speculative transactions.

In the United States, *David Millon* has suggested reforms to the piercing doctrine similar to the criterion of systematic operation as the issue discussed in this chapter. He would preclude piercing when the immediate cause of the corporation's inability to satisfy a claim brought by a contract or tort creditor is not the result of events or circumstances brought about by the owners themselves either deliberately or recklessly. The primary method of manipulation recognized by Millon is the opportunistic and one-sided transfer of negative risks.⁷²⁶ This would preclude piercing when the inability to pay is due to an unforeseen sequence of events resulting from the business. Instead, if the inability is caused by the owner's or controller's manipulation of circumstances to their benefit, veil piercing would be acceptable. This criterion has elements of both intention and systematic and unconcerned operation for personal gain. Judge Borden found similar elements from *Zaist v. Olson* (1967)⁷²⁷: "Based on the facts that the individual controlled the corporation; that the corporation undertook no obligation of its own to the plaintiffs; was financially unable to pay the amount due on the transaction and reaped no benefit from it; and that the individual would be enriched by the amount by which the corporation defaulted; the court concluded that the control was used to perpetrate an unjust act in contravention of the plaintiffs' rights; and that it caused the unjust loss complained of." No proof of intent was required to pierce, but the systematically construed disparity in the allocation of risks was enough to constitute injustice and allowed piercing.

725 HE 183/1992 vp. at 50 and HE 180/1996 at 34. Note, though, that the debt adjustment subsection is not limited to these actions. The subsection can be utilized to deny adjustment when asset transfers are reversible with the Asset Recovery Act.

726 *Millon* 2007, especially at 1340–1348.

727 He cites the *Zaist v. Olson* (1967) case in the dissenting opinion he delivered on *Angelo Tomasso v. Armor Construction Paving, Inc.* (1982).

In KKO 2017:94, the Supreme Court gave significance to systematically neglecting payments as significant for piercing. Since its beginning, the corporation had neglected to pay taxes and employee fees. This conduct is likely criminal, but, as discussed in III.3.2., it also supports piercing. The practiced business only benefitted another corporation with the same owner, and the arrangement was deemed to be nothing but an attempt to isolate the negative risk resulting from high employee costs in an entity with no assets. The appellate court mentioned this systematic neglect in its decision, though it failed to address what significance this held. The Supreme Court did cite it in support of piercing, though it eventually resolved the case based on unacceptable motives. In my opinion, it helped to show the reprehensible nature of the business.⁷²⁸

Still, the purpose of this neglect should be accounted for. Not all neglect hints toward illegitimate purpose. For example, criminal liability for tax fraud is excluded if the payment of taxes was neglected because of insolvency. Similarly, payments made by an insolvent debtor are not criminal if they are legitimate attempts to save the business. Even otherwise, criminal actions that were made to save the business should be assessed as less reprehensible than criminal actions that seek to extract benefits from it. In the discussed case, the neglect was systematic, and some hints existed that the benefits were allocated to the other company.

I would argue that the *veil piercing doctrine's requirement of reprehensibility could be fulfilled by a systematic neglect of payments and other condemned business practices*. Only one of the corporations involved needs to adopt these practices. If the corporation where the negative risk is isolated conducts itself in this manner, veil piercing could be used to remedy the damage caused by the combination of separating business into multiple entities and condemned business practices. The arrangement could even be deemed an attempt to isolate the effects of these condemned practices into an entity with no assets. It is even possible that criminal liability could materialize based on the same conduct. The division between piercing and criminal liability has been discussed earlier in this work at chapter III.3.2.

4.3.3.3. Fraudulent Behavior and Misrepresentation

A look into the US raises another interesting consideration. The terms “fraud” and “misrepresentation” appear often in US piercing decisions as characterizations of impropriety. They are also common grounds for veil piercing.⁷²⁹ Fraud refers not to common law fraud but, more broadly, it includes behavior that misrepresents or misleads a creditor.⁷³⁰ Fraud and misrepresentation are intertwined and used

728 Additional support is found in the Act on Compensation for Environmental Damage Section 7 Paragraph 2. It explicitly mentions the comparable party's goal of profit as a factor supporting piercing.

729 See *Thompson* 1991 at 1044–1045 and *Oh* 2010 at 133–134.

730 See *Krendl – Krendl* 1978 at 31.

interchangeably. They may arise in a variety of different contexts, including lies or misrepresentations about the purpose of the entity, its capital, debts, assets, independence, the identity of its representatives, or other representations made to third parties.⁷³¹ Misrepresentation is simply providing information that is not true or gives a false understanding of the corporation—of some aspect relevant to the creditor. Usually in the US, the misrepresentation in piercing cases is about the number of assets the company has.⁷³² The debtor-to-be actively gives information or withholds information and, by this conduct, causes the contracting party to have a false understanding of the situation and to extend credit to it in a situation where the creditor would not necessarily have extended that credit had the correct information been present. This sort of behavior would be assessed under criminal fraud in Finland. The question remains, though, as to whether this exhausts the legal remedies. The criminal procedure requires higher levels of proof and favors the accused in other ways.

Misrepresentation is also condemned in Contracts Act 33, among others, along with the principle of loyalty. Clearly, the conduct is reprehensible. It seems that the Finnish system has not adopted these considerations into the piercing doctrine. Instead, misrepresentation seems to be a liability doctrine on its own. In KKO 1991:186, the employer company was held liable for the pension foundation's shortcomings because it had represented the foundation as part of its operation and implied that the pension system was conducted by the employer company.⁷³³ Misrepresentation was present, and the case had all the elements of piercing in it, but the Supreme Court held the misrepresenting party liable, matching the misrepresentation. The misrepresented state of affairs was deemed the actual state of affairs, and the one misrepresenting was obligated to act accordingly. This seems appropriate. In the case, the employer misrepresented the legal obligations between the employees, the pension foundation and itself. The obligations were reset in the decision to match the given representation.

Also, the KKO 1994:36 decision is noteworthy here. In it, the supplier received an unconditional payment guarantee from A. It was meant to guarantee the debt the corporation might incur with the supplier. The business operation of the corporation was transferred to another corporation with the same name, but the supplies were continued without pause. The guarantee was deemed valid, regardless of how the operation was modified. The decision

731 *Figuroa* 2012 at 713–714.

732 See *Cheng* 2011 at 30 and those cited therein.

733 See also KKO 1994:36. Similar borderline situations between piercing and misrepresentation have emerged in Sweden also. See NJA 1982 s. 244 and *Nial – Johansson* 1998 at 228. *Göran Ramberg* even goes as far as to suggest two different categories: veil piercing and assumption of liability. *Ramberg* 1990 at 249–252.

basically ignored the separate personality of the two corporations because they continued the same operation. The Supreme Court held the transfer of business operation to be just an internal arrangement of the enterprise, and as such, it would not extend its effects to the supplier. The supplier was no doubt a voluntary creditor who had even demanded guarantees for the credit risk. Still, it seems that the supplier was allowed to trust the impression it had when the co-operation with the new corporation continued as if nothing had changed.

A similar remedy would likely work in many cases where the assets of a corporation are misrepresented, as is the common justification for piercing in the US. The ones giving the misrepresenting statement would simply be held liable for the difference between the actual assets and the misrepresented ones. This would eliminate the usefulness of these criteria of reprehensibility when piercing and would make the comparison to the United States in this regard moot. Still, this would also serve to limit the application of piercing when misrepresentation liability would apply. I doubt the Supreme Court would eliminate this difference it has established, though the doctrines would have been interchangeable in the *KKO 1991:186* case. Some choice thus remains in cases involving corporations and misrepresentation. They could be pursued with either doctrine.

4.3.4. Conclusions on Reprehensibility

This section discussed the reprehensible manner requirement of veil piercing. I started the analysis from the background theory of the prohibition of the abuse of rights. I used its criteria as the two main categories for establishing reprehensibility: unacceptable consequences and unacceptable motives. Within these categories, I found several more specific patterns to establish these more abstract criteria. These patterns need not necessarily be used as subcategories of the general terms. The choice to discuss them like this is logical in this work, although arguably, all five patterns could be discussed as independent methods of establishing reprehensibility.

The unacceptable consequences section consisted of two subcategories. The first was the excessive or undue damage. This was understood in relation to artificiality. Excessive or undue damage criteria are more readily present with the fewer genuine business operations the corporation has. This would shape the piercing assessment to a similar balance of business purposes and illegitimate benefits as in the tax avoidance norm. This model, however, is impossible to make completely objective and concrete. The second category was the unacceptable ramifications view, which emphasized the incentives that a judgment accepting some form of corporate use would give to business operators. If the judgment legitimized some use obviously harmful to the society, then the consequences are unacceptable in accordance with the piercing test.

The unacceptable motives section was divided into three subcategories. I first discussed the arranger's intent to damage and benefit at someone else's expense. This led to confusion with the core element of limited liability, which logically results in benefits if the negative risks realize. I solved this issue by emphasizing the difference between abstract motives to benefit and the specific, known and predictable motives to benefit. The second subcategory drew an analogy from the ban from business operations. The moral condemnation there is the systematic and unconcerned operation for personal gain. I crystallized this criterion into *systematically construed disparity in the allocation of negative and positive risks resulting in personal benefit at the expense of others*. This sort of behavior should be enough to deem the use reprehensible in a piercing context. The third issue I discussed was fraudulent behavior and misrepresentation. I concluded that these should be considered their own doctrine and not a part of the veil piercing test. In case of fraud or misrepresentation, the reasonable expectations of the party receiving the false or misleading information are protected, and the legal rights are affirmed to match the representation.

5. Evading an Obligation

5.1. Evading a Provision

The veil piercing test in KKO 2015:17 divided the description of the result from the use of corporate form into two possibilities. The decision named these results as examples, though these effectively cover all piercing situations I have encountered during this research. The possible results were either evading a provision of law or causing damage to a creditor. There is a thin line between the two in some cases, where the creditor status is based on a provision of law directly. For example, the remuneration duty in KKO 2015:17 and the recollection of pay security amounts in KKO 2017:94 could be categorized as both. They are utilizable separately or in combination. Their completely separate inspection is adopted here mostly due to the clarity of presentation.

The difference between breaking the law and evading a provision is subtle. Breaking the law means committing an act that is forbidden by the law. Evading a provision of law is committing an act that is legal in itself;⁷³⁴ the act is such that the legal norm should accommodate it, but it does not match the usual or intended content of the arrangements covered by that norm. It is an act that has been made to avoid the legal consequences of another legal norm by making an artificial arrangement⁷³⁵ and

734 Excluding fake legal actions. See *Kangas* 2005 at 158–159 for a brief history on the development of this opinion.

735 See *Kangas* 2005 at 158, *Lindfors* 2008 at 312.

using legal forms in a manner they were not meant to be used to achieve results that are either impossible or forbidden in law.⁷³⁶

One can attempt to modify the prerequisites in order to either allow or prevent the application of some written norm.⁷³⁷ This modification becomes evasion when the legal prerequisites are met in form, but the actions, in reality, do not match.⁷³⁸ The realities normally behind the chosen form are not present, whereas the action still fulfills the formal requirements. A tension between form and reality exists as the achieved result is either forbidden or impossible in law.⁷³⁹ This tension is present in tax evasion and artificial arrangements also. Both address the disparity of the legal form and the economic reality of the case. It should be noted that evasion of a provision is highly case-specific, and no general rules or legal test to detect evasion can be crafted.⁷⁴⁰

If the evasion of a provision is defined in this manner, one can immediately see its similarity to veil piercing as it is represented in this work. We can recognize intent as it was discussed in V.4.3.1. and artificiality as discussed in V.4.2. No general discussion as to the nature of law evasion is necessary here. Instead, the analysis focuses on the specific facts and forms in situations where the company form is used to perform the evasion. It is an effort to rationalize the more common elements of using corporate form to evade legal norms.

In the corporate context, this would mean using separate personality and limited liability shields to obtain benefits normally not obtainable through corporate use. The reality remains the same, as the corporate founder can assume full control over the corporation. The founder can act as before, only now in the name of another. The actor, in reality, has not changed, only the actor in form. Then veil piercing allows a norm to be applied “through” the corporation when the situation is factually the same as it would be without the corporation, considering the purpose of the evaded norm.⁷⁴¹ The tax evasion provision addresses the problem similarly. Evading a provision includes exhausting the purpose of the tax legislation. It entails accruing benefits that the legislation was not intended to cultivate while failing to follow the spirit and purpose of it.⁷⁴²

Evading a provision does not require the evader to benefit from the evasion. It

736 See *Tikka* 1972 at 15, *Kangas* 2005 at 159 and *Lindfors* 2008 at 312.

Although the evasion might be unintended. In the modern flood of regulation, it is increasingly difficult to know the exact legal status of some action or the exact interpretation of some norm. See *Mäkelä* 2009 at 194–200.

737 See *Knuutinen* 2009 at 134–136 and 196–198.

738 About the subject, see, for example, *Tikka* 1972 at 215–217, *Knuutinen* 2009 at 197.

739 See *Kangas* 2005 at 159–160 and *Lindfors* 2008 at 312–313. Also KKO 1945 I 21 and KKO 1946 II 136.

740 See *Laatikainen* 1989 at 191–193 and *Lindfors* 2008 at 313.

741 See *Huttunen* 1963 at 199.

742 See *Tikka* 1972 at 128 and 147.

is enough that a legal obligation is not fulfilled. One could argue, though, that the benefit is not doing the legally required actions. Time and effort are resources, just the same as assets.

When piercing the veil in evasion situations, the evaded provision modifies the considerations involved.⁷⁴³ Different factors become significant depending on the provision. The evasion-specific variables are usually found in the spirit of the evaded provision. The artificial arrangements provision emphasizes elements present in ownership, e.g., the legal powers available to the debtor that are comparable to the formal party as the owner, measures comparable to those of an owner and the benefits received by the debtor from the arrangement. Wage security cases uphold the spirit of wage security and may emphasize factors present in the employer-employee relationship. A consumer product liability case might emphasize the qualities of the product and information the parties had or should have had.⁷⁴⁴ Nevertheless, the basic requirements remain the same. A few examples would clarify this better.

In the KKO 2015:17 case, the evasion was founded on the idea that only a Finnish business was obliged to pay the remunerations for private copying. The act was selling products that mandate paying the remunerations. The purpose of the remunerations is to compensate artists for private copying of their work. In addition, the remunerations are based on EU legislation adding some extra pressure to ensure payment.⁷⁴⁵ These factors made their way into the Supreme Court's analysis of the case. They were examined with the facts of the relationship between Arctecho and Verkkokauppa. It was found that the formal separation did not match reality. Application of the remuneration norm was awarded per the reality of the operations.

In the decision in KKO 1983 II 185, the Supreme Court refused to pierce the veil of a housing co-operative that had given property as collateral for the debts of its sole owner, a real estate developer. The plaintiff demanded asset recovery on the basis that the collateral had been given from the property of the debtor. The veil would have been pierced in regard to the ownership. The Supreme Court refused the claim. Leppänen has criticized this decision as too formal and argues that the spirit and purpose of asset recovery would have justified disregarding corporate separateness. The transaction was possible due to the developer's control over the co-operative, and Leppänen argues that the actions had been made intentionally to damage the creditors.⁷⁴⁶ The whole purpose of asset recovery is to prevent the debtor from dishonest transactions to the creditors' detriment when nearing insolvency. Later,

743 See *Leppänen* 1991 at 284 and *Kolehmainen* 2009 at 603 and 609.

744 About piercing in product liability and veil piercing, see *Ruuska* 1987 at 504.

745 *Pihlajarinne – Havu – Vesala* 2015 at 601–602. Similarly, see *Airaksinen – Rasinaho – Pulkkinen* 2018a at 19–20.

746 See *Leppänen* 1991 at 287. For a more accurate analysis on the case, see *Tammi-Salminen* 2001 at 299–301 and those cited therein. See also *Huttunen* 2007 denying any possibility of piercing in regard to ownership.

these sorts of developer-versus-co-op situations have been deemed inappropriate, and extensive measures have been taken to prevent them.⁷⁴⁷ Arguably, the reality of the case matched the purpose of the Asset Recovery Act, and the factors related to asset recovery should have been considered.

Another example can be drawn from the legal literature. *Antti Kolehmainen* examines the preinheritance statute's effects on veil piercing consideration. The Finnish Code of Inheritance seeks to guarantee the children of the testator an equal position by considering preinheritance gifts given unequally to the children before the death of the testator. If the gifts are given to a corporation controlled by one of the children, the gift is not an assumed preinheritance. If the separate personality of the corporation is disregarded, the child has then received assets as preinheritance and correspondingly receives less as heritage. Kolehmainen arrives at the conclusion that piercing is possible since the testator attempts to dictate the division of heritage beyond the set legal limits.⁷⁴⁸ Naturally, the examination of these cases needs to address factors related to preinheritance, e.g., the purpose of the provision and the typical situations it is meant to address.

The landmark UK case *Prest v. Petrodel Resources Ltd.* was also an evasion situation. In it, the husband was deemed to have attempted to free himself of the duty to pay ancillary relief to his ex-wife. Similar cases exist in all the compared jurisdictions excluding Denmark.⁷⁴⁹ In *Hempel*, the Norwegian Supreme Court decided on the duty to pay costs relating to an investigation on the extent of pollution in the area. The case is quite unique in its connection to the polluter pays principle, and thus, no direct attempt to evade ever appeared in the conduct. Still, a legal duty effectively ended up with no solvent holder, and piercing considerations were utilized to extend the polluter pays principle to the parent company. In the NJA 2014 s. 877 case, there was also an obvious situation of evasion. In it, the corporate structure was used to extinguish the application of procedural norms on compensation of the winning party's legal costs, though the case can also be considered to be about causing damage to a creditor.

Continuing with the UK, the courts have been reluctant to include policy considerations.⁷⁵⁰ It is still uncertain how the introduction of the evasion principle in the *Prest v. Petrodel Industries Ltd* (2013) affects this. Potentially,

747 See *Rudanko* 1982 at 154–178.

748 See *Kolehmainen* 2009.

About piercing and the preinheritance norm, see also *Kangas* 1993 at 226 and *Lohi* 1999 at 12.

749 Although in the sole Danish case *UfR* 1997 s. 1642, the debt was based on legal provision.

750 For a thorough analysis on this reluctance in case law, see *Cheng* 2011 at 21–24.

it would allow for more policy considerations when determining the genuine actor.⁷⁵¹ In an older case, *Merchandise Transport v. British Transport Commission* (1962), the court considered two companies to be the same person to uphold that the scheme of the law is complied with in the spirit as well as in the letter.⁷⁵² In *Adams v. Cape Industries Plc* (1991), the Court considered it possible to disregard the separate personality only when the wording of a contract or statute is considered. In the United States, the courts often include these considerations.⁷⁵³

The US piercing doctrine also recognizes evasion situations in piercing.⁷⁵⁴ In an older decision, *State v. Swift & Co.* (1945),⁷⁵⁵ the corporation was alleged to be a device to operate the business without a permit. In a public policy–related decision, *Stark v. Flemming* (1960), a farmer incorporated his farm to establish a favorable employment record for the last few years before retirement in order to receive heightened pension benefits. This was not viewed as an evasion of the applied statute, as it fell within the purpose of the statute, assuring adequate retirement income. In another case, a same-sex couple sought a claim against a corporation as its operation included discriminating practices and the effects of the practice were isolated to a separate entity.⁷⁵⁶ Piercing to ascertain jurisdiction has been invoked in abundance⁷⁵⁷ and has also been used to determine whether a parent corporation is bound by a subsidiary’s union contract.⁷⁵⁸ A similar veil piercing claim has been successful in Finland also, though only at the lowest court level.⁷⁵⁹ Bainbridge even encourages the courts to think more of policy in piercing decisions, although, in their opinion, this means stricter adherence to the economically beneficial rule of limited liability.⁷⁶⁰

A comparative look seems to support the view that veil piercing can be applied where the corporate form is used to achieve a result that is contrary to the purpose of the applied provision of law or allows escaping some obligation or limitation set by a

751 Again, it should be noted that Lord Sumption does not consider this piercing.

752 At 201–201 and 206–207.

753 See *Cheng* 2011 at 22 and *National Labor Relations Board v. Fullerton Transfer & Storage* (1990). See also *Stark v. Flemming* (1960), *Roccograndi v. Unemployment Compensation Board of Review* (1962) and *Swearngin v. Sears Roebuck & Co.* (1967) at 37.

754 See, for example, *J.J. McCaskill Co. v. United States* (1910), *United States v. Reading Co.* (1912), *Veterans Service Club v. Sweeny* (1952), *United States of America v. Jon-T Chemicals, Inc.* (1985), *Devan Lowe, Inc. v. Stephens* (2002) and *Butler v. Adoption Media, LLC* (2007). In the literature, see *Krendl – Krendl* 1978 at 29–31.

755 See also *Roccograndi v. Unemployment Compensation Board of Review* (1962).

756 *Butler v. Adoption Media, LLC* (2007).

757 See *Swain – Aguilar* 2004 and *Sparkman* 2016 at 437–440 and the cases they discuss.

758 *United Paperworkers International Union v. Penntech Papers, Inc.* (1977).

759 See Länsi-Uudenmaa District Court decision 11.5.2015 15/4546, dno L 14/2211.

760 See *Bainbridge* 2000, especially section II.

provision. It seems common in the compared jurisdictions to look into the purpose of the circumvented provision and deny arrangements that exhaust the purpose.

5.2. Causing Damage to a Creditor

5.2.1. What Damage Are We Concerned With?

Causing damage to a creditor essentially means that the creditor of a corporation lands in a worse position than before. We should not require concrete fiscal damage. Instead, it is enough that the creditor loses something beneficial, e.g., a collateral item or a privileged position. In the legal literature, even the equality of the creditors is thought to be an interest significant enough for piercing.⁷⁶¹ If one creditor ends up in a better position due to the actions of the debtor, the others incur damage.

Pöyhönen argues that shifts in the risk position could constitute a justification for intervention. If the negative aspects of risk are shifted to one party, this increases their potential liabilities. The damage and liability have not yet realized, but should they realize, the results are then placed on the party carrying the risk.⁷⁶² This sort of shifting of negative risk can even have a direct effect on property value. The share price of the corporation is immediately affected, decreasing its value as collateral. Potentially, this leads to existing creditors demanding additional collateral. Additionally, the company can pay less dividends. Thus, a unilateral shift of the risk should not be accepted, even if the arrangement allows for it.

If there is no sufficient reason to allow one creditor such a privileged position, equality demands that the creditor be denied that position.⁷⁶³ This is regardless of the amount of damage, as asset recovery does not require showing actual damage; it only mandates the action to be such that would typically damage creditors. It falls to the purpose of the evaded norm to determine whether this is enough of an interest to pierce. If the debtor attempts, for example, to evade the norms in the Asset Recovery Act, equality of the creditors would seem sufficient.⁷⁶⁴

761 See *Leppänen* 1991 at 287 and *Tammi-Salminen* 2001 at 301.

762 See also *Pöyhönen* 2000 at 89 and 93–94. Similarly, in the United States see *United States of America v. Jon-T Chemicals, Inc.* (1985).

763 *Leppänen* 1991 at 287 and *Tammi-Salminen* 2001 at 301. See also *Pöyhönen* 2000 at 87–96 for a theoretical characterization of predicted violations of protected interests and intercepting these predicted events.

764 See *Tammi-Salminen* 2001 at 300–301. In a situation where the property has originated economically from the debtor and a corporation disposes of it to the benefit of the debtor, veil piercing is needed and should be used to allow the recovery of assets. See also *Leppänen* 1991 at 287 and *Havansi* 1979b at 104 footnote 16.

One interesting note about the KKO 2015:17 decision is that the veil piercing claim was made, but the amount claimed was calculated just like in a tort case. In court instances before the Supreme Court, the parties even argued whether the compensation was subject to mediation by using the Damage Compensation Act. It is important to note that the claimant also sought to affirm the claim against the formal liable party, and it is not discernible how the compensation amount should be calculated. The intuitive answer would be joint and several liability for the amount left unpaid. After all, the damage was caused by the joint operation of the two. Other answers are plausible, though they would require different theoretical characterizations of piercing liability. In this research, I have understood piercing as a personal liability for the obligations of another. From this, it follows that it is not tort liability, which would be limited to the amount of damage the liable party caused by their own actions. It is also not unjust enrichment, which would limit the amount to the benefit received. Still, it would seem proper to use the tort law principle of the prohibition of enrichment here. This would prevent the debtor from claiming anything beyond the damage suffered, thus limiting the amount of piercing liability to the amount of the original claim against the formally liable corporation.

In the United States, it is clear when the action of the dominant corporation renders the subservient corporation insolvent, then the requisite injury and causal connection are established.⁷⁶⁵ The action that needs to be in relation to the caused damage is causing the creditor's claim to be unsatisfied. The remaining claim is the amount.

In the literature, the issue is thought to be more complex, as the prohibition of enrichment does not apply and punitive damages are possible. This has led to some discussion on the nature of piercing liability. According to Cheng, the punitive damage, compensation and deterrence all seem insufficient to characterize veil piercing liability. Still, the corporate veil doctrine does not impose penalties, nor does it directly take into account the shareholder's gains from his improper conduct. The doctrine merely holds shareholders responsible for unpaid corporate liabilities. He proceeds to suggest that veil piercing liability should exist to prevent unjust enrichment. Still, determining the amount of enrichment is commonly prohibitively difficult, and Cheng ends up matching the compensation amount with the creditor's loss.⁷⁶⁶

⁷⁶⁵ *Collet v. American National Stores, Inc.* (1986) at 287 and the case cited there *Northern Illinois Gas Co. v. Total Energy Leasing Corp.* (1980).

⁷⁶⁶ See *Cheng* 2010 at 528–540 and 582–585 as well as the case law cited in footnote 129. He also notes that this would lead to the undercompensation of creditors in some cases. See also *Oh* 2013, who suggests reforming the piercing doctrine under unjust enrichment and the remedy of constructive trust.

The idea holds similarity with the Finnish literature also. *Juha Karhu* has suggested that the unjust enrichment doctrine could be modernized to combat inappropriate enrichment as well as the traditional enrichment without a basis.⁷⁶⁷

5.2.2. Voluntary Creditor

5.2.2.1. Comparative Analysis and Analogous Doctrines

In the legal literature, it is commonly thought that two groups of creditors should be treated differently when piercing the veil. These groups are the voluntary and involuntary creditors.⁷⁶⁸ Voluntary creditors are those who knowingly credit the corporation. They could also be called contract creditors. The opinions in the Finnish legal literature emphasizing this view seem influenced by the Nordic region's legal literature on veil piercing.⁷⁶⁹ The issue is solved similarly in the United States also. The only more peculiar view is from the United Kingdom where the formulation of the piercing doctrine into concealment and evasion principles seems to remove the significance of the voluntary nature of the creditor. I will now discuss these jurisdictions before continuing on into the Finnish system.

In the Nordic countries, the view of the more favorable treatment of involuntary creditors flourishes.⁷⁷⁰ For example, in Sweden, the assumption in contractual relations is that the contracting parties know their counterparties. If the contract is signed with a company, the counterparty should be assumed to know and to have accepted that the company is only the agent of another, and the operation is conducted for the benefit of another entity. On these occasions, the creditor protection norms in Company Act are enough to safeguard these creditors' interests.⁷⁷¹ Extending liability would only be possible when the contractual creditor was not aware that the operation was, in reality, driven by someone other than the formal contracting party.⁷⁷² *Johan Svensson* goes as far as to suggest that, regardless of the formal party to legal actions within corporate operations, the person who actually runs the operation should be liable. He does not call this piercing the veil, though.⁷⁷³ There is no case law to support this.

767 See *Karhu* 2007.

768 Cf. *Huttunen* 1963 at 181. He argues that if the veil piercing justification he supports is adopted, the division is meaningless.

769 See *Leppänen* 1991 at 303–304, *Kaisanlahti* 1996 at 209–210, *Airaksinen – Rasinaho – Pulkkinen* 2018a at 18, *Savela* 2015 at 414 and *Mähönen – Villa* 2015 at 290–291.

770 See *NJA* 2014 s. 877 at 10 and *NJA* 1947 s. 647. In the literature, see, for example, *Rodhe* 1984 at 485–487, *Stattin* 2008 at 442–443 and *Andersson* 2014. Similarly, in Denmark, see *Werlauff* 1991 at 75–76 and 518–519 and *Schwarz-Hansen* 2001 at 440–442. For the Norwegian opinion, see, for example, *Hagström* 1993 at 250.

771 *Adestam* 2015 at 14–15.

772 See *NJA* 1928 s. 57 and *Svensson* 2010 at 241–248.

773 *Svensson* 2010 at 248.

The NJA 2014 s. 877 decision also states the assumption that the contractual creditor is assumed to have accepted the Company Act norms.⁷⁷⁴ They are able to affect the terms and determine whether to become creditors at all and demand securities if necessary.⁷⁷⁵ This includes limited liability and separate personality. The decision does not exclude contractual creditors from claiming veil piercing, though it recognizes that these creditors are treated less favorably than involuntary creditors.⁷⁷⁶ On two decisions, contractual creditors have found success with claims under circumstances that resemble piercing. One decision was decided based on the law of commissioned corporations⁷⁷⁷ and the other based on the implicit assumption of liability.⁷⁷⁸ In NJA 1992 s. 375, the creditor was well aware of the risks involved in contracting with the corporation. The creditor had even demanded a letter of intent from the entity behind the corporation but failed to demand additional securities when necessary. This knowledge of the circumstances and neglected actions excluded veil piercing to the benefit of the creditor. The issue was only discussed in the judgment of the Court of First Instance and Appellate Court, though. In NJA 1993 s. 188, the court held a sister corporation bound by a no-competition clause contracted by another corporation in the same corporate group. It would seem, based on this tour of case law, that veil piercing is not excluded for voluntary creditors either, although the issue remains uncertain.

A clear pattern exists, placing significance on the voluntary creditors' knowledge of the corporate finances.⁷⁷⁹ Additionally, the courts should exclude veil piercing when the creditor was aware of the facts that would allow veil piercing later and still chose to become a creditor.⁷⁸⁰ Nerep even goes as far as to suggest that the contract creditors must always be aware of the limited liability in a corporation, and thus, veil piercing should only exceptionally be possible. However, he specifies these exceptional circumstances to be when the voluntary creditor's position resembles an involuntary position.⁷⁸¹

774 Similarly, see *Nerep* 2015 at 34 and SOU 1987:59 at 112.

775 See *Nerep* 2015 at 21 and 33–34.

776 Similarly, *Sandström* 2015 at 8.

777 NJA 1975 s. 45. The term *kommissionärbolag* was laid out in tax legislation. The case was about whether the commission relationship existed despite the formal contract between the commissioned corporation and the commissioner corporation stating that it did not. If that relationship existed, the commissioner had total liability of all the debts of the commissioned corporation. See also *Ramberg* 1990 at 249–252.

778 NJA 1982 s. 244

779 See also NJA 1992 s. 375 and SOU 1987:59 at 128.

780 *Moberg* 1998 at 81.

781 *Nerep* 2015 at 34.

This view of a more beneficial treatment of involuntary creditors is also prevailing in the United States,⁷⁸² although not beyond dispute.⁷⁸³ Dissenting opinions are rare, although some deny that contract creditors of a close corporation could protect themselves by bargaining.⁷⁸⁴ Then again, these creditors might cut transaction costs and do not individualize transactions based on the risk, even though they could.⁷⁸⁵ But neglect should not allow more favorable treatment in piercing claims, as they should have used their chance to investigate and obtain some security.⁷⁸⁶ Still, prohibitive transaction costs to negotiate the protections that voluntary creditors could negotiate can be cited to allow the voluntary creditor to pierce.⁷⁸⁷ For example, in *Consumer's Co-Operative v. Olson* (1988),⁷⁸⁸ the creditor continued to extend credit to a corporation defaulting on its payments to the creditors, even though the creditors' own terms of credit stated that no additional credit can be extended until the account is brought current again. The creditor was aware of the troubles with solvency and should have reacted accordingly. Even though the United States literature overwhelmingly supports the more favorable treatment of involuntary creditors, a statistical study of piercing claims has shown no signs of such favoritism, especially after adjusting the categories to voluntary and involuntary creditors.⁷⁸⁹

The different approach in the United Kingdom makes the nature of the credit relationship less relevant or even irrelevant. If we accept the view in *Prest v. Petrodel Resources Ltd* that veil piercing only includes situations under the evasion principle, only evading existing obligations would allow piercing. Under this situation, the voluntary and involuntary creditors are in similar positions. Either there were no negotiations or the negotiations are over before the abusive corporate arrangement is created. Neither could have been aware of the arrangement. In concealment principle situations, the voluntary nature would not matter either, as those arrangements are meant to conceal the true facts of the case. If the concealment is successful, then even

782 See *U.S. v. Jon-T Chemicals, Inc.* (1985). ("Unless the [corporation] misrepresents its financial condition to the creditor, the creditor should be bound by its decision to deal with the [corporation]; it should not be able to complain later that the [corporation] is unsound."). See also *Bell Oil & Gas Co. v. Allied Chemical Corp.* (1968), *Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.* (1992) at 549–551, *Williams v. Midwest Employers Cas. Co.* (2002), *Southeast Texas Inns, Inc. v. Prime Hospitality Corp.* (2006) at 679, and *Northbound Group, Inc. v. Norvax, Inc.* (2015) at 652–653. In the literature, see *Bainbridge* 2000 at 12–36, *Easterbrook – Fischel* 1991 at 55–59, *Cheng* 2010 at 514–515, *Sparkman* 2016 at 434–437 and *Peterson* 2017.

783 *Birbara v. Locke* (1996) at 1238.

784 See, for example, *Bell Oil & Gas Co. v. Allied Chem. Corp.* (1968) and the plethora of cases cited by *Cheng* 2010 at 532, although *Hackney – Benson* at 860–864 argue that contract creditors of a close corporation cannot protect themselves by bargaining. In case law, see *Consumer's Co-Op v. Olson* (1988).

785 See *Landers* 1976 at 530.

786 *Laya v. Erin Homes, Inc.* (1986) at 100 and *Consumer's Co-Operative v. Olson* (1988).

787 See *Oh* 2010 at 96 and *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014) at 469.

788 At 495–496.

789 See *Oh* 2010 at 140–143. More strongly in favor of different treatment, see *Thompson* 1991 at 1044.

voluntary creditors are unable to perceive the true facts before the contract is forged. The decision *Persad v. Singh* (2017)⁷⁹⁰ describes the express knowledge the claimant had of the nature of the limited liability company. The court's analysis of veil piercing took no note of this fact and focused instead on whether there was a legal obligation between the parties before signing the contract. It should also be noted that, by piercing the veil, the controller cannot be held party to a contract made by the corporation.⁷⁹¹

The analogous doctrines do not recognize this distinction. It is not discussed in piercing case law either, although no piercing cases have come up where the veil would have been pierced in favor of a voluntary creditor. It is open to question whether this distinction plays any role in the Finnish legal system. In any case, one should avoid categorizing too strongly since in piercing decisions are made *in casu*. The negative risks and chances of affecting the formation of said risks are different with each claimant. Voluntary and involuntary characterizations are but one part of this assessment. Different creditors in the same characterization might have had very different positions to influence the arrangement.

5.2.2.2. The Finnish Stance on Voluntary Creditors

The issue has not been addressed in Finnish case law. Although, there exists twin decisions; in one, the creditor was voluntary and in the other involuntary. The involuntary creditor was awarded piercing and the voluntary was not. These cases do not directly address this issue and cannot be used to deduce anything conclusive on the question.⁷⁹² The involuntary creditor was in case KKO 2017:94 and was the government agency responsible for pay security. That agency is in a special position regarding piercing, as there is statutory support for it.⁷⁹³ In addition, the voluntary creditors in the other case eventually won their case based on other doctrines and piercing proved unnecessary. The result does follow the view that involuntary creditors should be treated more favorably, though one cannot rule out other doctrines or even coincidence as an explanation of the result.

Still, the KKO 2017:94 decision did emphasize that the pay security creditor was not a contractual creditor, had no control over the creation of the credit relationship and was the creditor directly based on law. The decision did not explicitly state that these elements favored piercing. These are, however, exactly the arguments that are usually cited when discussing the different treatment of voluntary and involuntary creditors. At the least, this is a concession by the Supreme Court of Finland that the voluntary and involuntary natures of the creditors are of significance. The decision also hints toward accepting the more favorable treatment of involuntary creditors. A

790 at 781–782

791 See *Okoli* 2014, especially at 259, and the cases discussed therein.

792 See also *Kärki* 2018a.

793 See HE 104/1998 at 17, HE 219/2009 at 6, KKO 2017:94 at 18 and III.2.5. of this work.

more direct stance appear in an appellate court decision, which interprets the KKO 2015:17 decision to exclude piercing when the one claiming liability entered the arrangement voluntarily.⁷⁹⁴ I would reject a complete exclusion, though the appellate court decision does highlight the default interpretation on the issue.

Traditionally, the issue has been addressed remarkably similarly in Finland and the compared jurisdictions. The usual argument is that veil piercing should not be available for voluntary creditors, at least not as easily as with involuntary creditors.⁷⁹⁵ They make a contract with a corporation, and they must then be aware of the limited liability shield, the separate personality, and have at least some information as to the financial standing of the corporation.⁷⁹⁶ These limitations are known, and no party to a contract should be allowed to make a claim based on a fact that they knew or should have known at the time the contract was made.⁷⁹⁷ A choice must be made as to whether the creditor demands arrangements to reduce their negative risk or whether they rely on the Company Act norms protecting the creditors.⁷⁹⁸ This determines the amount of negative and positive risk each of the contracting parties carries. They should not be allowed to pierce the veil since this would constitute renegotiating the deal and readjusting their risks. When contract creditors are aware of the risks of the credit, they are able to adjust the cost of the credit to match the negative risk.⁷⁹⁹ Higher negative risk means higher costs. Limited liability and separate personality are factors that affect the level of negative risk, thus the contract creditor is able to add their weight to the interest and other contract terms they demand for the credit.⁸⁰⁰ A rationally operating contract creditor accounts for all the risk factors, including the corporation's ability to perform disloyal actions.⁸⁰¹ The veil should not

794 Appellate court of Itä-Suomi 29.1.2016 no. 52, S 15/593.

795 See *Leppänen* 1991 at 303–304, *Kaisanlahti* 1996 at 209–210, *Airaksinen – Rasinabo – Pulkkinen* 2018a at 19–21, *Savela* 2015 at 414 and *Mähönen – Villa* 2015 at 290–291. See also KKO 1999:111, where the Supreme Court emphasized that the shareholder was not liable for the corporation's contract breaches.

796 See *Leppänen* 1991 at 303–304 and *Kaisanlahti* 1996 at 192 and 209–210 and those cited therein.
797 *Savela* 2015 at 414.

798 *Mähönen – Villa* 2015 at 290–291. For a thorough explanation of the assessment process, see *Schwarz-Hansen* 2001 pp. 438–440.

799 See *Villa* 1997 at 360. See also *Niemi-Kiesiläinen* 1996 at 261. If the creditor carries the risk of default, they can add the cost of that risk to the price of the credit and thus transfer the risk to the debtor.

800 See *Kaisanlahti* 1996 at 209–210. According to *Kaisanlahti*, failure to assess the negative risk or correctly adjust the cost to match the negative risk speaks only of the creditor's incompetence and not the position of the contract creditors in general.

801 Such as additional indebtedness or draining funds. *Kaisanlahti* 1996 at 210.

The contract can be made to include terms limiting the corporation's competence to contract more debt or reduce corporate assets. About such terms, their allowance and validity, see *Tammi-Salminen* 2001 at 34–75, although the creditor can trust that the contract is executed as agreed. In other words, breaches of contract are considered unexpected and should not alter the legal position the creditor is in. See KKO 2016:46, where the bankruptcy estate was bound by retention of ownership, although the debtor had used the already delivered material before paying for it and thus breached the contract.

be pierced if the corporation has given its contractual partner correct and sufficient information on its financial standing before contracting.⁸⁰²

In reality, not all contract creditors have the opportunity to shield themselves from abuses of limited liability when contracting.⁸⁰³ Savela notes that this argument is only partly true. Every contract creditor has had the opportunity not to make the contract at all. If the argument about the insecurity of contract creditors is accepted, justification of the freedom of contract is open to question.⁸⁰⁴ Even if the use of a corporation was only an attempt to avoid the contractual obligations, the contracting party must still have known they were contracting with a limited liability corporation. Is the contract not a knowingly taken chance?

Solving this problem could begin with another opinion regarding extending contractual liability to non-signatory parties. Tammi-Salminen argues that contractual obligations can be binding toward a third party when the third party is an actual party to the contract but not formally a party to the contract. The third party belongs to the same interest holder as the contracting party. The obliged third party has, in part, participated in conduct that violates the decorum. Holding the third party liable becomes plausible, especially when the formal separateness was only a device of the third party to avoid being bound by contractual obligations. This constitutes abuse of the formally separate legal subject.⁸⁰⁵ I should further emphasize that abusing the corporate form as understood in this work includes other conduct patterns as well. The contractual situation and Tammi-Salminen's opinion act as a starting point for the analysis here.

From these three criteria, contractual liability to a third party can be extended: 1) the formal status as a third party does not match the reality of the case; 2) unison

802 See SOU 1987:59 at 111 and 130. "... bolag som spelar med öppna kort och ger presumptiva borgenärer ärligä beskedd om sin ekonomiska ställning, riskfyllda åtaganden, ägarförhållanden etc. inte med samma fog kan anklagas för att otillbörligt ha åsidosatts borgenärernas intressen." The wording is rather ambiguous and gives no clear definition of the duties. Kaisanlahti interprets that the given information level depends on the character and foreseeable negative risks of the business. *Kaisanlahti* 1996 at 237–238. Although the argumentation is *de lege ferenda* or law and economics-based, it somewhat matches the duty of loyalty in *force de lege lata*.

803 *Mäbönen* 2001 at 802–803.

804 *Savela* 2015 at 414 footnote 36.

805 *Tammi-Salminen* 2001 at 288–289. See also *Rudanko* 1982 at 32–41. From case law, Rudanko derives a principal statement that the Contracts Act Section 33 can be extended to cover the decisions of the company management and even the general meeting since they can limit the liability of the company actors. This prohibits a certain type of self-dealing, as the constructor is not allowed to be free from liability for actions made in the co-op. The effects of the contract between the constructor and the buyers of a co-op's stock should limit the competence of the company organs.

See also *Laine* 2011 at 166, *Savela* 2015 at 397 and KKO 2003:131. Regarding tort, it has sometimes been suggested that a legal relationship closely resembling a contract could be used as a basis for contractual tort. It has not been accepted, however, that such a relationship could be between corporate management and creditors of the corporation.

of interests with the contractual party; and 3) participation in conduct that violates decent practice. This leads us to examine decent contract practice. Some conduct violating the decent contract practice would need to be present for veil piercing. This returns the assessment to the Contracts Act Sections 28–34. Then piercing would be possible if a third party has exercised coercion, fraudulent inducement, abused someone's distress, misrepresented, made a fake legal action or induced circumstances that would be incompatible with honor and good faith. In a contractual relationship, veil piercing would be possible when the third person controls the contract party and uses it to isolate responsibility from actions in violation of the decent practice.

The contract parties have a duty of loyalty toward each other. This means that, to a certain extent, they need to account for the interests of the other party. Another general principle of contract law is the duty to provide the other party with information on facts that are likely to be decisive for the party's commitment to the contract.⁸⁰⁶ Neglecting this duty can be interpreted as misrepresentation. When misrepresentation is present, holding the one owing the duty of information liable is justified, even in a contractual relationship.⁸⁰⁷ This is not veil piercing liability, though, but liability based on the general principles of contract law.⁸⁰⁸ The question should be whether a third party can have a duty to provide information. In principle, this duty could be thought to exist if the previously stated criteria one and two are present. That is when the formal status as a third party does not match the reality of the case and there is a unison of interests with the contractual party. Neglecting this duty could then fulfill the third criterion as a violation of decent practice. The situation nears misrepresentation or is incompatible with honor or good faith. However, a direct connection to honor and good faith is hard to construe. Instead, they could be substituted to some extent with the violation of good business practices. The evaluation needs to keep in mind that these common and acceptable practices do not justify any conduct, it needs to be case-specific, and even common arrangements can be inherently reprehensible. Additionally, good business practices as soft norms are vulnerable to evasion attempts just as legislation is.

In decision KKO 1997:146, duty of loyalty was extended beyond the formal parties to the contract. The controller of two companies was not allowed to use this control and formal separateness to the detriment of his creditor. The trial was about whether the collateral arrangement damaged the bank's right to collateral since it held the shares of Housing Inc. as collateral for the debts of Construction Inc. A controlled Construction Inc., which in turn controlled

806 See *Hemmo – Hoppu* 2006 at Sopimuksen keskeinen sisältö>Sopimuksen tulkinta>Sopimusten tulkintaperiaatteista>Lojaliteettiperiaate.

807 *Kaisanlahti* 1996 at 241.

808 See *Telaranta* 1960 at 325 and *Savela* 2015 at 402.

Housing Inc.; Housing Inc. pledged the buildings it owned to A and his wife as collateral. The buildings formed the majority of the share's value, thus the actions reduced the value of the collateral the bank held. The same value was given as collateral twice. The Supreme Court deemed the collateral given by Housing Inc. as invalid in relation to the bank.

The decision gave the contracting party the duty to take into account the interests of the other party formally outside the contract and its effects. Construction Inc. was not allowed to exercise its control in Housing Inc. in a manner that damaged the bank. It is a matter of perspective as to whether the duty extended to Housing Inc.⁸⁰⁹ The Supreme Court did not allow using a different entity to make a disloyal action but still held the actions as valid where they did not damage the other party. The actions made using different entities were valid to the point they started to damage the contract creditor.

This decision also offers a lesson for veil piercing. Duty of loyalty can sometimes justify disregarding a legal action or an entity in the arrangement if the motive is to exhaust the right of the other contractual party. Violating other principles of contract law could also be potentially significant.

Adopting the situation from KKO 1997:146, the corporate arrangement is created to isolate the negative risk resulting from violating the decent contract practice. A controlled corporation is created as a party to the contract. Legal consequences of the violation of decent practice are carried by one entity while the benefits are arranged to materialize in another. If the contract is annulled, then the benefits have disappeared from the contracting corporation. Then, *veil piercing for the benefit of a contract creditor would seem acceptable, at least in cases where the validity of the contract itself is questioned*. This differs from the model Tammi-Salminen created, as veil piercing would be used to determine whether the party participated in violating conduct.

In some misrepresentation related cases, veil piercing is not necessary at all. The wrongs can then usually be corrected with the general principles of contract, corporate or tort law. Usually, the duty of loyalty and protection of due expectations serve as remedies for misrepresentation and allow for holding formally non-liable parties liable.

One gruesomely efficient example of this is the decision in KKO 1991:186.⁸¹⁰ The facts of the case included all the usual veil piercing elements. The corporation-employer controlled a foundation responsible for the pensions of the employees.

809 See *Tammi-Salminen* 2001 at 302–305.

810 Similarly in the US, see *David v. Glemby Co.* (1989), where the subtle representations of the parent that it would perform the subsidiary's contractual duties, as well as some indirect performances of these contractual duties, were utilized in the piercing context. See also *Sparkman* 2016 at 382–383.

The foundation was inadequately capitalized, and the pensions were effectively paid with corporate funds. The foundation was argued as a dependent and dominated affiliate of the corporation. The corporation's management decided which payments the foundation made. In the end, the decision was really simple. The corporation had created the impression that the employees will receive the promised pensions. Creating the impression allowed holding the corporation liable for the pensions. The employees were allowed to trust the given impression, and their due expectations were protected. There was no need to pierce the veil. The case shows the strength of the default rules of limited liability and separate personality as well as the courts' reluctance to rely on piercing when other, less controversial remedies are available.⁸¹¹

The same situation arose again in the KKO 1995:164 decision. The Supreme Court argued that, despite the separate personality, the foundation was financially dependent on the corporation and had no management independent of the corporation. Their relationship had been very tight, and the corporation had actually run the operations of the foundation. The Court held these as relevant circumstances contributing to the creation of the employees' due expectation that the corporation was responsible for the pension system. These two cases show that veil piercing is often not necessary to protect contract creditors since the piercing elements can create due expectations if the operations of a dependent and inadequately funded affiliate are, in fact, run by the controller. Nevertheless, the underlying issue is the same: the need to hold additional entities liable.

One noteworthy situation to consider with contract creditors is the interpretation of Contracts Act Section 36: If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be given to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract and to other factors. Sometimes, piercing considerations can arise in these circumstances and other factors. For example, in the Appellate Court of Turku 5.1.2016 15/948, the physical dependence of the sole shareholder was taken into account when addressing the adjustment of the contract the corporation had entered in. It should be noted that the sole purpose of the corporation was to arrange the physical care and assistance the shareholder required to survive.

811 See also *Huttunen* 1996 at 33–35. He sees the case to show the rejecting stance the Supreme Court has adopted toward piercing.

Similarly in Sweden, see NJA 1982 s. 244. Similarly in England, see Lord Neuberger in *VTB Capital plc v. Nutritek International Corp* (2012). He explained that, subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A in the form of a cause of action in negligent or fraudulent misrepresentation.

The KKO 1994:137 decision involved many facts that are significant in piercing also. The case was about the interpretation of an insurance contract clause. The plaintiff demanded piercing to its own benefit but was denied.⁸¹² The alternate claim was to adjust the contract, which the court awarded. Among other things, the Supreme Court noted that, after the sale of assets, the operations in the factory continued as before, and there was a corporate group relationship between the new and old owners; the ownership to the contract object had only become indirect,⁸¹³ and the same persons held control over it despite the change in ownership. Thus, it is possible to adjust the contract if there have been changes in the corporation's circumstances after the contract. It is hard to conceive situations where this could actualize, though, since the facts of the KKO 1994:137 case were very specific.

5.2.3. Involuntary Creditor

Involuntary creditors are those who had no choice over becoming creditors of the corporation; they did not knowingly enter into a relationship with the corporation but are in one without having chosen to be. Tort creditors are an example of this sort of creditor. Involuntary creditors are generally thought to be more deserving of protection by veil piercing than voluntary creditors.⁸¹⁴ Parties that could not avoid becoming creditors of the company might occasionally need more comprehensive protection than the Company Act and related laws provide.⁸¹⁵ Although I discussed the differences between voluntary and involuntary creditors at length in previous chapters, I will present some more involuntary creditor-specific issues here. I will aim for brevity, as these are rather tightly connected to the arguments presented about the voluntary creditors.

The Swedish piercing doctrine builds strongly on the position that the involuntary creditor is occasionally in need of stronger protection.⁸¹⁶ The

812 Although the minority opinion would have interpreted the clause to cover only those arrangements where control and possession change in a way that increases the negative risk born by the insurer. He would have ignored the formal ownership.

813 The parent-owned subsidiary and subsidiary owned the property.

814 See *Airaksinen – Pulkkinen – Rasinaho* 2018a at 19–21 and *Mähönen – Villa* 2015 at 303. Hansman-Kraakman have even suggested unlimited liability for corporate torts. See *Hansmann – Kraakman* 1991. In a similar fashion, Mähönen has suggested that situations where veil piercing is needed should instead be solved by creating legislation to allow corporate group liability for obligations not arising from contracts. See OM 48/2016 at 38.

Similarly in the Nordic region. See *Schwarz-Hansen* 2001 at 440–442, NJA 2014 s. 877, UfR 1997 s. 1642 and Rt. 1996 s. 672.

815 See NJA 2014 s. 877, *Huhtamäki* 1999 at 146 and KKO 1958 II 43.

816 See NJA 2014 s. 877.

preference has been discussed in the literature as well⁸¹⁷ and is repeated in case law⁸¹⁸.

In the US, this is the prevailing view also.⁸¹⁹ The statistical research does show some evidence that tort piercing, in practice, is roughly equally as likely as contractual piercing.⁸²⁰ This deviation has inspired a plethora of explanations, including the availability of easier compensation sources for tort creditors, more settlement of claims, scarce resources and risk aversion of tort claimants as well as insurance.⁸²¹ In tort cases, particular significance is placed on whether a corporation is undercapitalized, which involves an added public policy consideration of whether individuals may transfer a risk of loss to the public in the name of a corporation that is marginally financed.⁸²²

The economic view of veil piercing provides additional support for the favorable treatment of involuntary creditors. *Richard Posner* conceptualized the voluntary creditor as capable of requiring compensation for increased negative risk. In his opinion, the negative risk includes the inability to pierce the corporate veil. Thus, the voluntary creditor would have received compensation for not being able to pierce.⁸²³ *Jonathan Landers* deduced from this that involuntary creditors have not received compensation and should be allowed to pierce.⁸²⁴ Additionally, the argument goes that when a company is not required to pay for the risks created by its actions, it will be more likely to engage in activities with social costs that exceed their social benefits. This is particularly true in the case of involuntary creditors such as certain tort creditors, trade creditors, and employees. These parties are not compensated for the increased risky behavior of the company.⁸²⁵ In involuntary cases, there is little or no element of consensual dealing, and the question is whether investors should be able to transfer a risk of loss or injury to members of the general public.⁸²⁶

The UK is a significant exception to this view of veil piercing being more justified for the favor of the involuntary creditor. In *Adams v. Cape Industries Plc.* (1991), the court held that “we do not accept as a matter of law that

817 See *Andersson* 2010 at 55–58, *Nerep* 2003 at 32–33 and *Nerep* 2015 at 33–34 and 38–39.

818 See Svea Appellate Court, T 1337-17.

819 See *Georgakopolous* 2007, especially at 4–7, *Bainbridge* 2000 at 12–36, *Millon* 2007 at 1328, *Marcantel* 2011 at 199–200 and *Peterson* 2017 at 78–94, especially at 82 citing the bulk of case law. For authoritative case law, see *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat* (1999).

820 See *Georgakopolous* 2007 at 4–10 and *Oh* 2010 at 141.

821 See *Georgakopolous* 2007, *Georgakopolous* 2010 and *Millon* 2010 at 24–26.

822 See *Jablonsky v. Klemm* (1985) at 566 and *Axtman v. Chillemi* (2007).

823 *Posner* 1975 at 511–515.

824 *Landers* 1976 at 534. See also *Landers* 1975.

825 See *Easterbrook – Fischel* 1991 at 104, *Millon* 2007 at 1355 and *Peterson* 2017 at 65.

826 *Peterson* 2017 at 80.

the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.”⁸²⁷ Adams was a tort case, and the corporate group had even faced similar claims in the past—factors that would have supported piercing in Finland. The decision enforced the right to shield from future liabilities by using corporations.⁸²⁸ Earlier in the context of voluntary creditors, the significance of the dichotomy established in *Prest v. Petrodel Resources Ltd* (2013) was thought to eliminate the need to discern between these types of creditors in the UK when piercing the veil. The evasion of existing liabilities was deemed affirmative for veil piercing. In this context, however, there seem to be no arguments for the different treatment of voluntary and involuntary creditors.⁸²⁹ Still, the difference has been cited in *Chandler v. Cape* (2012), where even the tort creditors could not seek compensation based on piercing. Rather, the court created a doctrine of assumption of liabilities in health and safety issues in the subsidiary. Surprisingly, this doctrine shared many elements with veil piercing, namely control and foreseeability of the tort damage.⁸³⁰ Similarly, *Chrispas Nyombi* has found that the courts tend to find new exceptions to the *Salomon* principle in tort cases without actually using the veil piercing doctrine.⁸³¹

The involuntary creditor cannot affect the actions the corporation takes, she is dependent on public information only and cannot construct a contractual safeguard.⁸³² Because the corporate controller can affect the actions and released information, she is in the best position to prevent the damage.⁸³³ Since the controller is also able to limit the funds available to cover the damage, this disproportionate allocation of control and information supports holding the controller liable.

Control is a necessary element in piercing the veil; thus, the allocation of control over the debt between parties should be given significance too. Voluntary creditors

827 At 826. See also *Trustor* (2001) at 1184–1185.

828 The UK system was not always that reluctant toward the more favorable treatment of tort creditors. See *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co Ltd* (1921) at 483–484.

829 See for example, *Creasey v. Breachwood Motors Ltd* (1992).

830 See also *Thompson v. The Renwick Group Plc* (2014).

831 See *Nyombi* 2014.

832 *Villa* 2002 at 631.

833 See *Villa* 2002 at 631.

can exercise control over the creation of the debt, and contractual duties give them some mechanisms even after that. Involuntary creditors, on the other hand, have no influence whatsoever. The debtor creates an arrangement, and the creditor is bound by it without any influence in forming the arrangement. They cannot secure themselves with the remedies of contractual law.

A quick look around the doctrines related to piercing shows us that they are indeed designed to guarantee the fair treatment of creditors and combat the disloyal arrangements. They target arrangements where only one party has control over the circumstances, albeit they do not explicitly recognize the division into voluntary and involuntary creditors. Environmental damage is easily caused outside the contract, and liability could be insulated with formally separate entities if not for the Environmental Liability Act Section 7.⁸³⁴ Artificial property arrangements are situations in which the debtor has disposed of the property formally but in a manner that she can still utilize it. The creditor is not able to affect the debtor's decisions. Arrangements made solely to receive payment from wage security are not binding toward the State. The State can create the legal framework, but in the end, it has no control over how the employer and the employee devise their contractual relationships and whether that relationship aims to circumvent the legal framework. The same goes for taxation. Even in the KKO 2015:17 case, Teosto had no choice over whether to contract with Arctecho. The creditor position was created entirely by choosing to practice the business.⁸³⁵

An easily understandable situation would be one in which some person suffers an injury due to the actions of the corporation, yet the corporation has neglected to insure and it turns out to be an inadequately capitalized corporation with no funds to satisfy the claim. The corporation would gain an undue advantage if the corporate form could be used to perform operations without complying with the normal requirements of care. When making a decision, the controller has no economic interest or obligation to account for the potential negative risk since her liability is limited to the amount of her investment.⁸³⁶ This may lead to opportunistic behavior and excessive negative risk, for others bear the damage should it realize, and the controller alone reaps the potential rewards.⁸³⁷

834 See *Airaksinen – Pulkkinen – Rasinaho* 2018a at 19 and *Leppä* 2011 at 72–73.

835 The same applies with *NJA* 2014 s. 877 and *KKO* 2015:17 also.

836 *Kaisanlahti* 1996 at 216–217. When contemplating whether to pursue a course of action, a shareholder remains indifferent to the damage because they cannot be held liable for it.

837 See *Kaisanlahti* 1996 at 217 and 230–231. He provides a clear example of how unlimited liability would not remove the problem. If a partnership's operations cause major damage and the partners have no assets, the chosen form of the enterprise does not matter to the injured: whether their liability is limited or unlimited, they will not be able to receive full compensation. *Kaisanlahti* summarizes the position of an involuntary creditor commendably. He recognizes that limited liability endangers the involuntary creditor's position. This is a clear externality, though complete elimination of it is impossible. Removing limited liability is not the final solution since the shareholder's wealth is limited. The most significant fac-

It should be noted that founding a corporation to diminish the negative risks caused by potential tort liability is a legitimate use of a corporation. There need to be other factors present to justify piercing. The conduct might not be reprehensible or artificial, and control might be sufficiently divided, etc. Still, if the intent to create the arrangement is to transfer a reasonably well-known tort risk to the tort victim, the arrangement is easier to view as reprehensible.

The same is true for the United States. The evasion of tort liability in itself does not justify disregarding corporate separateness.⁸³⁸ The misconduct required to pierce the veil is always intentional, and veil piercing is never concerned with deterrence on probabilistic torts.⁸³⁹ This would suggest that the arranger needs to know of the specific tort with sufficient certainty and create the arrangement to evade that specific liability.⁸⁴⁰ The mere chance of some tort realizing at some point is not enough.

5.2.4 Abolishing the Labels Involuntary and Voluntary – Factual Assessment of Influence

I have already inspected the usual arguments surrounding the creditors' nature as either a voluntary or involuntary creditor. Involuntary creditors are typically in a much weaker position than voluntary creditors, as they are not able to choose whether to become creditors or influence the terms of the credit. They are the weaker party by definition. The key difference is in their ability to influence the terms of credit and the ability to choose whether to enter the credit relationship at all. The lack of these supported the more favorable treatment of involuntary creditors. The existing view seems to use involuntary and voluntary as labels that determine the treatment of the creditor. I would instead suggest forgetting the labels and simply looking into the elements behind them—*influence and choice*. Following this, a voluntary creditor with weak influence and little choice should be treated as favorably as involuntary creditors.

tor is the business' negative risk and assessing the level "insurance" this risk requires. This means adjusting the available assets to match the negative risk. Insurance can be in the form of available assets or actual insurance.

The economic analysis of involuntary creditors reveals that the parent corporation, not the damaged party, is in a more effective position to prevent the negative risk from realizing, and thus, liability would be justified from the ramifications perspective. See *Kaisanlahti* 1996 at 245–246. The parent corporation is able to obtain any and all information from the subsidiary, whereas the damaged party usually is able to get only the public information. The parent is also the cheapest insurer.

838 *Craig v. Lake Asbestos of Quebec, Ltd.* (1988). See also *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat* (1999), stating that no special obligation exists for the corporation to capitalize adequately for tort liabilities. Similarly *Cheng* 2010 at 538 and *Cheng* 2011 at 34–35.

839 *Cheng* 2010 at 538.

840 Similarly *Sparkman* 2016 at 427.

Naturally, there are different levels of weak positions among both categories.⁸⁴¹ It is entirely possible that a party in a weak contractual position is almost like an involuntary creditor, whereas involuntary creditors such as the tax authority or pay security have comprehensive tools and powers set in law. They have actually prepared for situations and are able to predict their status as a creditor, even though they cannot influence the terms of credit or prevent the creation of a credit relation. As large organizations, the tax authority, pay security or even Teosto are in a much better position than victims of accidents caused by corporate operations, but they are all still involuntary creditors. Each creditor position is a different combination of powers and negative risk, and the decision in the case should match the specific position of that creditor.⁸⁴²

The labels are useful as categories to systemize the discussion. The initial assessment of voluntary or involuntary could perhaps be used as a starting point of the discussion that then proceeds to examine the level of influence the creditor actually possessed.⁸⁴³ For example, the employees are voluntarily in a contractual relationship with the company, although in their case, mild coercion and threatening with termination can easily affect their ability to influence contractual terms and whether to sign the contract. In the literature, *Johan Adestam* has opined that, when voluntary creditors were not able to evaluate the circumstances and negative risks around the company, there might be a need for increased protection and chance of piercing.⁸⁴⁴

There is a long continuing tradition in the United States on this subject. The prevailing view in the legal literature argues against veil piercing in contract-based situations on the argumentation that voluntary creditors are capable of negotiating.⁸⁴⁵ The spearhead of criticism against this view is that it may fail to recognize different types of contractual creditors. Cheng provides a good description of the main arguments. These analyses are most often made with the financial creditor in mind, not the trade creditor, subcontractor or employee. The financial creditors are sophisticated and possess considerable bargaining power vis-à-vis the debtor corporation. They are in a much better position to request the information and protection they desire and are better risk-bearers than shareholders due to their ability to diversify their investments. Individual financial creditors,

841 About theory of risk position, see *Pöyhönen 2000* at 177–184. Similarly in the US, see *Peterson 2017* at 64.

842 Naturally, the two extremes exist. Some creditors have no control whatsoever, and some are able to contract around limited liability should they so decide. These extremes should just not be used to determine every case.

843 Similarly in Sweden, see *Stattin 2008* at 451. More cautiously, see *Nerep 2015* at 40.

844 *Adestam 2015* at 15.

845 This discussion is partly held in the context of justifications for limited liability as a default rule in regard to contract creditors. See *Landers 1975*, *Posner 1975*, *Landers 1976* and *Cheng 2011*.

trade creditors, employees, and perhaps even consumers, lack either the incentive or bargaining power, or both, to investigate credit risks and obtain the requisite level of protection. Trade creditors and employees often have high information costs and poor ability to diversify and are thus inefficient monitors and risk bearers compared to shareholders.⁸⁴⁶ Although he argues about the justification of limited liability, these descriptions crystallize the differences between classes of contract creditors also in the veil piercing context.

These factors could also be adapted to Finland and could be used to analyze how different voluntary creditors should be treated when veil piercing. Here is a short, non-exhaustive, list:

1. level of sophistication
2. bargaining power
3. access to information
4. capability to diversify
5. reliance on the debtor

The first criterion refers to the experience and skill the contract creditor has. For example, a bank or professional investor with a lot of knowledge on the market, economy and production has a high level of sophistication. An individual construction worker mortgaging their house to provide a loan to a corporation operated by a close party is less sophisticated. The more sophisticated creditor, among other advantages, knows what information is needed, how to analyze it and how to adjust the contract terms to reflect the risks. The second criterion, bargaining power, entails elements from all the other criteria and more. If there is a significant difference in the contracting parties' sophistication, access to information and ability to diversify, then the party with more of them has more bargaining power. At its core, bargaining power could be understood as the capability to have your choice terms included in the contract. The concept is rather openly interpretable and is by no means exhausted by the mentioned criteria. The level of bargaining power can be influenced by a plethora of different factors, for example, argumentation skill, common history, psychological factors or amount of assets at one's disposal.

The third category speaks for itself. Information is influential, and the party with more of it is capable of making a better decision, provided that the information is correctly assessed.⁸⁴⁷ This disparity is well recognized in law, and several disclosure

⁸⁴⁶ *Cheng* 2011 at 118, 120–123 and 156–157. Similarly, *Krendl – Krendl* 1978 at 34, *Barber* 1981 at 386, *Gelb* 1982 at 13, *Cheng* 2010 at 511–512 and *Peterson* 2017 at 64.

⁸⁴⁷ In Swedish decision NJA 1992 s. 375, the contractual creditor was aware of the facts that would allow veil piercing and was subsequently denied piercing because of that knowledge. See also *Stattin* 2008 at 450–452.

requirements adopted in law speak volumes of its importance. Fourthly, the ability to diversify should be taken into account. If the creditor, or future creditor, has multiple choices of parties to contract with or if they can contract with several and split the contributions, then that creditor is capable of diversifying against the risk. Especially if such a diversification has been made, the creditor has indeed assessed the risk level and has instead chosen to limit their exposure, just like investing in the stock market.

Finally, the creditor can be in a reliant relationship with the debtor. A prime example of this would be the employee creditor. Usually, though not always, the employees are reliant on the employer for income to finance sustenance and other necessities. If there are a few choices of employment, then the employee is even more reliant. There is no choice about whether or with whom to contract. These factors alone usually give the employer much bargaining power and quite easily lead to the employee not having any choice as to the terms of the contract.⁸⁴⁸

A contractual relationship can sometimes lead to claims and demands from either side. Breaches of contract can result in a claim for damages, the amount and certainty of which are later decided in a trial or some other procedure. This claim is a conditional debt and thus transferable. The creditor can sell this debt to another. It is entirely possible to sell the debt to a controlled corporation. Then the liabilities incurred by the pursuit of this claim and the risk of negative outcome are isolated to the corporation, whereas the possible profits come to the controller. Especially in trials where the losing party needs to compensate the trial costs of the winning party, this can result in unjustified consequences.⁸⁴⁹ Even though the creditor's relationship to the debtor originated from the contract, she cannot be said to be a voluntary creditor in this matter.⁸⁵⁰ The creditor had no control over the transfer of the claim, nor could she ignore the lawsuit. She is an involuntary creditor of the corporation. Had the contract originally been with the corporation, however, she would no doubt have been a voluntary creditor.

Against this background, it is easy to note how the specific nature of the norm conflicting with limited liability alters the assessment. If the norm is meant to protect the state or actors with equal resources, reprehensibility should require a lot more exorbitant actions. If the conflicting norm is meant to protect some group that is considered the weaker party, reprehensibility seems easier to show.⁸⁵¹ Thus,

848 For a more in-depth analysis of these positions, see *Cheng* 2011 at 154–161.

849 For a case with a chain of events like this and the so-called trial company (*processbolag*), see NJA 2014 s. 877. See also *LoPucki* 1998 about judgment-proofing in the United States.

850 Similarly, the process view of the contract abandons the traditional contract–no contract dichotomy when assessing liability. Instead, the decisive factor is the actions the parties have taken and the overall assessment of their position. About the process view of the contract, see *Pöyhönen* 1988 at 211–231, especially at 218.

851 See *Pihlajarinne – Havu – Vesala* 2015 at 601, who argue that the reprehensibility in *Verkkokauppa* case was in large part due to the purpose of the remuneration (compensating the artists for the unapproved copying of their work) and the individual artists as the aggrieved party.

veil piercing is more common and plausible in such areas of the law governing consumers, employees, the environment and even remunerations to copyright holders.⁸⁵² This list of protected parties could also include minority shareholders. Legal actions taken to circumvent minority protection protocols have been deemed abuse in case law.⁸⁵³

5.2.5. Government Agencies and the State

The state and its agencies as creditors are more difficult to assess. The state can be party to a contract or the victim of a tort, in which case it should be treated like any other creditor of those groups. More problems arise when the state did not specifically intend to be the creditor of the corporation, and the claim is not in tort but results directly from the interpretation of a provision. The state passed on the legislation that obligated the corporation to do something. *Ari Savela* argues that the state, through legislation, has had the opportunity to create the safety mechanisms it desires. The corporation then had the opportunity to design its operations to abide by these rules, and thus, veil piercing should not be allowed for the benefit of the state.⁸⁵⁴ This view is rather formal. It would essentially extinguish the usefulness of the abuse of rights doctrine that is prevalent in veil piercing. The fact that the state had the opportunity to create some mechanism seems irrelevant for abuse consideration. When one abuses a norm for personal benefit at the expense of the state, it does not matter what the norm is. In this situation, the rule is perhaps used to achieve the opposite result of what it was intended to create—or some result that should be impossible according to the rules.

A different argument could be made. In the US decision *United States of America v. Jon-T Chemicals, Inc.* (1985), the court argued: “[T]he Government did not voluntarily enter into the relationship with Farms. It did not have the option of granting or not granting the subsidies to the joint ventures. Under the Upland Cotton Program, it was obligated to subsidize applicants who purportedly qualified. . . . The fact that the Government did not rely on any misrepresentations regarding Farms’s financial condition or its relationship with Chemicals is thus wholly irrelevant to the question of whether Chemicals should be held liable for Farms’s misconduct. Unlike the ordinary contracting party, the Government was not dilatory in any duty

852 The existing case law does not confirm this, though, aside from the Verkkokauppa case and remunerations. These were wage security cases where piercing was applied not to protect the workers claims but those of the State, although this protection derived its legitimacy from the general abuse norm in the wage security act. Even if the decisions did not mention the norm, they abided by, copied and applied its wording. See, for example, KKO 1996:2.

About piercing in product liability, see *Ruuska* 1987.

853 See KKO 2011:68, although the minority opinion argues that the abuse of rights doctrine should not have been utilized in the case because there was no weaker party to protect.

854 *Savela* 2015 at 415. See also *Airaksinen – Pulkkinen – Rasinaho* 2018a at 19. They argue that the State has been able to safeguard its interests with legislation, at least in taxation.

to investigate Farms's finances, since it had no such duty." The core idea here is the fact that government and authorities have none of the possibilities contract creditors have. They cannot choose whether to enter the relationship, they cannot affect the terms, and its assessment of the situation is limited to whether the corporation fulfills the formal requirements of whatever is applied.

In KKO 2017:94, the pay security system was abused. This system is controlled by a government agency as the representative of the state. Still, the question of the state as a creditor cannot be answered with reference to this case. Pay security credit is in a special position in Finnish law, as it has written law support for veil piercing.⁸⁵⁵ It is thus a lower threshold for the courts to award veil piercing in pay security situations.

Of these two interpretative options, emphasis should be placed on the reasonable expectations the corporation has developed, according to which the business has been arranged. This, in turn, contradicts the intention assessment of veil piercing. Piercing should be available for the state if the intention was to obtain benefits at the expense of the state and then the business was arranged according to the rules to obtain this questionable benefit. I argue that the business cannot develop a reasonable expectation of protection when the entire purpose of the arrangement is abusive. The state does not have the influence of a voluntary creditor but has had some control over what the rules are. Should the conduct aim to circumvent or evade the set rules, the state should be allowed to pierce. I would disregard the argument that creating the legislation somehow means the ability to influence the credit relationship. This argument seems to be yet another extension of the formal interpretation of law—the assumption that whatever is not explicitly mentioned in the statute's text is allowed, no matter how grossly it goes against the purposes behind the statute.

5.3. Conclusions on Evading an Obligation

I found veil piercing to have two alternative evasion requirements: 1) the corporate form is used to evade a legal provision, or 2) it is used in a manner that causes damage to creditors. The corporation to either allow or prevent the application of some provision of law, thus creating a result that is either legally forbidden or impossible by law. This has a clear connection to the assessment of artificiality. The prerequisites of the provision are met, but the use does not match the situations the form has been designed to regulate. No general rules can be crafted to detect these situations, though the evaded provision always brings its own note to the assessment. For example, considering artificial ownership would require a look into the elements of ownership. In the KKO 2015:17 case, a similar emphasis existed: considering who is responsible for remunerations would require an examination of who sells data storage devices.

855 See HE 104/1998 at 17, HE 219/2009 at 6 and III.2.5. of this work.

Causing damage to a creditor covers any detrimental result to the creditors as a justification for piercing. Still, this part of the piercing requirements is usually not disputed as it most often is obvious. In all simplicity, the piercing case does not appear in court, if no creditor has suffered a detriment and thus possess an interest to raise the claim. Even the changed division of negative risks could justify a claim. The nature of the creditor's position could also affect whether the piercing claim should be accepted. This is based on the finding that if the creditor has been able to affect the terms of the relationship and decide whether to become a creditor, she should not be allowed to alter the deal *ex post*. The creditor has had the opportunity and even the duty to research the arrangement before becoming a creditor. Based on this influence, the creditors could be classified as voluntary and involuntary. These categories should not prove decisive, however. Even within these categories, the level of influence each creditor actually possesses differs a lot. The bank and the employee are both voluntary creditors, though their influence on the outcome of the contract creating the credit relationship is completely different. The more influence the creditor has had, the less likely that piercing should be in favor of that creditor.

One additional issue should still be addressed: since these two creditor types are quite different from one another, should there be a different liability test for both? Veil piercing in light of the current case law could be understood as a liability doctrine protecting involuntary creditors.⁸⁵⁶ The formulation of the veil piercing test in KKO 2015:17 does not make this sort of distinction between creditor types. Above, I have dissolved this categorical distinction into a more subtle fact-based analysis on the actual information the parties had and the influence they exercised over the creation of the debt. From this perspective, it would seem odd to exclude one group from piercing. Instead, the takeaway should be that, the less voluntarily the creditor became a creditor, piercing is more readily available.⁸⁵⁷ How exactly this translates to the application of the piercing test remains to be determined in case law, should the courts choose to follow my recommendation here.

The same warnings as with control are in order here. I argued earlier that evidence of the different elements of the test can be used to compensate one another. Still, the elements of evasion and damage are almost always apparent and even obvious. It should thus only be used cautiously, if at all, when compensating the impropriety requirement. The capability to compensate the other requirements of the test seems most strongly linked to the involuntary versus voluntary viewpoint I have examined in this chapter. The creditor's lack of influence would support giving that person additional protection through the piercing doctrine. Then the nature of the damage

856 Current case law in Finland has not allowed piercing in favor of voluntary creditors outside the enforcement procedure.

857 Similarly in the United States, see *Peterson* 2017 at 83–84 referring to *Penn National Gaming, Inc. v. Ratliff* (2007).

could compensate the otherwise lacking impropriety requirement. Alternatively, it could just be interpreted to support the existence of improper elements in the arrangement.

6. The Supporting Factors – Objective Indicators Supporting Veil Piercing

6.1. General Considerations

The supporting factors in veil piercing are objectively verifiable conditions that appear in corporate operations. The existence of these factors hints at possible abuses, but they are not enough to justify veil piercing in and of themselves.⁸⁵⁸ Mostly, these factors support finding the more general requirements of piercing. For example, a corporation intentionally and continuously operating on the edge of insolvency is more than likely being used in a reprehensible manner. A corporation in which the legal formalities are not followed is likely under the actual control of one or more individuals.

As said, these factors only support deeming the arrangement as an abusive one. The court bases its decision on the overall assessment of the facts present in the case. In this form of assessment, the decision is based on the entirety of the facts and legal relationships forming the rights and duties of the parties instead of the formal existence of some specifically defined legally relevant facts. The elements present in real life are considered important in showing the true nature of the case. The supporting factors are elements of this sort. They can be used to show the true nature of the corporate use, e.g., whether the corporation is controlled or used artificially or in a reprehensible manner. Sometimes, if the case lacks evidence to the contrary, these factors alone are enough to prove the more general requirements of piercing. Their significance is usually revealed only in relation to each other and to other facts present in a case. The overall assessment inspects the elements present and the patterns they create in relation to each other in determining the actual nature of the arrangement.

The factors cannot be given exact values or definitions. They are somewhat ambiguous; it is impossible to determine, for example, the exact level of adequate

858 See also *af Schultén* 1984 at 96–97, who states that the level of integration and inadequate capital are not grounds for liability *per se* but significant factors that should be taken into account in the assessment.

The division between supporting factors and the actual veil piercing test also abides by the Supreme Court's standing in the *Verkkokauppa* decision. In it, the Supreme Court first formulated a general test for piercing but later assessed the facts of the case against that test. See KKO 2015:17 at 30–34.

capitalization or exactly when someone can be confused about the corporate actor. One general rule can be provided, though. The further away the circumstances are from the usual and normal circumstances existing around corporations, the more justified veil piercing becomes.⁸⁵⁹ The extraordinary elements differentiate the arrangement from the accepted standard, and by examining the nature of these elements, we can discover significant facts either supporting or opposing piercing. This approach is adopted in artificial property arrangements⁸⁶⁰ and is applicable in veil piercing as well.

Another question is the causal relation with whatever caused the damage. In Finland, the question seems easy enough based on KKO 2015:17. Using the group structure, intercorporate relations or the shareholder's control (or, more shortly, the use of corporate form) causes the damage that is claimable by piercing. This part of the piercing test is rather easy to show. After this, one can cite whatever additional factors to show that someone indeed used the corporation and that the use was artificial and reprehensible. In the US, these supportive factors are often regarded as justifications for piercing instead of showing some relevant aspect of the piercing test. This leads to strange inconsistencies with causality, as some of these supportive factors are in no way causally related to the actual damage caused.⁸⁶¹ This creates unnecessary complexity as to the assessment of these factors. There is ultimately no direct link between the conduct sanctioned by veil piercing liability and the damage compensated by veil piercing. This quagmire can be avoided in Finland, and it is not even entirely based in the US. The courts should apply the totality of the circumstances test when piercing in order to assess all known and relevant information and perform an examination of an issue in light of all known and conceivable circumstances, excluding nothing and giving no one fact, action or condition a controlling influence upon the assessment. One should remember, though, that the US piercing cases often serve similar functions as the Asset Recovery Act, unlawful distribution and debtor's dishonesty do in Finland and, in those cases, looking at the causality between improper action and the damage is logical.

The division between the test for veil piercing and supporting factors is partially copied from the United States.⁸⁶² The structure is well developed and, in the author's opinion, it suits veil piercing perfectly.⁸⁶³ It allows for structured analysis of the facts

859 *Leppänen* 1991 at 303.

860 See *Linna* 1999 at 342–347.

861 About the causal relationship in piercing cases, see *Sparkman* 2016 at 446–465.

862 See *Hamilton – Booth* 2005 at 400–410 and *Kärki* 2015 at 747–755 for the US system. In US case law, see *Jones & Trevor Marketing v. Lowry* (2012) at 636–637.

863 About the compatibility of the system, see *Kärki* 2016.

and their relevance, bringing some order and objectivity into the overall assessment. An almost identical division is used in Enforcement Code 4:14.⁸⁶⁴ In this chapter, some of the more common factors cited in piercing decisions are examined. Others have been considered in court decisions, and some have been influential in the legal literature. The factors can be divided into seven groups according to the facts and considerations they entail. I will now proceed to examine them in an attempt to make the veil piercing assessment more objective and predictable.

6.2. Inadequate Resources

6.2.1. On the Concept

Inadequate resources was one of the key factors in support of piercing in the KKO 2017:94 decision. Traditionally, this criterion has been called undercapitalization, but on this occasion, I will stay true to the terminology of the Supreme Court. This choice also emphasizes the view that all the resources are significant instead of only the amount of capital. The conduct constituting inadequate resourcing in the case was threefold. One corporation held the assets and the other held the negative risks. The benefits of the corporation holding the negative risks were siphoned away through contract prices, leaving the corporation with no assets when the negative risks realized. I am deriving these factors as significant when assessing the adequacy of resources:

1. lack of resources
2. siphoning of assets
3. separation of benefits and liabilities.⁸⁶⁵

It is entirely possible to utilize all of these methods to benefit whichever entity the controller appoints. In some cases, all three are present, although any one in isolation is capable of constituting inadequate resourcing. The Finnish legal system is well equipped to deal with the siphoning of assets through transfers. This would suggest that piercing considerations focus more on the other two, although these transfers still support piercing. I will not analyze these much further here as they are rather self-explanatory. These are the methods that are utilizable to make the corporation inadequately resourced, and I will inspect when inadequate resourcing is present. The discussion will often cross these three categories, and one of them—separation of benefits and liabilities—is given its own chapter.

⁸⁶⁴ See *Linna – Leppänen* 2015 at 152. See also Chapter III.2.1. of this work.

⁸⁶⁵ Similarly in the United States, see *Krendl – Krendl* 1978 at 35–38.

But first, there is a need to clearly distinguish three ways of understanding inadequate resourcing, or as it is traditionally called, undercapitalization. Company Act 1:3 sets a minimum level for stock capital in a corporation.⁸⁶⁶ A public company is required to have 80 000 euros of stock capital, and private corporations are required to have none. In a strictly formal sense, a corporation cannot be undercapitalized if these requirements are fulfilled. The statute-provided minimum capital is not that relevant for veil piercing. The minimum capital is set so low that it offers no protection for the creditors of a corporation.⁸⁶⁷ The amount is easy to maintain whether the corporation is legitimate or not. It simply lacks the impact to act as an indicator of abuse.

The piercing analysis is not concerned with the lack of minimum capital. Traditionally, it has been about undercapitalization or inadequate capitalization with which corporation operates.⁸⁶⁸ The concept used here—inadequate resources—takes the capital amounts as well as other resources into account. Resources are inadequate if there is less than what the practiced business requires. This sort of inadequacy supports piercing the veil.⁸⁶⁹

In the KKO 2017:94 decision, the Finnish Supreme Court addressed inadequate resourcing in veil piercing. In it, one person was able to determine the contracts between the two corporations he owned, along with the contracts made with counter values that did not allow the staff rental corporation to pay wages or expenses auxiliary to wages. Inadequate resources were present because one person controlled the contract between the corporations and determined the contract sums in a way

866 Due to this, it is problematic to devise any other standard for capital levels. *Savela* 2015 at 412.

867 See also *Villa* 2002 at 629, *Airaksinen* 2013 at 445, *Kärki* 2018c and HE 238/2018.

Similarly KM 1992:32 at 373, where the minimum capital requirement is seen to diminish the need for veil piercing with the more comprehensive protection it offers.

868 See *Werlauff* 1991 at 75–76 and 518–519. He makes the same distinction. He calls the lack of minimum capital absolute or formal undercapitalization (*absolut, formel underkapitalisering*) and capital inadequacy in comparison to expected liabilities relative undercapitalization (*aktivitetsrelateret*). He also identifies a third category between these two: finance market–created lack of equity capital (*markedsrelateret*). This refers to a situation in which the corporation is unable to acquire credit from the market after which rationally operating shareholders should have provided more equity capital. Werlauff sees that relative undercapitalization is only a supportive factor for piercing, whereas absolute and market-created undercapitalization are enough to justify piercing. See also *Stattin* 2008 at 448 and *Gelb* 1982 at 3–4.

869 See *Mähönen – Villa* 2015 at 299.

See also NJA 1947 s. 647, NJA 1975 s. 45, NJA 2014 s. 877, *Leppänen* 1991 at 303, *af Schultén* 2003 at 10 and *Savela* 2015 at 413.

In addition, see SOU 1987:59 at 129–137. The Swedish *betalningsansvarskommittén* published a memorandum where it considered inadequate capitalization as a necessary requirement for piercing, along with inappropriate use of control.

Cf. *Huttunen* 1963 at 156. He sees that inadequate capitalization does not justify piercing since the creditor can always check registries to determine how much capital the corporation has. Undoubtedly, this is the case with contract creditors. This argument has lost some of its relevance since the 2006 Company Act reform.

that resulted in the staff rental corporation operating at a loss or in a manner that does not allow it to sustainably meet its obligations. The stated fact of inadequate resourcing was then brought up when the Supreme Court gave justifications for finding the inappropriate purpose behind the arrangement. Thus, based on this case, *inadequate resources seem to be only a factor supporting veil piercing, as it hints toward the reprehensibility and artificiality of the arrangement.*⁸⁷⁰

Similarly, in the United States, undercapitalization or inadequate capitalization has been viewed in support of finding an improper motive behind the corporate use. In *Radaszewski v. Telecom Corp.* (1992), the court held that “[t]he reason, we think, is not because undercapitalization, in and of itself, is unlawful (though it may be for some purposes), but rather because the creation of an undercapitalized subsidiary justifies an inference that the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it.”⁸⁷¹ There is another school of thought, though. Sometimes, undercapitalization alone—and not as an indication of improper motive—has been thought to justify piercing.⁸⁷² Regardless of the function, undercapitalization rationale tends to assert itself strongly when courts decide to pierce.⁸⁷³

In Sweden, the literature has attempted the same. The argument is that undercapitalization only supports finding dependence or disloyalty.⁸⁷⁴ It should be noted, though, that this argument is made against the background that the Swedish piercing doctrine is uncertain, and the discussion is about whether undercapitalization is an independent requirement of piercing.⁸⁷⁵ I have established here that it is not an independent requirement in Finland.

To (overly) simplify inadequate resourcing, control over the contracting corporations in the arrangement combined with one contracting corporation operating at a loss for the benefit of the other equaled inadequate resourcing in the KKO 2017:94 case. For future cases, the Supreme Court left some room for interpretation by characterizing the inadequate resourcing as *operating the corporation in a manner that does not allow the corporation to sustainably meet its*

870 See also *Kärki* 2018a at 278–279.

871 See also *Krendl – Krendl* 1978 at 20–21 and *Cheng* 2010 at 568–569 and 575–576, asserting that the proper understanding of undercapitalization is an indication of impropriety. In support, *Costello v. Fazio* (1958).

872 For example, *Anderson v. Abbot* (1944) at 362–363.

873 See *Oh* 2010 at 138. Cf. *Thompson* 1991 at 1067.

874 See *Moberg* 1998 at 80.

875 SOU 1987:59 at 131.

obligations.⁸⁷⁶ This means that it is not necessary to operate at a loss, but it needs to be reasonably foreseeable that the corporation is incapable of sustainably meeting its obligations.⁸⁷⁷ This should be due to the manner in which it operates, leading to a situation where the corporation does not possess the resources and is unable to gather those resources from its operations should the operations remain unaltered. The Finnish understanding is about resources during the operation, taking into account initial capital, cash flow, ability to generate profit and otherwise operate sustainably. Adequate resources seem to *enable the perpetuity of the corporate existence* and even the preparation for some distress.

6.2.2. How Does Inadequate Resourcing Support Piercing?

Inadequate capitalization can hint at the controller's reprehensible intention to let others carry the negative risks.⁸⁷⁸ The Supreme Court left room for interpretation for inadequate resourcing, allowing the inclusion of situations in which it is reasonably foreseeable that the corporation is incapable of sustainably meeting its obligations as well as those where the corporation was systematically made insolvent or carried the negative risks. This inability needs to be foreseeable enough, and this foreseeability needs to be understood in relation to the purpose of the arrangement. To recount from earlier findings in this research, reprehensibility in veil piercing is most commonly found by showing the inappropriate intent to cause damage or evade obligations. If the inability is foreseeable enough to incentivize the creation of the arrangement, it should be foreseeable enough to assess the inadequate resources. This means that the controller of the arrangement knows of a significant risk of costs or potential liability and chooses to pursue the actions despite knowing that the liable corporation is unable to meet the obligation should it occur. The corporate arrangement enables them to favor whomever they desire among claimants to the cash flows of a firm.⁸⁷⁹ Inadequate resourcing hints that the controllers have used this possibility. On the other hand, outside intention, inadequate resourcing could be combined with negligent management of the corporation to establish some reprehensible and condemnable disregard for third party rights.⁸⁸⁰

Stattin has made an important distinction. Inadequate resourcing is more important when a creditor makes a piercing claim. When the piercing claim is made to enforce

876 Millon has suggested similar reforms to the US piercing doctrine. He systemizes this sort of behavior under the term "financial responsibility." See *Millon* 2007.

877 This comes close to the definition of insolvency. Still, that definition refers to obligations when they become due, whereas here we are concerned with obligations that are reasonably certain to arise but might not exist yet.

878 In the United States, inadequate capitalization alone has occasionally justified piercing. See *Shapoff v. Scull* (1990) at 1470: "The requirements of the [alter ego] doctrine may be met where, as here, the corporation is undercapitalized in light of its prospective liabilities."

879 *Macey – Mitts* 2014 at 152–153.

880 *Macey – Mitts* 2014 at 127.

a legal norm or uphold a policy goal, then inadequate resourcing is less significant. In the latter case, inadequate resourcing can still be used to show that the corporation was dependent.⁸⁸¹ The Finnish piercing doctrine does not give as high a significance to the dependence criterion as the Swedish one does. Therefore, I would question whether inadequate resourcing has any significance when piercing due to the evasion of a provision. It might be possible to deduce something about the intentions behind the arrangement in limited situations or whether the use was artificial.

Perhaps this argument becomes clear only through examples *in casu*. Still, in case of fiscal damage to creditors, there is a direct connection between the lack of resources and the damage, which is not present in evasion situations. For example, when the corporate form is used to circumvent nationality requirements laid out in the law, the case is about upholding a policy. Veil piercing is used to determine whether the attributes—unwanted nationality—of the corporate controllers can be considered those of the corporation, as the nature of the circumvented norm is not considered with the actual business. This situation has nothing to do with how many assets the corporation in question has. An example to the contrary would be circumventing the duty to hold co-operative negotiations with the employees. This is done by artificially dividing the business into multiple entities, the workforce of each being below the limit of 20, after which you must hold the negotiations. The piercing assessment is still about the evasion of a provision of law and considering one attribute of the other entities—the number of employees—as that of the entity who should hold the negotiations. In this case, though, that provision is business-related in nature, so it makes a difference if the entities are resourced highly enough to practice business as independent employers. If they are not, it is easier to determine that the entities are an intentional attempt to circumvent obligations laid out in the law.

An interesting question surfaces if the table is turned. Since providing inadequate resources speaks to impropriety, providing adequate resources does the opposite. If the corporation is adequately resourced, it can hardly be called improper use. The business is given viable funds, and creditors are secured to the amount of the funds. Even if the resources are eventually not enough to satisfy the creditors' claims, the conduct can hardly be seen as improper if the resource level matched the expected negative risks of the business. Adequate resourcing suggests that the corporation has a real business purpose and that the controller did not intend to damage the creditors. However, impropriety can be shown through other criteria, and adequacy of resources should not rule out veil piercing. It simply speaks against piercing.

881 *Stattin* 2008 at 439 and 448–449.

6.2.3. Sustainable Resourcing

The decision in KKO 2017:94 adopted a concept of inadequate resources a bit different from the undercapitalization opinions existing in the literature. Still, these two are undoubtedly related. The decision does not look into the initial moment when the company was founded and assess whether the capital provided would be enough. Instead, the decision looks into the realized conduct. Did they conduct the arrangement in a manner that allowed the participating corporations to meet their obligations? If one corporation in the arrangement *systematically operates in a manner that does not allow it to sustainably meet its obligations that are certain to arise* and this is done to the benefit of another, inadequate resourcing is present. The benefits of the arrangement are realized early or continuously, and the obligations manifest later. I have divided this criterion into two parts: the first asks what level of resources is sustainable, and the second part asks what obligations are certain enough to be taken into account. I shall address the former first.

Continuing from the definition of inadequate resourcing, it would seem that determining sustainability is not about absolute amounts that need to be left in but, rather, some sort of prediction of business development and needs of the business. In its most simple form, this means ensuring that the corporate contracts are made in a manner that allows the corporation to meet its known expenses.⁸⁸² Thus, inadequacy should never be determined by comparing the assets and liabilities at the time of the claim. This comparison would lead to finding inadequate resourcing in every bankruptcy and veil piercing case and would show significant hindsight bias favoring the creditors.

Piercing claims usually appear in situations where the formally liable corporation is already insolvent. It is then deceptively easy to deduce that it must not have had enough resources since it ended in insolvency.⁸⁸³ The problem is that the persons capable of deciding the amount of resources the corporation receives did not have this information. If we accept the view that inadequate resources hint toward inappropriate intentions behind the corporate arrangement, how could these intentions be affected by the information the decisive persons did not have? The assessment thus needs to be made on the basis of the information these persons had at the time the decision was made and what was reasonably predictable then.⁸⁸⁴

Naturally, if the operation is systematic and goes on for a while, this is easily established. If the controllers seek to continue a clearly inadequately

882 Similarly, see *Vahtera* 2018 at 268–269.

883 Similarly, see *Bainbridge* 2000 at 53 and *Nerep* 2015 at 27.

884 Similarly in the US, see *Cheng* 2010 at 578–579. This view is also compatible with the business judgment rule used to address the management's liability.

resourced operation, this knowledge should be taken into account. Then we could dub this the decision to continue with inadequate resourcing, even if this information did not exist when it was initially decided to commence the operation.

Interestingly, the inadequate resourcing definition from KKO 2017:94 is in line with the KKO 2003:33 decision, in which the Supreme Court of Finland held that a housing corporation needed to collect large enough maintenance charge payments from the resident-shareholders to cover the liabilities of the corporation. Both decisions seem to enforce some standard of *sustainable resourcing to enable the perpetuity of the corporate existence* and even the preparation for some distress. If these charges are set too low, the difference can be considered an unlawful distribution. The difference here is that the distribution is not necessarily made, as in transferring value. Instead, the inadequate resourcing can also transfer the two sides of risk. Still, both place negative consequences on the shareholders or the controllers of the arrangement based on their failure to maintain assets in the corporation to the satisfaction of the creditors. Both concern a situation in which the same person or a group controls the entities involved. In KKO 2003:33, the shareholders themselves were the benefactors, and in KKO 2017:94, a single shareholder controlled both corporations. The controller(s) manipulated the pricing in these transactions to benefit an entity of their choice at the expense of the corporation's ability to meet its obligations.

The application of KKO 2003:33 on corporations other than housing corporations has been rejected.⁸⁸⁵ The KKO 2017:94 decision seems to extend the norm from KKO 2003:33 to other corporations, albeit with more limited direct consequences and more subtle meaning. Inadequate resources alone does not lead to liability but only supports liability by veil piercing, whereas in KKO 2003:33, the difference was directly claimable.⁸⁸⁶ Perhaps the symbiotic contracting practice in KKO 2017:94 could have been interpreted in light of KKO 2003:33 as unlawful distribution had the bankruptcy estate made the claim. Instead, the pay security authority made the claim. It would seem that KKO 2017:94 does place new requirements of capital, pricing or other resource allocation on the corporations. It should be noted, though, that this requirement is tied to the piercing assessment and not corporate operations in general, at least currently. Therefore, neglecting this only leads to increased piercing risk, and liability requires fulfilling the other elements of the piercing test also.

885 *Villa* 2003 at 7 and *Rasinaho* 2016 at 215 and 228.

886 A fact set very similar to KKO 2003:33 has appeared on a veil piercing case in the US. In it, the veil was not pierced as the limitation of liability in the arrangement was deemed to be well within the public policy. The dissenting opinion adopted a similar stance to that in KKO 2003:33. See *Bartle v. Homeowner's Cooperative* (1955).

Returning to the definition of inadequate resourcing, I have deduced the following: if a corporation is *systematically operated in a manner that does not allow it to sustainably meet its obligations that are reasonably certain to arise*, inadequate resourcing is present. In KKO 2003:33, the expenses were very easy to verify from its own accounting and were, thus, very easy to predict as certain to arise. In addition, the housing corporation continued to charge inadequate payments for a long time, slowly accumulating debt. If one attempts to assess the predictable expenses and obligations a business might occur, the possibilities are much more numerous. The most obvious are taxes and fees mandated by law.

Taking the pattern of neglecting known expenses is compatible with the view I follow in this research that inadequate resourcing speaks of the unacceptable motives behind the corporate arrangement. It is important to determine whether the inadequate resourcing was an improper attempt to limit one's liability while still retaining the profits from the operations or whether it was an attempt at some other reprehensible purpose. The easiest defense against claims of resourcing as part of impropriety is showing the proper reasons behind the lack of resources. The limitation is most likely legitimate if the inadequacy is due to the unfortunate running of the business, if the possible profits have been used (at least in part) to support and develop the business, if the owner has not taken an overly large salary from the corporation, or if the owner has provided the business with additional funds or has otherwise acted in good faith to keep the business alive.⁸⁸⁷ If, however, the owner has derived large personal benefits, squandered the profits, lost or hidden funds, and if the inadequacy is due to this sort of behavior, the limitation of liability would seem improper.

The comparative outlook does offer a lot of different interpretation options here. In the United States, some courts have sought to utilize the industry average capital in determining the amount of resources the company should be given.⁸⁸⁸ Other cases have taken this industry standard and have had an expert examine its adequacy.⁸⁸⁹ Yet operating a business with high amounts of debt is so common that no modern startup business could be called adequately capitalized.⁸⁹⁰ The comparison to what the standard is would likely give an unsatisfactory answer to a question about what the standard should be.

887 Providing the corporation with equity capital is an assurance of the shareholder's commitment to the corporation. It is a sign of *bona fide*. *Kaisanlahti* 1996 at 240.

888 See *In Re Lumber Inc.* (1954). Similarly about insurance, see *Millon* 20017 at 1376. For criticism on the view, see *Cheng* 2010 at 573, who is of the opinion that such a test is prone to manipulation, and the industry standard itself might be inadequate. As an answer to this criticism, see *Marcantel* 2011 at 222–223.

889 See *Laya v. Erin Homes, Inc.* (1986) and *United States v. WRW Corp.* (1993) at 25.

890 See *Matheson – Eby* 2000 at 177, *Nerep* 2003 at 20–21 and *Millon* 2006 at 28. Similarly in Finland, see *Kyläkallio – Irola – Kyläkallio* 2017a at 13.

One prominent proposal for refashioning the piercing test in certain limited liability entities in the United States sees this sort of siphoning of funds combined with insolvency as sufficient to pierce the veil.⁸⁹¹ If a legitimate corporation believed liability existed, it would begin holding reserves, either through its income in the ordinary course or by sheltering existing retained earnings to ultimately pay what could become the judgment.⁸⁹² An illegitimate corporation would seek the exact opposite route of exhausting any existing and future reserves.

The examined decisions seem to emphasize the continuous siphoning and eventual inability to meet the obligations. Siphoning of assets would suggest unsustainability, even when the corporation had adequate assets at the beginning.⁸⁹³ The Finnish cases so far seem to represent the siphoning category, and no discussion on the initial level of capital was conducted. It is also worth noting that the initially inadequate assets could increase during the operation, making it an unreliable factor.⁸⁹⁴ The most clearly unsustainable resourcing situation happens when the corporation has minimal initial resources, and any assets the operation manages to secure are siphoned away.⁸⁹⁵

Still, the almost prohibitive difficulty of determining the correct level of capital remains.⁸⁹⁶ Instead, when defining sustainable resources, we seem to be reliant on siphoning and systematically accumulating liabilities over the timespan of the arrangement. This view is prone to hindsight, but it is also quite compatible with the idea that inadequate resourcing supports the finding of unacceptable motives. If the siphoning and accumulation were systematically done over the period of the arrangement, this speaks to the motivation behind the corporate use. This is also in less contradiction with the purposes of limited liability. The systematic accumulation of liabilities and siphoning are rarely, if ever, within the concepts of honest business and trade. Instead, they show an attempt at personal gain at the expense of others.

6.2.4. What Obligations are Certain Enough?

When determining what obligations are certain enough, current case law offers no support, and the compared jurisdictions are not much more helpful. What is clear is that those obligations that are certain to arise should be included. Any deviation

891 See *Matheson – Eby* 2000 at 181–193. This refashioning would mold the test to greatly resemble asset recovery and unlawful distribution as they exist in Finland.

892 *Marcantel* 2011 at 220. Similarly, see *Ob* 2010 at 138 and *Cheng* 2010 at 581–582.

893 See also *Gelb* 1982 at 14–15 and the dissenting opinion of Judge Keating in *Walkovsky v. Carlton* (1966) at 422–423. See also *Ob* 2013 at 125 and *Pierson v. Jones* (1981) at 1087.

894 *Gelb* 1982 at 17–18 and *Ob* 2010 at 98–99.

895 As was the case in KKO 2017:94.

896 Similarly in Sweden, see *Nerep* at 26.

from 100 percent makes the assessment more difficult. The issue becomes what is predictable enough. Naturally, the corporations can operate in an unsustainable manner and cover the obligations from other sources of funding, for example, capital investment or group subsidies. The current case law has had the advantage of hindsight, as the corporations in the cases have cumulatively neglected obligations over an extended period. Thus, it has been easy for the Supreme Court to use the term “certain.” This is all well for their purposes, but I am concerned with predicting what obligations are certain enough at the time the decisions are made.

As for the United States, significance is given to the liabilities that are certain or likely enough to arise over the course of the business in light of the circumstances and the competence of the management.⁸⁹⁷ Swedish literature has adopted the view on certain or likely enough. Inadequate resourcing is understood as the corporation not being given enough resources to meet the expected liabilities, taking into account the risks and obligations that operations of that scale and type might cause.⁸⁹⁸ Some give significance to how predictable those liabilities are.⁸⁹⁹ The courts should also be allowed to consider not only the initial resources given to the corporation but also whether those resources have been siphoned away during the operation.⁹⁰⁰ In NJA 1947 s. 647, the corporation could not have operated its business without continuing financial support from the shareholders. This was interpreted as a sign that the corporation was not on economically solid ground, which in turn supported holding the shareholders liable, although the initial capital level was compared to the debt amounts in the case.⁹⁰¹ This should be interpreted as a sign that both are significant in deducing whether the resources were actually adequate.

The English take is total denial of this view, and isolation for known tort risk and other obligations is well within the allowed corporate uses.⁹⁰² Even in situations where the damage has already emerged though no court

897 See Judge Keating (dissenting) in *Walkovsky v. Carlton* (1966), *In Re Mobile Steel Co.* (1977). See also *Barber* 1981 at 390, *Millon* 2007 at 1355–1358 and *Sparkman* 2016 at 402–404 and 411–416..

Cf. *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat* (1999), *Bainbridge* 2000 at 53 and 59 and *Huss* 2001 at 114–115, *Axtmann v. Chillemi* (2007) at 17–18 and 21–22 and *Martin v. Freeman* (2012) at 14. 898 See NJA 1975 s. 45, the appellate court in NJA 1982 s. 244 and NJA 1992 s. 375. In literature, see *Hellner* 1964 at 166, *Nerep* 2003 at 18–23, *Stattin* 2008 at 447–448 and *Nerep* 2015 at 25–28.

899 NJA 1982 s. 244. Also SOU 1987:59 and *Nerep* 2003 at 22.

900 NJA 1982 s. 244 and *Stattin* 2008 at 447–448.

901 See also NJA 1975 s. 45, where the criterion was repeated. Also worth noting is the NJA 1982 s. 244 decision. For more about undercapitalization in the decisions, see *Moberg* 1998 at 62–67.

902 See *Adams v. Cape Industries Plc* (1990) and *Prest v. Petrodel Resources Ltd* (2013). Cf. *Re F.G. Films* (1953).

proceedings have been initiated, arrangements to limit liability exposure are allowed.⁹⁰³

I present four situations where liability is predictable enough: 1) the liabilities are already known to arise; 2) the liabilities are thought to be likely enough to incentivize the controller to create an abusive arrangement to evade them; 3) the liabilities are accumulated systematically throughout the timespan of the corporate arrangement; and 4) the management should have known that liabilities would arise.

The first of these is concrete knowledge. I would use the English *Adams v. Cape Industries Plc* (1990) case as an example. In it, the arrangement was created only after the first asbestos trial was over and the management knew additional compensation claims would appear. They reacted to the now-established precedent by creating the subsidiary structure to evade these claims. The English court deemed this perfectly acceptable, but I should note that the English jurisdiction shows that this allowance was due to the formal interpretation and hostility toward piercing. I would argue that the other jurisdictions would not treat this arrangement similarly.

The second argument is a combination of knowledge and unacceptable motives. The controlling party knows that a form of liability is likely to arise; it estimates this likelihood to be significant and the potential compensation amount to be high enough to desire a new arrangement to escape that liability. The NJA 2014 s. 877 decision is a prime example of this. The chance of losing the trial and liability of the opponent's costs was a known and significant possibility. The arrangement was created solely to circumvent that liability.

The third situation is based on historical information. Throughout the existence of the arrangement, the company has systematically accumulated liabilities. Through this knowledge, the controller has no doubt developed knowledge of what obligations are certain enough. If the arrangement ends up in a situation where a piercing claim is necessary, then this would show that the controller has not corrected this and has allowed the corporation to become undercapitalized. This is especially prevalent when the benefits of the operation are siphoned away at the same time.

The KKO 2017:94 decision was a good example of this sort of situation. It is also the only Finnish decision citing inadequate resourcing in the veil piercing context. In it, the inadequate resourcing was used as support for veil piercing when the corporation has been siphoned until empty or operated so that it was incapable of covering its liabilities, and this was done to benefit another. The controller chose to move benefits to another entity while continuously neglecting payments and accumulating negative

903 Liability rules might make it rather complex to limit exposure. Cape industries succeeded in this through eliminating its presence in the United States before the proceedings began, thus preventing the UK courts from enforcing judgments entered against it in the United States. See *Adams v. Cape Industries Plc* (1991).

risks in the debtor corporation. This conduct went on for three years. This is an obvious and egregious form of inadequate resourcing. Any deviation toward more subtle inadequacy makes the condemnation more difficult. It is hard to predict how this argument would fare if the unsustainability argument is based only on future conduct or predictions of liabilities. This certainly makes the evidence harder to find. It should not, however, deny the possibility, however, as the disparities can be obvious.

In Sweden, some similar assessments exist. In NJA 1975 s. 45, the Swedish Supreme Court gave significance to whether a corporation was given enough resources for it to operate independently.⁹⁰⁴ If it was not given such resources, it could be said that the company providing the resources, and to whose benefit the operation eventually fell, is the one operating the business instead of the inadequately resourced corporation.⁹⁰⁵ The same conclusion was reached in NJA 2014 s. 877.⁹⁰⁶

Although the US piercing literature is dominated by undercapitalization, inadequate resourcing is still also noted. Asset stripping is often cited in piercing cases, and it can definitely be part of the reason why the resources are inadequate. Similarly, using corporate assets for personal expenses is often viewed in support of piercing.⁹⁰⁷ In *Insituform Technologies, LLC v. Cosmic TopHat, LLC* (2013),⁹⁰⁸ the corporate arrangement was similar to KKO 2017:94. Cosmic TopHat was operated in a manner that did not allow it to sustainably meet its obligations, and the arrangement allowed the shareholder to favor whomever among the claimants to the cash flows of the firm. In fact, this sort of favoring or intention to do so is often required to pierce.⁹⁰⁹ Combined with the allocation of the benefits of the symbiotic operation, this would support holding sibling corporations liable.

In the Appellate Court of Turku 26.10.2016 no. 1070 decision, the court did ponder the relevance of the neglected payment sum. It specifically assessed the sum of the claims that the plaintiffs sought in that trial and concluded that lesser claims would not support finding inadequate resourcing. This type of comparison is biased by hindsight, though. There are multiple points in the process preceding

904 Similarly, in an earlier case, NJA 1947 s. 647.

905 See *Svensson* 2010 at 263.

906 See also NJA 1982 s. 244.

907 See, for example, *Federal Trade Commission v. Bronson Partners, LLC* (2009) at 391 and *Harris v. Kupersmith* (2009) at III.B.

908 See also *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014), in which the arrangement allowed the controller to decide which creditors were paid.

909 See for example, the discussed *Insituform Technologies, LLC v. Cosmic TopHat, LLC* (2013) and *Milk v. Total Pay and HR Solutions, Inc.* (2006).

the trial that can eliminate claims from the consideration. The claims made do not represent a true picture of the resources in relation to the claims. This is why the assessment should be made based on the totality of the resources and the totality of the liabilities that the corporation has and is likely to face at the time the disputably abusive arrangement is created.

The fourth situation is about what the management or the controller should have known—what liabilities were such that their occurrence should have been predicted and proper preparations made. The first step in this determination would be the level of negative risks the business operates with. A business with higher negative risks needs more capital or insurance to cover these risks should they realize. For example, companies involved in mining have more significant negative risks than an accounting office. The assessment should look into the typical negative risks confronting those types of businesses and determine whether the amount of resources is adequate in comparison.⁹¹⁰ If the corporation has a convincing level of resources compared to the scope of the business, veil piercing should remain unlikely. The industry also affects what liabilities are reasonably predictable. Another similar element is the size and scale of the business.

This sort of assessment of probability has emerged in KKO 2001:29. The case was about whether the debtor's debts exceeded their assets. One particular debt was based on a security. The debtor had promised to pay the debt of a corporation if it could not pay that debt itself. The probability was determined by examining the payment history and profitability of the corporation.⁹¹¹ The nature of the obligation made the predictability rather easy in that case. It does seem that the type of obligation does alter the assessment of probability.

This prediction could also derive some support from the solvency test (Company Act 13:2) used when distributing assets.⁹¹² According to it, assets cannot be distributed if the distribution rendered the company insolvent. In determining this, the management needs to account for all the predictable obligations of the company. Unfortunately, the process of this prediction is highly based on the subjective experiences of the management. The core of the test is to account for known issues in the operation.

6.2.5. What Are the Resources?

Now that we have established what inadequate resourcing means, it should be explicitly stated what to account for when assessing whether the resources are adequate. A good starting point is that everything that can be used to satisfy the debtors' claims can be considered resources when assessing inadequacy. This includes

910 See *Easterbrook – Fischel* 1991 at 59.

911 See also *Tuomisto* 2012 at 48–49.

912 About the solvency test, see *Airaksinen – Rasinaho – Pulkkinen* 2018b at 41–51 and *Ruohonen* 2012.

liquid funds, easily liquefiable items such as stocks or bonds, property items whether real or chattel and even the ability to obtain additional credit from the market. Every category of available funds must be accounted for, even those sets that have been transferred forward but can be recovered.

One particularly useful interpretation from the United States should be adopted in Finland also. According to the *Radaszewski v. Telecom Corp.* (1992) decision, insurance should also be considered capital, at least regarding the creditors with access to these funds.⁹¹³ This opinion has also emerged in Sweden.⁹¹⁴ Insurance offers readily available funds to satisfy these creditors. If the business is well insured against the typical negative risks it operates with, it has properly considered the risks involved. The arrangement cannot be viewed as reprehensible then because, instead of placing the capital in the corporation, they have contracted an insurance company to cover certain risks. Thus, they have not forced the negative risks on the creditors with a unilateral decision but have appropriately paid someone to carry those risks. Without insurance, the corporation carries the same negative risk, and payment can be taken from its property.

Finnish case law has addressed the significance of insurance in other compensation situations, specifically when discussing tort liability. Two cases involving fire damage from roofing installations considered the lack of insurance as prohibiting the liability. In KKO 1994:5, the damaged party had neglected the contractual obligation, mandating insurance coverage. This violation prevented it from claiming the damage. In KKO 1991:176, the party suffering the damage had insurance, and during negotiations, they specifically addressed its existence, which prevented the moderation of the compensation amount. Perhaps the discussion during contract negotiations was interpreted to mean that both parties had accepted the insurance amounts, especially the amount of one's own risk, in the insurance terms. The damaged party had already received some compensation from its own insurance, lessening the liability of the tortfeasor, which meant that the amount was not unreasonable.

These decisions do not offer exactly the same view as the arguments I have brought forward here. They do highlight the significance of insurance as proper preparation. In the KKO 1994:5 decision, the connection between the insurance and available compensation was more clear. The insurance should have

913 Similarly, see *Barber* 1981 at 394–395 and *Millon* 2007 at 1377–1380. The connection between assets and insurance was also recognized in *Walkovszky v. Carlton* (1966) at 419–420 and *American Trading & Production Corp v. Fischbach & Moore, Inc.* (1970).

In Finland, support could be derived from the moderation of tort amounts. In this context, neglecting insurance shows a lack of proper preparation. Allowing moderation in such a situation would allow the tortfeasor to indirectly benefit from neglecting insurance.

914 See *Hellner* 1964 at 166.

been in place. Had it been in place, it would have provided compensation to the damaged party. Thus, the party that had neglected taking the insurance had to suffer the consequences. The decision is hard to connect to the discussion here since there was a clear contractual obligation to be insured. In addition, both decisions were such that the damaged party had or should have had insurance.

Subordinated loans, hybrid bonds and binding guarantees from owners or from the corporate group should also be considered capital.⁹¹⁵ No doubt, these fill the same requirements as insurance does, providing readily available compensation. If inadequate resourcing is understood as part of the arrangement to minimize asset exposure to risks, then it should be noted that these instruments do the opposite. They expose assets at risk and speak to the legitimate and *bona fide* intention behind the use of the entity.

In practice, the assessment of the debtor's financial state is usually difficult since reliable information is hard to come by.⁹¹⁶ The creditor has no access to the bookkeeping of the debtor and must settle for information provided by the debtor and public financial statements. In addition, the debtor might have little motivation to keep accurate accounts in a sham corporation or a business in a crisis.⁹¹⁷ Even if kept correctly, the business lives on, and the public statements are only historical information.⁹¹⁸

6.3. Shareholder-Provided Resources – A Sign of Good Intentions?

The pattern in which shareholders fund the corporation might tell us something of the purpose behind the arrangement. There is no case law support for this in Finland, and the following analysis is mostly based on Swedish influences, though some support could be derived from other jurisdictions also. Although this is not authoritative support for the interpretation, the logic behind the argument is compelling and could be accepted and should at least be considered in Finland.

The basic structure of the argument comes from the earlier mentioned case NJA 2014 s. 877.⁹¹⁹ In that case, the shareholders provided the company with minimal

915 See *Nerep* 2015 at 25 discussing SOU 1987:59.

916 See *Koulu* 2009 at 155.

917 See *Koulu* 2009 at 155.

918 See *Kaisanlahti* 1996 at 239–240.

919 Another good example with similar asset transfers would have been *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014). In it, the court found that “the evidence supports the district court’s finding that the LLC had inadequate capital due to manipulation by its member, a publicly traded corporation, and that Appellant used its position to control the amount of money that would be transferred to LLC, and to decide which bills of LLC would be paid with transferred monies.”

assets that matched the realized expenses. At the same time, there was the easily foreseeable risk of legal costs from the trial, and the company had no other sources of cash flow. It is easy to argue that the company was not sustainably able to meet its obligations. It was reliant on the will of the shareholders to provide it with funds, and the shareholders were under no obligation to do so. Clearly, the pattern here shows that the purpose of the arrangement was to break the symmetry of the rule on trial costs compensation. This conclusion was easy in the decision because the company had no business other than the trial and no other income, and the funds provided went directly to pay the attorney of the corporation. All the pieces fit together in a manner that leaves no other reasonable explanation for the purpose of the arrangement.

Another Swedish case worth noting is NJA 1982 s. 244, where the payment pattern and financial reporting gave creditors the impression that the parent company was liable.⁹²⁰ The parent had also informed creditors that the subsidiaries would have their own substance, but their operations would be controlled by the parent. In NJA 1947 s. 647, the Swedish Supreme Court gave significance to the fact that the corporation could not have operated its business without continuing financial support from the shareholders. All of the owners readily provided the corporation funds, although no agreement existed to compel them to do so. This was interpreted as a sign that the corporation was not on economically solid ground, which in turn, supported holding the shareholders liable.⁹²¹

The same situation has come up in the United States also. In *United States of America v. Jon-T Chemicals, Inc.* (1985),⁹²² the parent corporation (Jon-T Chemicals, Inc.) argued that the subsidiary (Jon-T Farms, Inc.) should not be considered undercapitalized because it had virtually unlimited access to credit in the form of loans from its parent. To this, the court responded: “In our view, Chemicals’ argument misses the point. The underlying question is whether Farms was an economically viable, independent entity or whether it operated merely as the adjunct or alter ego of Chemicals. The fact that Farms continually had net operating losses and survived due to massive and ongoing transfusions from Chemicals does not indicate that Farms ever stood on its own two feet. Quite the contrary; it reinforces the district court’s conclusion that Farms did not have any separate financial existence.” It is important to note that these loans amounted to seven million dollars, were made without

920 About the case, see also *Ramberg* 1990 at 252–257, who sees the case as an assumption of liability.

921 For more about the undercapitalization in the decision text, see *Moberg* 1998 at 62–64.

922 See also *Gartner v. Snyder* (1979), *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014) at 465–466, *Macey – Mitts* 2014 at 129–130 and *Sparkman* 2016 at 371–374.

corporate resolutions authorizing the loans and without demanding any collateral or interest.

Birbara v. Locke (1966) demonstrates the opposite situation.⁹²³ A publicly held corporation purchased a private corporation that had fallen in distress due to changes in taxation laws. The new parent corporation then injected the subsidiary with funds in the form of loans. Absent of any evidence to attempts at personal gain at the creditors' expense, or of any asset flow from subsidiary to parent for that matter, these loans were not viewed in support of piercing. The difference from the *Jon-T Chemicals, Inc.* case is obvious: these loans were made to save the business, which was in financial distress due to business-related reasons. The intention behind the loans was clearly to rejuvenate it as a profitable business on its own. In the *Jon-T Chemicals, Inc.* case, on the other hand, the parent systematically loaned to the subsidiary to cover expenses resulting from all of its operations, and all the while, the benefits of the operation befell the parent. The intention behind it was clearly to run a supportive operation that was not profitable in itself but reasonable through a symbiotic relationship with the parent.

The comparative look reveals something useful here. It is usually considered a sign of good intentions when a shareholder provides a company in a solvency crisis with new funds.⁹²⁴ After all, this can be extremely risky. What, then, objectively discerns a legitimate attempt to save the business from an abusive intention? Is the arrangement in such totality that the corporation's existence benefits only another party in the arrangement? If so, the additional funds given by a shareholder can fit the pattern of the arrangement.⁹²⁵ The shareholder benefits from keeping the arrangement afloat until the big risk meant for isolation through the arrangement realizes. In this case, the company must be operated so that it is constantly reliant on the shareholder-provided funds, even though it could develop its operations to allow it to survive on its own.

For example, the shareholder controlling the intercorporate relationships could make the pricing of contracts between the corporations such that it would allow both corporations to operate profitably, or at least without a loss. In such a situation, the shareholder has made the conscious choice of operating the other corporation at a loss, only providing it with the minimum amount of resources required to keep the risk isolation arrangement afloat. If the additional investment is only large enough to cover the losses or to pay the creditors—with whom the co-operation is essential for the continued existence of the arrangement—then there is no evidence of

923 See also *Metroplex Mailing Services, LLC v. RR Donnelly & Sons Company* (2013).

924 Expressly in *Barlow v. Budge* (1942) at 442–443.

925 As in the *United States of America v. Jon-T Chemicals, Inc.* (1985).

goodwill and these payments should be considered to be only the maintenance cost of the abusive arrangement. If the additional investment is large enough to allow the corporation to develop its functions toward a level where it can operate sustainably, then it should be considered an attempt to save the corporation.

The view expressed in the analysis of debtor's dishonesty is in contradiction here. Vento stated that if the level of risk to the creditors does not change with the actions taken, the action is always acceptable.⁹²⁶ We are not concerned here with the acceptability of the action itself, however. No doubt, these payments are acceptable and necessary, and their pattern—not the individual actions—needs to be viewed. *Does the pattern show that funds are provided to fulfill choice obligations to keep the arrangement afloat?*

These payments should be considered the cost of keeping the limitation arrangement afloat. Even if this situation is present, applying piercing also requires additional criteria. Even if the shareholder's contribution cannot be considered an attempt to save the business, it still does not prove the requirements of veil piercing. With this last bit of analysis, I have attempted to prove that the shareholder's additional investments in the corporation do not necessarily act as evidence of good intentions. To put this in simple form, *if the corporation's need for additional funds from shareholders is the result of the same shareholder's choice to favor the other entities in the arrangement either by neglecting or making payments and the situation would have allowed the corporation to operate without losses, then the corporation is inadequately resourced, and the shareholder's investment in it should not be considered an attempt to save the corporation unless other evidence so proves.*

6.4. Disparity of Benefits and Negative Risks

The allocation of benefits and negative risks is significant for piercing the veil. The Krendls' third category included situations in which the lack of economic substance includes operating a corporation unprofitably or having the corporation do business exclusively with the dominant party so that all of the profits of the transaction are reaped by the dominant party or an entity of its choice. This entails two key elements: distribution of the benefits and the exclusivity of the corporate operations.

This view can be further developed through the judgment-proofing theory of LoPucki discussed in II.5.1. of this work. In it, he argues that substantially all judgment-proofing has a single essential structure: a symbiotic relationship between two or more entities, in which one of the entities generates disproportionately high risks of liability and another owns a disproportionately high level of assets. Through the contract that unites them, the two entities allocate the gains from

⁹²⁶ Vento 1994 at 236–240.

judgment between them. Typically, the asset-owning entity guarantees the payment of selected contract obligations of the liability-generating entity (the “operating entity”) necessary for the latter to continue in business. The contract types include at least the following: lessor-lessee, secured lender-borrower, buyer-seller, franchisor-franchisee, licensor-licensee and parent-subsiary.⁹²⁷ All the veil piercing cases that have emerged in Finland thus far can be explained within this structure of judgment-proofing.⁹²⁸ Still, the wording of the piercing test from KKO 2015:17 does not limit itself to judgment-proofing situations.

In KKO 2017:94, the business was divided into two entities, and the contractual relations between them enabled the corporation holding the assets to obtain the potential profits of the business practiced in a symbiosis. It could not have operated the business without truck drivers, and it rented those drivers’ work input from the other corporation in the arrangement. The corporation thus got the ability to practice its business and generate profit from the symbiotic relationship. The other corporation in the arrangement only held the workers’ contracts. The rent agreement between them was construed so that the renting corporation could not generate profit or operate sustainably. It was thus given none of the benefits in the symbiotic arrangement, whereas the other corporation was given all of them. The allocation and inadequacy of resources was reached through contract pricing.

As for the risks, the asset-holding corporation was secured. In case of a reduction in its transportation contracts, it would only hold the asset maintenance costs and the loss of revenue. The other company, however, held all the legal obligations related to employees, claims for unpaid wages and administrative fees. There is a clear disparity of risks here. However, in the case, this was not enough by itself. The case presented a clear manipulation of the contract prices and systematic neglect of taxes and other administrative fees to amass credit in the company. When the crisis occurred, the decision was made to let the corporation bearing the negative risks claim bankruptcy. All this combined created the impression that the whole operation was a designed and systematic attempt to isolate negative risks into separate entities from the benefits of the business. Absent a plausible other explanation for the arrangement, the corporate veil was pierced.

Another excellent example of this disparity is the NJA 2014 s. 877 case discussed earlier in the inadequate resourcing part of this work. In it, the two shareholders founded a corporation to participate in a trial of its initiative, but the corporation had no resources. When needed, the shareholders provided it just enough funds to pay for attorney costs. Similar to KKO 2017:94, they manipulated the resource levels in a manner that allowed the corporation to continue its operations and left the ultimate costs to the creditor. The risks of the trial meant that the loser would

927 See *LoPucki* 1998 at 149.

928 As demonstrated in II.5.1. of this work.

have to pay the winner's trial costs. In the corporation, there were no assets, so the negative risks of the operation were all with the corporation and ultimately with the counterparty to the trial. Yet all the benefits, meaning the funds receivable should the claim succeed, would be freely utilizable to the shareholders, although they were also within the corporation in form. The difference is that the NJA s. 877 situation was an all-or-nothing situation in which there would either be benefits and no costs or only costs and no benefits. In this sort of arrangement, the disparity exists just by placing this dual chance in a corporation and eliminating the negative risk.

Through these cases, I would determine the allocation disparity as significant for veil piercing as follows:

- 1) systematic amassing of credit and/or negative risks for one entity;
- 2) placement of assets on another entity;
- 3) business operation practiced in symbiosis between the two entities, e.g., one cannot operate without the output of the other; and
- 4) the arrangement and its operation are not explainable through a valid business reason.

Now this reasoning is remarkably close to the judgment-proofing structure.⁹²⁹ The addition here is that we are not necessarily concerned with only judgment creditors but also possibly with other creditors that make their claims with a delay. This would include at the least the tax authorities as well as the pay security authority. The basic elements are the same, however.

There are some similar issues related to this situation in the Swedish legal literature, and it would seem useful to discuss them here. In Sweden, some older case law has given relevance to whose benefit the business is driven.⁹³⁰ This is rather obvious and merits no further comments. *Torsten Sandström* sees the possibility of holding the shareholders liable when they manipulate the factual circumstances behind a corporate transaction and when this manipulation causes the corporation the inability to meet its obligations.⁹³¹ Although his opinion is limited to transactions, it is important to note that the manipulation of circumstances should enable extensions of liability.

In Swedish case law, the NJA 1982 s. 244 decision holds facts matching the allocation manipulation. The parent held all the liquid assets, whereas the subsidiary handled the payments. The subsidiary was entirely dependent on the parent as to whether it could pay the bills, and the court found that the subsidiary was

929 Also, the assessment of closeness in the Asset Recovery Act gives emphasis to similar factors. For example, it remarks the right to the profit of another. Admittedly, there is no such right *per se*, but only in fact. The closeness section also mentions practicing business through another entity or establishing a foundation for the sole benefit of the corporation. I would dub these as earlier mentions of the symbiosis I have discussed here. See HE 102/1990 vp at 45.

930 NJA 1925 s. 652 and NJA 1928 s. 57. See also *Svensson* 2010 at 244–248.

931 *Sandström* 2015 at 6.

systematically kept this way. The parent even transferred valuable assets from the subsidiary to itself. This, among other issues, was used to conclude that the subsidiary was not an independent corporation from the parent.

Some distinguish whether the corporation operates to serve the direct interests of the shareholders more than to create profits within the corporation.⁹³² It would even seem plausible to claim that the corporate purpose of creating profit for the shareholders is not realized in these situations. If the corporations are in a symbiotic relationship, the supporting corporation operates to the benefit of the other corporation. Naturally, that other corporation can be the parent entity, but not necessarily. Even if the two corporations have the same shareholders, it is questionable whether the corporate purpose can legitimately be realized through another corporation as an intermediary, e.g., indirectly.

Analogous support for considering the benefit allocation is strong. When assessing tax avoidance, some emphasis is given to the benefit allocation.⁹³³ The attempt is to locate the entity in which the benefits materialize and tax that entity, even if said entity is not the one that should formally be taxed. The Act on Compensation for Environmental Damage also considers benefit allocation. The preparatory works for the act note that there may be situations in which environmental damage is caused within an activity that is practiced for the benefit of another. Then the other party, in reality but not formally, is the operator of the activity as intended by the act.⁹³⁴ Enforcement Code 4:14 names the benefits received by the debtor as one of the objective factors hinting toward the arrangement being artificial. I would conclude that the allocation of benefits to an entity that does not carry the negative risk in the arrangement universally supports liability in the analogous doctrines. Even in the evaluation of the closeness of a corporation in an asset recovery context, significance is given to the one who reaps the benefits of the operation.⁹³⁵

In the Finnish legal literature, the separation of benefits and risks has also been thought of as significant. *af Schultén* sees the allocation of benefits as significant when piercing. If the subsidiary operates in its own name but the whole group or the parent benefit, the subsidiary is operating on the parent's account. He goes as far as to suggest placing the burden of proof on the parent to show that the subsidiary is used in a loyal manner. This would apply to situations in which the subsidiary's benefits are allocated to the parent, the negative risks remain with the subsidiary and the subsidiary is inadequately capitalized.⁹³⁶ The benefits are relatively easy to transfer, even though several restrictions do exist. Under- or overpriced contracts or dividend

932 See *Andersson* 2014 at 1. See also *Hellner* 1964 at 166.

933 See *Myrsky – Råbinä* 2015 at 358–360.

934 HE 165/1992 at 26–27.

935 See *Tuomisto* 2012 at 24.

936 See *af Schultén* 1984 at 96 and 113.

payments are old and known methods to this. Their interpretation is ambiguous, though, and using them to strip the corporation of assets adds yet another level of complexity to the piercing cases, thus reducing the probability of being caught. In case law, the allocation of benefits was considered in the decision of KKO 2017:94. In it, the appellate court allowed for piercing partly because the arrangement could be explained as reasonable only because one corporation received the benefits and the other carried the negative risks.

In the United States, the allocation of benefits does come up. *Krendl* and *Krendl* hold it as a necessary requirement for piercing. Otherwise, there would be a potential for suits against parties with only remote relationships with the corporate wrongdoer.⁹³⁷ In *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014),⁹³⁸ the court stated that the manipulation of assets and liabilities between the member and company so as to concentrate the assets in the former and the liabilities in the latter can be suggestive of improper use of the LLC as well. It is also arguable that the unity of interests required by some piercing tests means that businesses were engaged in a joint effort to accomplish the same purpose.⁹³⁹

The purpose of the piercing doctrine remains unclear in the US. *Thomas K. Cheng* has suggested in his analysis that the purpose of the doctrine is to prevent unjust enrichment at the expense of the creditors.⁹⁴⁰ This view is compatible with the benefit allocation argument presented here. Someone receives the benefits of a symbiotic operation, and this results in unjust enrichment. Asset stripping is one of the more common behaviors the courts use to fulfill the impropriety requirements of piercing decisions. Asset stripping means emptying the formally liable corporation of assets and allocating them in another entity's or the shareholder's possession.⁹⁴¹ This, in part, would support the characterization as unjust enrichment. Regardless of the characterization, asset stripping seems to support piercing in both Finland and the US.

In the decision UfR 1997 s. 1642,⁹⁴² two companies had organized music festivals together. One operated ticket sales and the other operated beverage

937 *Krendl – Krendl* 1978 at 24.

938 at 458. See also *Metroplex Mailing Services, LLC v. RR Donnelly & Sons Company* (2013) at 898 stating that veil piercing requires the party claimed liable to have directly benefitted from the corporate arrangement. See also the older case, *Pepper v. Litton* (1939). In the literature, see *Vandekerckhove* 2007 at 178 and *Cheng* 2011 at 36–37 and *Sparkman* 2016 at 375–379 and 398–399.

939 *Butler v. Adoption Media, LLC* (2007) at 1067.

940 See *Cheng* 2010 at 500.

941 See *Pepper v. Litton* (1939). In the literature, see *Vandekerckhove* 2007 at 178 and *Cheng* 2011 at 36–37 and *Sparkman* 2016 at 375–379 and 398–399.

942 For a similar case, see also NJA 1975 s. 45.

and food sales. The ticket sales company was constantly short on cash, whereas the restaurant company had a steady cash flow. Cash was constantly transferred from the restaurant company to the ticket company to cover the festival's expenses. Due to the hectic circumstances of a three-day festival, no accurate records of the lent sums were available. This lack of proof was interpreted in favor of the claimant, and veil piercing was awarded. Additionally, the restaurant company acquired the property of the now-bankrupt ticket sales company without compensating the goodwill value the property had due to their joint operations. The Danish Supreme Court found that the economic operations of the companies were combined to a meaningful degree, and the division of tasks allowed them to unequally distribute profits and negative risks. Both companies were held liable for the bankrupt ticket sale company's debt to the tax bureau and customs. The allocation of benefits is therefore a worthy consideration in Denmark, though the decision remains rather unique.

In the UK, the courts have given significance to the economic integration of the corporations when placing liability. Thus, the effects of symbiosis to liability appears there also. Unfortunately, these decisions are not veil piercing decisions. On the contrary, the courts take extra care not to use veil piercing.⁹⁴³ That being said, the factor is not unheard of in veil piercing either. In older case law, the parent corporation treated its subsidiary's profits as its own supported liability.⁹⁴⁴ However, in *Adams v. Cape Industries Plc* (1991) the court found that the business of the corporation might have been run entirely to the practical benefit of the entity sought liable without exposing that entity to known tort liability. This was interpreted as an inherent right of the commercial actors according to English law, and it created no basis for liability.

The analysis thus far would suggest that operating at market value would reduce the chances of piercing.⁹⁴⁵ Deals with persons close to the corporation need to be made according to the at-market-value standard. The terms of the contract need to resemble those that would have been reasonable if the parties did not have a close relationship, although the close parties can safely give each other somewhat more favorable terms. This, in part, prevents abusing the close relationship to channel improperly large benefits from the corporation. Contracts that differ from the standard can be deemed unlawful distribution and the payments returned to the

943 See *Chandler v. Cape Plc.* (2012) and *Thompson v. The Renwick Group Plc* (2014). See also *Mujib* 2018 at 394.

944 *Smith, Stone & Knight Ltd v. Birmingham Corporation* (1939).

945 Similarly in the US, see *Collet v. American National Stores, Inc.* (1986) at 285–287.

corporation.⁹⁴⁶ It is entirely possible that only part of the benefits of the division result from the transfer of assets, whereas the rest result from the isolated negative risk, i.e., the chance of bankruptcy in the UfR (1997 s. 1642) case above. The deviation from market value could be interpreted to support the finding of reprehensible intent to avoid exposure of assets. If the price is set to reflect the success of the corporation holding the risk, there is nothing inherently wrong in it. However, if this is done in a way that allows the profits to be siphoned out of that corporation based solely on the contract, then it speaks to the existence of a reprehensible symbiotic relationship and supports piercing.⁹⁴⁷

6.5. Commingling and Confusion

Commingling and confusion refer to situations in which the operations of the entities are intertwined and mixed with each other to the point that it is hard or impossible to determine who the actual operator is. Commingling means that the companies utilize the same resources interchangeably without formal agreements on their transfer from one to the other. It can also include situations where the same persons are employed in both corporations. Confusion, on the other hand, refers to how the entities interact with third parties. If the interaction creates an ambiguous image as to the real operator, confusion is present. These both support the finding of control and somewhat support deeming the conduct unacceptable.

The *commingling of funds* means that the funds of the controller and the corporation(s) in the arrangement are mixed. They are not kept separate as they should be. On the other hand, the funds can be kept separate, but they are used interchangeably without formal transfers. For example, the expenses of the parent are paid from the account of the subsidiary, or the subsidiary has no bank account of its own.⁹⁴⁸ A difficult line drawing could result from the common practice of centralized corporate group accounts. The answer should be looked for in the funds' terms of use. If the funds are distributed arbitrarily without business reasons and to the detriment of the creditors, the use supports piercing. If the distribution is controlled and requires certain conditions to be fulfilled, the funds are hardly commingled, as there are clear rules for their use. Alternatively, the shareholder owner might withdraw large sums from the company whenever a personal need

946 See *Rasinaho* 2016 at 214–216.

947 Similarly in the United States, see *LoPucki* 1998 at 153–154 and *Collet v. American National Stores, Inc.* (1986) at 281 and 285–286.

948 It should be noted that the existence of separate accounting, bank accounts and assets should not in itself preclude piercing and does not mean that there is no commingling. The accounts can be used interchangeably and the asset location manipulated. See *KKO* 2018:20 and *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014) at 466–469.

arises.⁹⁴⁹ As a result, an examination is unable to determine which funds belong to which entity, as they have shown a capability of using them interchangeably. This hints that the corporation has not had a legitimate business purpose separate from its controller or other corporations used in the arrangement. This supports piercing the veil.⁹⁵⁰

This sort of commingling of finances is a common factor in piercing cases. The earlier-mentioned Danish decision UfR 1997 s. 1642 is a well-known precedent in Denmark. Sweden has its own similar case,⁹⁵¹ and commingling of finances is one of the most often-cited factors in piercing decisions in the United States.⁹⁵² One court even states that if two entities with common ownership failed to follow legal formalities when contracting with each other, it would be tantamount to declaring that they are indeed one and the same.⁹⁵³ Moving money in between the companies and even shareholders without formal contracting seems to favor piercing in many a jurisdiction. It should be noted that there are specific norms to combat these sorts of transactions, although they need not necessarily exclude piercing.

In the US, proof of commingling of funds or other assets may be used to illustrate the domination of the entity or the controlled entities' status as an alter ego.⁹⁵⁴ This factor has been emphasized by the courts since the early days of the doctrine.⁹⁵⁵ It may also be considered under the observance of corporate formalities, as there must be records on the use of corporate assets.⁹⁵⁶ Even personal guarantees have sometimes been cited in support of veil piercing.⁹⁵⁷ Guarantees should usually speak against piercing and not in support of it.⁹⁵⁸

949 Strictly with veil piercing in mind, the shareholder-owner should arrange for a regular salary or a dividend instead in order to avoid claims of commingling. This argument was presented in regard to the US system by Bainbridge (2000 at 46), and I foresee no reason why it should not apply in Finland also.

950 See *Huttunen* 1963 at 156. He sees no reason to adopt commingling as a justification for piercing when the commingling has benefitted the corporation at the expense of the shareholder. Huttunen does recognize the situation in which the shareholder benefits at the expense of the corporation, though he remains silent on the subject.

951 NJA 1975 s. 45

952 *Oh* 2010 132–139 and *Thompson* 1991.

953 *Trustees of Village of Arden v. Unity Construction Co.* (2000) at 3, *NetJets Aviation, Inc. v. LHC Commc'n, LLC.* (2008). See also *Sparkman* 2016 at 379–381.

954 *Huss* 2001 at 115 and *Sparkman* 2016 at 417–419. See also *American Trading & Pro. Corp. v. Fischbach & Moore, Inc.* (1970).

955 *Berkey v. Third Ave. Ry. Co.* (1926), noting that wages of employees such as motormen and conductors were paid by the subsidiary itself. See also *State v. Swift & Co.* (1945) and *Consolidated Sun Ray, Inc. v. Oppenstein* (1964).

956 See for example, *Soderberg Advertising Inc. v. Kent-Moore Corp.* (1974) at 732–733, *Miles v. CEC Homes, Inc.* (1988) at 1024–1025, and *Vanderford Co., Inc. v. Knudson* (2007) at 270–271.

957 See, for example, *Hamilton – Booth* 2006 at 402.

958 *Cheng* 2010 at 558.

However, they can be part of the pattern that shows a systematic choice of which creditors receive payment in a symbiotic corporate arrangement.

Even in the piercing-hostile United Kingdom, concealing the facts in an attempt to obstruct, obfuscate and deceive the court in its decision-making has allowed the courts to make certain assumptions in support of liability, albeit this possibility has more to do with interpreting the lack of evidence against the party who could easily have provided it.⁹⁵⁹ In *Prest v. Petrodel Resources Ltd* (2013), the defendant had withdrawn funds from the corporations he did not even formally own for personal expenses without any formalities. He treated the funds like he owned them. The Supreme Court did not address these factors in relation to piercing, though.

Continuing with the UK, commingling is cited in a few decisions. In *Wallensteiner v. Moir* (1974),⁹⁶⁰ Dr. Wallensteiner had several legal entities under his control. He made circular check arrangements through them and used their assets interchangeably and without reference to anyone. Combined with absolute control over the entities, this suggested that Dr. Wallensteiner should be held liable. Only one of the judges was ready to pierce, though, and liability was eventually placed on the basis of breach of directorial duties.

Commingling of employees means that the corporations involved in business share the employees. Again, examined in isolation, there is nothing wrongful about this. As part of the overall examination, though, it can be used as part of the pattern to achieve some unacceptable result.

When the employees are commingled, the results of work are assigned arbitrarily between the corporations in the arrangement. Between the corporations, there are no clear contracts or even orders specifying who the employees are working for at a given time. They are moved around informally and according to the will of the controller. Yet the work they do or where they work does not necessarily change. Leppänen argues that this sort of commingling supports finding the separateness of the corporations to be artificial, hinting that they do, in fact, form a single economic whole.⁹⁶¹ I would agree, though I need to update this view to match the piercing test adopted in this work. The changes are rather simple, though, as I would claim that the commingling instead hints that there is no genuine business purpose behind the separation of the operation into several entities.

959 See *Prest v. Petrodel Resources Limited* at 4, 15 and 44 and *British Railways Board v. Herrington* (1972) at 930–931. Similar considerations were expressed in the UfR 1997 pg. 1642 decision also, and the unclear factors should be interpreted against the party responsible for maintaining clarity.

960 The veil piercing considerations of the judgment are on pages 1013 and 1032.

961 See *Leppänen* 1991 at 297–303, Appellate Court of Turku 28.11.1986 no. 974 and Appellate Court of Turku 8.12.1989 no. 1121. See also KM 1992:32 at 372.

It could be argued, though, that the commingling of employees has significance as a criterion of its own, especially when piercing in labor-related situations—for example, pay security and employer duties. This is due to the conflict of norms and abuse approach to piercing I have adopted in this work. The nature of the abused norm or conflicting norms guide the overall assessment to emphasize facts related to the normal application of the norm. In employee relations, it is significant how the employees' work is attributed between corporations, and thus, it would be significant when piercing in an employment-related situation. In non-employment related situations, the commingling of employees could be cited in support of artificiality, too, but its impact is undoubtedly lesser.

Similar considerations have also appeared in Sweden. In NJA 1992 s. 375, the two corporations had a contract of co-operation. It allowed one of the corporations to utilize the staff, buildings and other material of the other. The staff functions were managed by one corporation in a group in the case NJA 1982 s. 244, though the court did not emphasize this fact in its liability decision.

An example would be in order here. In the case of the Appellate Court of Turku 8.12.1989 no. 1121, three companies were declared bankrupt, and all were deemed liable for unpaid wages. One of the companies denied liability since it had not employed anyone. The court still held it liable. The reasoning was that the employees had worked to the benefit of all the companies, and it was not clearly possible to indicate where the profits had materialized. In addition, all the corporations' offices were at the same place and they had the same owners and the same controller. The business and employment relationships in the case were so unclear that no formally responsible corporation could be designated.⁹⁶² The court deemed that the corporations formed a single whole and held all three liable.

Confusion as to the real operator entails situations where it is ambiguous who is really making the actions, who is the real operator. The expressions given to third parties are meaningful. The actor can be held liable if they have acted in a manner that allows the other party to assume that they are actually a party to the contract.⁹⁶³ If the corporate actions to the outside seem like the actions of another, there is confusion. Significance is given to the impressions of the targeted audience of the actions.⁹⁶⁴ Confusion can have an effect in two ways: It can create legitimate expectations toward the given appearance and, as a consequence, can lead to liability

962 See *Leppänen* 1991 at 298.

963 See *af Schultén* 1984 at 88 and *Leppänen* 1991 at 280.

964 See KKO 1958 II 43, KKO 1991:186 and KKO 2015:17. The audience was a creditor, the employees and the customers, respectively.

on the basis of general principles of private law. On the other hand, it can support finding the artificiality and control requirements of the veil piercing test, even if the confusion itself is not enough to incur liability.

An example case is in order, I think. Unfortunately, this has not appeared to be too significant in piercing case law. In the case KKO 1958 II 43, the CEO and board member of Länsi-Lapin Radio Oy had started a business called Länsi-Lapin Radio in another town. The corporation had created the impression that it owned the business using various public methods. Trusting this impression, a creditor had supplied items for the business. The creditor was entitled to collect from the corporation.⁹⁶⁵ Although the liability was due to legitimate expectations and not piercing, some guidelines can be derived from it. The corporation had created an impression to the public that it was the owner. From the outside, it had seemed as if the corporation was involved in the business. It had actively sought to misguide its contractual partner, who then developed legitimate expectations. With its actions, the corporation created the impression that it was liable for the obligations, and the creditor was allowed to trust the impression.⁹⁶⁶

A similar decision has appeared in Sweden also. In NJA 1982 s. 244, the creditors were allowed to trust the impressions created through payment patterns and financial reporting. The parent company also exercised intrusive control over the day-to-day operation of the subsidiary that the court deemed its operations as merged. Their operations seemed inseparable to outside parties, and the parent's payment instructions created the impression that the parent was responsible for the payments. The creditors were allowed to trust this impression. Arguably, some of the circumstances that created this impression would not suffice anymore, as concentrating fiscal functions on one corporation in a corporate group has become a common practice.

Support could be drawn from the United States, where commingling and confusion are well established, albeit controversial, factors in veil piercing.⁹⁶⁷ In the case *Zaist v. Olson* (1967), a person named Olson owned East Haven

965 For a comprehensive description of the case KKO 1958 II 43, see *Telaranta* 1960 at 325 footnote 147. He interprets the case as principal's liability for legitimate expectations created by a representative. Similarly in Sweden, see NJA 1928 s. 57 and *Svensson* 2010 at 246.

966 Kaisanlahti arrives at the same conclusion about the case. He goes on to emphasize how active Länsi-Lapin Radio Oy had been in creating the public impression. He also brings forth the economic view that the corporation had been able to acquire the contract performance for too cheap a price due to misrepresentation. Thus, the efficiency argument supported holding Länsi-Lapin Radio Oy liable. *Kaisanlahti* 1996 at 241–242.

967 See, for example, *Holland v. Joy Candy Manufacturing Corp.* (1957), *Steven v. Roscoe Turner Aeronautical Corporation* (1963) at 161, *American Trading & Production Corp. v. Fischbach & Moore, Inc., Sea-land Services, Inc. v. Pepper Source*, (1991) and *Birbara v. Locke* (1996) at 1239. In the literature see, *Georgakopolous* 2007 and those cited there.

Inc. and later founded three other corporations. All of them operated from the same address, had mostly the same shareholders and none of them held the mandatory general meetings. The corporations were managing a shopping mall construction project. All the construction work benefitted the owner of the land. At all times, one of the corporations held the title to the land, but Olson constantly changed the holder. Those contracting with the corporations could not be aware of which held the land. All the construction work was contracted in the name of East Haven, but that corporation never held the land. The court pierced the veil and held Olson and one of his corporations liable for the obligations of East Haven.

The Turku Appellate Court case I described when discussing the commingling of employees and the *Zaist v. Olson* (1967) case are good examples of the active controller of the corporate arrangement attempting to create an extremely confusing situation in which no one could be entirely certain who held what assets and who was liable for which obligations.⁹⁶⁸ The Turku Appellate Court decision found it impossible to identify the real liable party, whereas in the *Zaist v. Olson* case, the liable party was clear, but the owner of the assets was somewhat hidden.

Commingling has come up in the UK also. In *Gilford Motor Co. v. Horne* (1933), the company had no physical premise and was only located in a garage in Horne's home, and it used almost the same letterheads that Horne had used before. Also, the company had only two directors and shareholders: Horne's wife and his former colleague. The Court pierced the veil citing these factors among others. The case is old and hardly reflects the current view on formalities. It was introduced here to demonstrate that commingling factors are not unheard of in the UK. Similar factors were cited in support of a piercing claim in *Adams v. Cape Industries Plc* (1991), but the court eventually gave higher significance to the motives behind the arrangement. The motive was to establish a corporation with a genuine business run by a third party. Although the initial impulse behind transferring such business interest to a genuine third party came from the certain future tort claim directed against the parent.

The same sort of argumentation can be seen in the KKO 2015:17 decision. Arctecho's business was practiced on Verkkokauppa's web page without separating it from Verkkokauppa's own business. The business targeted Finnish consumers exclusively, and after purchase, confirmation e-mails were sent by an employee of Verkkokauppa. Arctecho was not even mentioned in the e-mail. From the customers'

⁹⁶⁸ See also *Sea-land Services, Inc. v. Pepper Source* (1991) and *Bernadin, Inc. v. Midland Oil Corp.* (1975).

perspective, it seemed as if the business was, in fact, Verkkokauppa's.⁹⁶⁹ There was a commingling of employees and confusion as to the operator. These factors helped the Supreme Court find that the whole Arctecho endeavor had been made for the improper purpose of neglecting the remunerations.

The same that was said of how similar control structure applies to commingling and confusion also. The wordings of the analogous doctrines are general enough to allow for the examination of commingling and confusion. It could be included in all the analogous doctrines' applications, though none of them explicitly assert it as significant. Case law proves the significance of commingling and confusion, as analogous support is hazy. Perhaps piercing case law can provide some new tools for the analogous doctrines in this regard.

6.6. Artificial Division of an Existing Business

I have discussed artificiality in relation to veil piercing in V.4.2. of this work. Artificiality in legislation usually refers to the disparity of the legal form and the economic reality. Enforcement Code 4:14 and the tax avoidance provision both utilize this view. Similar condemnation can also be found with environmental liability.⁹⁷⁰ These doctrines examine the standard and accepted use of the given legal instruments and assess whether their use in the case matches these standards. With the environmental damage liability, some support was found for the view that piercing should be accepted more readily when the damage is caused by operations that used to lie with the benefitting entity. *With the artificial division of an existing business, I refer to situations in which the business was originally practiced in one entity and later a part of it; holding an especially high risk for costs was transferred to a separate entity without the reality of the operation changing in any way.* In this work, the artificial division of business refers to these situations exclusively. It can be used to show the reprehensible nature of the arrangement. Obviously, the artificial division of an existing business also fulfills the artificiality requirement. Any arrangement where the business is separated into multiple entities from the beginning might also be artificial, but not artificial division of business as understood here.

The artificial division of business concerns especially corporate groups and intercorporate relationships. It means situations in which the business conducted in one corporation is divided so that part of it is transferred to another corporation, either a new one founded for this purpose or to an existing one if it allows for the evasion of negative risk. This is usually a perfectly normal business action. What

969 See KKO 2015:17 at 2–4 and 32.

970 See HE 165/1992 at 26–27, where the stance against the evasion of liability includes both the transfers of the business and artificial isolation arrangements.

makes it artificial is the lack of legitimate business purpose behind the division. The division cannot be reasonably explained with reasons other than avoiding an obligation or isolation of negative risks. The corporate actors' information is what separates the artificial division of an existing business from setting up the division from the beginning. Over the course of the business, some of its parts are found to be more prone to negative risk than others. The existing knowledge of the negative risks and potential liabilities makes dividing an existing business into separate entities more easily reprehensible.⁹⁷¹ The damage is simply more easily predictable, making it more plausible that the purpose of the division was inappropriate. No assumption should be made, though. The fact that operations used to lie with the other entity does support the finding of reprehensibility, but the claimant still needs to show reprehensibility, i.e., with intent to harm. Division alone is not enough to pierce the veil, even when there are no acceptable economic reasons behind it.⁹⁷² Artificial division is but a situation of such a nature that it easily damages creditors. As such, the controller is, or at least should be, aware of this probable consequence.

Both of the recent major veil piercing cases involved this sort of situation. In KKO 2015:17, the subsidiary was deemed to operate a part of the parent's existing core business.⁹⁷³ The especially negative risk-prone operations were operated by the subsidiary. In KKO 2017:94, the existing business operation was divided into the negative risk-bearing and benefit-bearing entities, while the operation itself remained as it was. The changes were only formal. The fact that an existing operation was divided was not central in these decisions, though, but it was one factor in the total assessment of the facts of the cases. In connection to this factor, both decisions emphasized the fact that the supporting corporation's operations were tightly connected to the other corporation, and they were operated in symbiosis. Additionally, in KKO 2017:94, there was no evidence that the operations were meant to be developed into a sustainable and independent business.

To my knowledge, this criterion is a new construction and does not appear in the veil piercing literature. In case law, situations matching this do exist, however. For example, in Sweden, the earliest piercing case was about a tailoring business that was first practiced in the entrepreneur's own name and then transferred to an entity without changes to the business itself.⁹⁷⁴

This differs from the United States, where the artificial division of business resembles what is more commonly known as a single economic unit. The

971 Cf. the UK doctrine laid out in *Adams v. Cape Industries Plc* (1991).

972 See also *Leppänen* 1991 at 277. Although holding only one corporation liable when it is, in fact, part of a larger economic whole is dubious toward the rights of the creditors.

973 The relevance of the separate entities serving the business purposes of their controller was also recognized in KKO 1994:136.

974 See NJA 1935 at 81.

term in the legal literature in the US refers to operations where one single business is unnecessarily and abusively operated under several entities.⁹⁷⁵ The problem with this view is discerning legitimate intercorporate co-operation from artificial division. It basically needs a plethora of these other criteria before it can even be used to support piercing the veil, making it more of a veil piercing test than a supporting factor. The Finnish version itself is capable of contributing something meaningful to the piercing assessment.

Some discussion also revolves around the enterprise liability theory.⁹⁷⁶ According to the theory, liability should be placed on the entire business, regardless of how many separate entities it holds. Separate entities are disregarded when, in reality, they act under a unified interest. The separate entities are viewed only as agents of that interest. The theory is rarely seen in case law, but it is not unheard of.⁹⁷⁷ Often, enterprise liability theory and veil piercing could be used interchangeably.⁹⁷⁸

In the UK, the timing of the incurrance of the legal obligations and the use of corporate structure to avoid them is crucial.⁹⁷⁹ Veil piercing is applicable only when the corporate structure avoiding the obligation is created after the legal obligation already exists. This leads to a very different analysis than in Finland and the US. Dividing an existing business to evade future liabilities is verified as legitimate, no matter how probable or even how certain those liabilities are to arise.⁹⁸⁰ However, if the division would exhaust an existing claim or an obligation, it can be targeted with piercing. It remains debatable as to what an existing obligation is. In *Adams v. Cape Industries Plc* (1991), the parent shut down and transferred the operations of the liable subsidiary after a default judgment was given. The court determined the foundation of the first subsidiary as the relevant point where the existing liabilities were checked. The parent was not held liable, as the default judgment had not existed at that time.

Also, *Yukong v. Rendsburg Investments Corp.* (1998) demonstrates a flaw in the evasion reasoning. If the operations are transferred to a company that exists prior to the transfer, the reference point should not be the incorporation; it should be modified from the time of incorporation to the time a corporate

975 See *Hamilton – Booth* 2006 at 39–42, *Bainbridge* 2000 at 6. See also *Walkovszky v. Carlton* (18 NY2d 414 (1966) Court of Appeals of New York), *Holland v. Joy Candy Manufacturing Corp.* (1957), *Ampex Corp. v. Office Electronics, Inc.* and *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.* (1958).

976 See *Berle* 1947 and *Oh* 2011 at 132.

977 For example, *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.* (1958). See also *Mull v. Colt Co.* (1959).

978 Similarly, *Bainbridge* 2000 at 63.

979 See *Prest v. Petrodel Resources Ltd.* and *Cheng* 2011 at 37.

980 See *Adams v. Cape Industries Plc* (1991).

entity is utilized.⁹⁸¹ This problem seems to disappear with the *Prest* decision, as it words the evasion: “[A] company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.”⁹⁸² The wording *interposed* supports the inclusion of already existing corporations if using one allows for the evasion. The same argument should hold true in the Finnish system, though it has not been contested in Finland.

Yet another problem with the UK approach is determining whether a claim exists. Is a judgment required? Is a claim enough, or should we look at when the damage occurred? Certainty and preventing strategic behavior would dictate that the event that gives rise to the liability is used to determine whether liability exists provided that the company knows or should have known that the event might expose it to liability.⁹⁸³ This criterion of knowing is utilizable in Finland also. This is not an accepted view in the UK, though. In *Adams*, the parent was aware of the potential liabilities before setting up the second subsidiary, as it had previously settled such claims. Yet the veil was not pierced. In Finland, this should have heavily favored piercing.

In Sweden, some similar ideas exist within the dependence of a corporation criterion. To recap, this meant that the corporate operation is indistinguishable from the shareholders’ own operation and thus fulfills the shareholders’ interests directly rather than through generating profit within the corporation.⁹⁸⁴ Dependence is further divided into the dependence of management and dependence of operations.⁹⁸⁵ *Moberg* understood this to mean that the corporation’s business purpose is not independent of the shareholders.⁹⁸⁶ One can easily spot the similarities with the Finnish KKO 2015:17 decision, in which the Supreme Court argued that the parent corporation practiced one core part of its business through the subsidiary. The Swedish counterpart does not address whether that part was derived from existing business, though. Similar to my interpretation of the artificial division of business, the Swedish legal literature seems prone to interpret the dependence of the corporation as an indicator when assessing whether the corporate use is unfair or abusive.⁹⁸⁷ This sort of finding would support holding the arrangement as reprehensible.

981 *Cheng* 2011 at 39.

982 *Prest v. Petrodel Resources Ltd.* at 28 and 35.

983 See *Cheng* 2011 at 41.

984 See *Hellner* 1964 at 166, SOU 1987:59 at 132, *Moberg* 1998 at 76. For a critical view see, *Nerep* 2015 at 28–29.

985 See *Nerep* 2003 at 23–26 for a good description on the concept.

986 *Moberg* 1998 at 76–77.

987 See SOU 1987:59 at 132. Cf. *Nerep* 2015 at 28–29. *Nerep* rejects the use of dependence as an indicator of unfairness. If viewed in isolation, this is no doubt true. However, if the dependence is part of a systematic pattern of active design to avoid liability, then, in my opinion, it is meaningful in piercing assessment.

There is weak support in Swedish case law. In NJA 1975 s. 45, liability was established because the formal judicial characterization of the arrangement changed while the reality of the operation remained the same. The case was about a commission agreement between two corporations, where one was to run the operation in its own name for the benefit of the other. This practice included the benefitting corporation taking full responsibility for all the debts of the operation. This arrangement was desirable because of tax benefits. The corporations in the case had this agreement terminated and made a new contract stating that both were now operating independently. In reality, however, the operations did not change. At the same time, the benefitting corporation was no longer liable for the debts of the operation. This allowed the Supreme Court of Sweden to hold the benefitting corporation liable for some of the debts. This decision somewhat resembles the artificial division criteria I am discussing here. An existing operation is changed in judicial form, but no changes or only minor changes appear in the actual operation. Changes in judicial form can be the division of business functions into other entities or contractual re-characterization of a dependent entity as self-standing.

Artificial division could be used as a discerning factor when all the corporations practice some business. If the business practiced by the liable corporation has been transferred from the original corporation and the liable corporation provides services exclusively for the original corporation, the situation is no doubt artificial.⁹⁸⁸ Any deviation from exclusivity makes the assessment harder, though; reprehensibility still needs to be determined from other factors. Finding artificial division negates the legitimate business purpose argument in these situations.

Isolating the part of the business at especially high risk for costs and liabilities into a separate entity is economically beneficial to the business, but this isolation of negative risk might not be acceptable, even though it is economically sound. An acceptable economic purpose in these situations refers to reasons other than limited liability protection. No doubt, attaining the effects of the abused provision of law cannot serve to legitimize the arrangement.⁹⁸⁹ Even if the division can be reasonably explained only by the limitation of liability, it is still valid and acceptable as long as the controller acts in good faith and with loyalty toward creditors and third parties. The division is artificial then, but it is not improper; some other factor must be used to show the impropriety.

988 As was the situation in KKO 2017:94.

989 As I have discussed in V.4.2. of this work. Similarly in tax avoidance. See See KHO 2014:66 and *Myrsky – Råbinä* 2015 s. 351. See also *Tikka* 1972 at 217, who is of the opinion that the tax avoidance norms mainly cover cases where no purpose other than paying less tax can be shown.

The controller does not necessarily keep the original business corporation active. In so-called chaining,⁹⁹⁰ a person uses a corporation to conduct business, invests the profits to the business or channels them to personal use amassing debt to the corporation. When further amassing becomes overly difficult, the controller sells the business to another corporation under their control while leaving the liabilities to the old corporation. The operation is continued in this fashion, and the business is moved from one corporation to another. The business in its entirety should be liable for the damage caused, meaning all the corporations that once held the business should be jointly liable for the damage.

The legal literature in the United States refers to this phenomenon as “mere continuation.”⁹⁹¹ The successor company can be held liable for the predecessor’s obligations if the corporations are deemed essentially the same.⁹⁹² Although it could be argued in independent doctrine, it is utilizable within the piercing doctrine, as shown in the example below. The courts can hold either the new corporation or the shareholder/controller liable for the obligations of the old corporation. In the case *K.C. Roofing Center v. On Top Roofing, Inc.* (1991), one person operated a roofing business. He operated under different corporate names, amassing debt from suppliers and paying large sums to himself and his wife as salaries and rent. After the first corporation, he founded four more, having a total of five companies within five years, all of which were in operation for a year. Through the entirety of the operation, the business was conducted publicly under the name On Top Roofing, regardless of the name of the corporation that was officially responsible. When questioned, the shareholder said he founded a new corporation every time he felt the business needed a fresh start: “it is a very competitive business.” The court utilized the “instrumentality” veil piercing test as laid out in Missouri⁹⁹³ and established the unjust act part of the test by deeming the subsequent corporations as mere continuation.

The United Kingdom has taken a strange approach to mere continuation situations. They have prohibited using the same or similar name(s) as a company that has gone into insolvent liquidation within five years of the liquidation. Additionally, the use of such a name is only prohibited for those formally involved in the liquidated business as a director or shadow director. Anyone violating this could face personal liability for the company’s

990 About chaining corporations and veil piercing, see *Laine* 2011.

991 See *Hamilton – Booth* 2006 at 39. See also *Axtmann v. Chillemi* (2007).

992 See California *Butler v. Adoption Media, LLC* (2007) at 1063–1065.

993 *Collet v. American National Stores, Inc.* (1986) at 284–287.

obligations.⁹⁹⁴ This no doubt lessens misleading situations in which the legal entity conducting the business is changed but the name is not. This does not prevent mere continuation arrangements, but makes them more arduous and lessens the incentives to utilize these arrangements as they are unable to use the goodwill of the original company. Still, the solution reflects the formal approach to company law in the UK. Instead of forbidding the arrangement itself, they prohibit one objectively discernible key factor in it. This is no doubt a safe choice regarding predictability and legal certainty, though reliance on the name makes it a bit toothless and easy to circumvent.

6.7. Neglecting Corporate Formalities

Neglecting corporate formalities is understood here as conduct in which the controller uses the corporation without conforming to the formalities required by such use. This includes neglecting general meetings, keeping the minutes, bookkeeping, making written decisions and contracts and even self-contracting between the controller and the corporation while the controller represents it. Not too much weight should be given to these factors. At best, they can be used to support claims that the controller could act within the corporation without having to consider the interests of others. This capability, in turn, speaks to the existence of control over the corporation.⁹⁹⁵ It is in how this capacity is utilized that can show reprehensibility.

On the other hand, in neglecting hints of the subjective intentions of the controller,⁹⁹⁶ combined with commingling and confusion, one can derive that the controller has not considered the corporation as a separate entity. Finnish case law places no emphasis on this, but in the United States, some courts have pierced the veil due to the shareholder not treating the corporation as separate. This is done by utilizing the concept of estoppel.⁹⁹⁷

The inexistence of business purpose, however, cannot be derived from neglecting the formalities. A dependent corporation can just as well have an operating business. Whereas it is true that attempting to abuse the corporate form for one's own benefit has no incentive to abide by corporate formalities, it is not sufficient to rule out other plausible explanations. One must also keep in mind the objective of said

994 Insolvency Act 1986 Sections 2016–217.

995 Similarly in the US, see *Tzovolos v. Wiseman* (2007) at 839–841 and *Sparkman* 2016 at 387–392, especially at 388.

996 See KKO 2005:98 and KKO 2011:49. Open and honest co-operation with the authorities creates an assumption of the proper nature of the arrangement. Also *Linna – Leppänen* 2015 at 153 and *Marttila* 2006 at 777.

997 See *Powell* 1931 at 6§.

formalities.⁹⁹⁸ Most serve the informational needs of those with interests in the corporation, and neglecting them results in the non-enforcement of transactions or some other determined sanction. If some formality-serving creditor protection is neglected, this could support veil piercing.⁹⁹⁹ As such, neglecting formalities could help show some elements of misrepresentation or intent to mislead. Also, Company Act Chapter 5, Section 1 does allow the shareholders to skip some formalities when the decision is unanimous. Support for veil piercing should not be derived from using the possibility to shortcut those formalities. Neglecting some mandatory formalities could instead support veil piercing, though mostly with regard to control.

This issue about the purpose behind these formalities has been addressed in KKO 2015:81. The case was about consumer credit and collection. The credit agency and the collection agency both operated without a permit, and the claimant argued that this made their operation violate acceptable practices, which in turn would make the credit agreement void. The formality here is the permit required by the operation. The Supreme Court looked into the permit and deduced that it was for purposes other than regulating the relationship between the debtor and the creditor. Thus, neglecting the formal requirements did not make the credit agreement void. The decision aligns with the argumentation here, and its principle can be extended to piercing cases with little effort.

In the United States, the rise of LLCs—limited liability companies—has shifted much of the small businesses out of the corporate form. Compared to the corporation, these limited liability companies offer much more freedom to organize the management of the company. There are few mandatory formalities. The existence of this freedom meant that neglecting corporate formalities should be given less meaning when piercing an LLC veil, whereas in a corporate setting, the formalities are stricter and should have a bigger role in piercing.¹⁰⁰⁰ Thus, we arrive at a similar interpretation as in Finland.

Neglecting formalities offers flimsy support at best, although the KKO 2018:20 decision held that arranging the management, accounting and auditing in an appropriate manner and separately in the corporations involved speaks against piercing. I take it that these factors were especially significant in that particular case, as it was about accounting fraud, which itself sanctions following these formalities, and piercing was only one issue in the case. Additionally, these factors were not

998 Similarly in the United States, see *Cheng* 2010 at 553, who manages to express this idea in an excellent example: “If the entire body of shareholders decides to siphon off corporate assets for their own personal benefits, a requirement that the removal of assets be approved by a shareholder vote will not protect the creditors.”

999 *Cheng* 2010 at 553.

1000 *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* (2014), especially at 459–469.

neglecting formalities but were more about commingling and confusion. Thus, Finnish case law around veil piercing has not placed much, if any, significance on this factor. This is undoubtedly for the best, as a look into the confusing uncertainty around the subject in the United States shows an alarming example:

In the United States, neglecting corporate formalities is one of the most often cited considerations in veil piercing, although not that often in decisions where piercing was accepted.¹⁰⁰¹ This is strange considering the weak connection this criterion has with the damage.¹⁰⁰² At most, neglecting corporate formalities should be viewed as a sign of indifference, as there is no causal link between the damage and the neglecting of formalities; if you play fast and loose with formalities, maybe the court will think you play fast and loose with your bills also.¹⁰⁰³ On the other hand, Cheng characterizes neglecting formalities as a form of misrepresentation—a failure to convey to the counterparty that it is making a transaction with a corporation.¹⁰⁰⁴ Another critique of the doctrine comes from the apparent disproportion of the consequences compared to the neglect. Personal liability via piercing can be devastating, whereas neglecting a few formalities is hardly that harmful.¹⁰⁰⁵ Even if the formalities were observed, the companies likely could do the same actions, leading to creditor damage.¹⁰⁰⁶ Still, some courts view neglecting formalities as evidence of not treating the corporation as separate, and this would deny them limited liability protection. For example, in the *Victoria Elevator Co. v. Meriden Grain Co.* (1979), the court declares “[s]ince defendant did not treat the corporation as a separate legal entity, he should not be entitled to its protection against personal liability.”¹⁰⁰⁷ This view was utilized in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.* (1976). In the decision, the fact that shareholders and officers other than the alleged controller did not receive salary, dividends or fees from the company supported piercing. The lack of remunerations was used to show that they were nothing but figureheads. The controller instead withdrew funds from an undercapitalized business to the exact amounts that could be withdrawn from the company. The company was not treated as a separate entity but rather for the controller’s personal benefit.¹⁰⁰⁸ Courts have

1001 See *Thompson* 1991 at 1063 and *Oh* 2010 at 133.

1002 For an extensive discussion on this connection, see *Cheng* 2010 at 551–555. See also *Gelb* 1982 at 7–8, *Matheson – Eby* 2000 at 174–176, *Huss* 2001 at 113, *Marcantel* 2011 at 225, *Macey – Mitts* 2014 at 109 and *Sparkman* 2016 at 423–429.

1003 *Bainbridge* 2000 at 43. Similarly, *Millon* 2007 at 25.

1004 *Cheng* 2010 at 519.

1005 See *Millon* 2007 at 25.

1006 *Barlow v. Budge* (1941) at 443.

1007 At 513.

1008 See also *Gelb* 1982 at 8.

held that neglect alone is not enough to pierce the veil.¹⁰⁰⁹ Although the court did not explain why this mattered, I argue that this factor somehow hinted toward the controller not treating the corporation as a separate entity.

Between states, there are differing court opinions as to the weight of this criterion.¹⁰¹⁰ Instead, if neglecting formalities is to support piercing at all, the formalities not intended solely for the protection of shareholders should be excluded from the piercing assessment.¹⁰¹¹ In contrast, some courts have refused piercing when there has been severe neglect of the formalities.¹⁰¹²

It would be an understatement to say that the importance of neglecting formalities in veil piercing assessment is confusing and unclear. As a precaution, some states have directly commented on the issue in legislation. California has directly precluded neglecting meetings as a basis for member liability in limited liability entities.¹⁰¹³ Texas addressed the issue directly in its corporate statute that shareholders or others have no liability for any obligation of the corporation on the basis of several named veil piercing tests or due to the failure of the corporation to observe any corporate formality.¹⁰¹⁴ These opinions in the literature, as well as the court decisions, seem to allocate unnecessarily large meaning and effect to neglecting formalities. Using neglect to show intent would seem more fruitful than examining the causal link between the damage and neglect. Veil piercing is not the doctrine to combat neglecting the formalities. Instead, it targets abusive use of a corporation, the existence of which the neglect speaks of, albeit indirectly and only weakly. Neglecting formalities has also been used to show control over the corporation.¹⁰¹⁵

The issue is significantly less discussed in the other jurisdictions. In England, some mentions of neglected formalities appear in case law.¹⁰¹⁶ Their significance is not explicit, though, as they relate to the ambiguous façade considerations. In Sweden, I have found no analysis on this issue.

1009 *Soloman v. Western Hills Development Company* (1981) at 263–264.

1010 For example, *Consumer's Co-op. of Walworth Co. v. Olsen* (1988) states that neglecting formalities should not automatically lead to piercing. In Nevada, neglecting the formalities would not support a veil-piercing claim without evidence that the plaintiff had been harmed by these failures. See *Polaris Indus. Corp. v. Kaplan* (1987) at 877. In Georgia, failure to follow formalities is excluded as grounds for personal liability. See *Insituform Technologies, LLC v. Cosmic TopHat, LLC* (2013).

1011 *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat* (1999).

1012 *Zubik v. Zubik* (1967) at 271 and *Barlow v. Budge* (1942).

1013 California Corporate Code § 1710(b). See also *Huss* 2001 at 118, making the connection between corporate veil piercing and limited liability entities in this regard.

1014 Texas Business Corporation Act 2.21. This was adopted in 1989 after the questionable *Castleberry v. Branscum* decision where liability was based on its inequitable result alone. See also *Oh* 2010 at 121–123, *Sparkman* 2016 at 424–426 and *Peterson* 2017 at 91–93.

1015 *United States v. WRW Corp.* (1993) at 28.

1016 See, for example, the facts in *Gilford Motor Co Ltd v. Horne* (1933) and *Adams v. Cape Industries Plc* (1991). See also *Kershaw* 2009 at 74–76.

One must remember Company Act 5:1, which allows the shareholders to neglect the general meeting and make a unanimous decision. Especially in wholly-owned companies, this procedure is surely in common use. Still, the provision requires the decision to be written and signed, and the decisions are only made public to the shareholders. To neglect making a written decision can thus damage only the shareholders and should not support veil piercing. Keeping the minutes and holding a general meeting are provisions protecting the shareholders and their information gain, and neglecting them should not support veil piercing.

Self-contracting could be understood as the neglect of required corporate formalities and refers to situations in which the controller acts as the representative of the corporation and makes a contract with herself.¹⁰¹⁷ These actions are heavily restricted. First, the controller is disqualified to make such a contract as the representative of the company. The shareholders can make the contract decision, though, since they can take on matters that belong to the management by default. Shareholders can make a decision about self-contracting deals, and even a disqualified shareholder can take part in the procedure if all the shareholders are disqualified. In a wholly-owned corporation, self-dealing is possible. Since these deals need to be made according to the at-arm's-length standard, self-dealing contracts differing from this are easily deemed unlawful distribution. This, in part, prevents the abuse of the close relationship to siphon improperly large benefits from the corporation.

Besides these, one should examine whether the corporation has acted openly and honestly toward officials such as the tax authority and police.¹⁰¹⁸ Neglecting tax payments or employee-related payments, withholding information or lack of co-operation in a criminal investigation can be used to show the corporate arrangement's purpose as reprehensible. If payments are systematically neglected, the purpose of the arrangement is likely the isolation of negative risk and damaging creditors or systematic unconcerned operation for personal gain. Again, this could be proven false by showing a legitimate business reason. If the neglect results from poor business judgment, inability or failure of the business, they can hardly hint at ill intentions.

6.8. Conclusions on Supportive Factors

In this section, I focused on the so-called supporting factors of veil piercing, the objectively discernible facts. These are circumstances in corporate operations that

¹⁰¹⁷ This includes any legal action where the controller as a person and the corporation both have an interest.

¹⁰¹⁸ See KKO 2005:98 and KKO 2011:49 and the appellate court in KKO 2017:94. Open and honest co-operation with the authorities creates an assumption of the proper nature of the arrangement.

show or at least hint toward the fulfillment of the more abstract piercing requirements. I began the inspection by assessing how inadequate resourcing might evidence the unacceptable motives and artificiality of the arrangement. Inadequate resourcing referred to situations in which the corporation operates with capital that is clearly inadequate compared to the liabilities it is likely to face. The difficulty with this criterion is that the demanded level of resources is hard to determine. I examined the decision in KKO 2017:94 and made a thorough comparative analysis of the possible methods of determining the correct level of resources. This resulted in a failure to deduce an objective standard. I still managed to make the subjective standard more explicit and concluded that the resources are inadequate if the corporation cannot operate sustainably when accounting for reasonably predictable liabilities. The assessment also needs to inspect this from the perspective of the controller. If the controller reasonably, in *bona fide* thought the resources were adequate, they should be considered so. I also argued that anything that can be used to the satisfaction of the creditors should be considered a resource and that shareholder-provided assets commonly but not always speak of *bona fide* intentions.

Next, I addressed the disparity of benefits and negative risks. I defined this behavior through these elements: 1) systematic amassment of credit and/or negative risks on one entity; 2) placement of assets on another entity; 3) business operation practiced in symbiosis between the two entities, e.g., one cannot operate without the output of the other; and 4) the arrangement and its operation are not explainable through a valid business reason. This sort of arrangement speaks to the unacceptable motives and artificiality of the arrangement.

After this, I examined the commingling and confusion criteria. Commingling was defined through the commingling of assets and of employees. This refers to the controller using or assigning assets, employees or their work arbitrarily between the entities involved without regarding the entity to which they formally belong. This can hint toward the reprehensibility of the arrangement and control over the entities. Per confusion, I defined it as the inability to determine the real operator. This criterion emphasizes what the third parties perceive and the impression they get. If they get the impression that the operation was not that of the formal operator, this would support piercing.

I proceeded to discuss a pattern of artificially dividing an existing business. This is a new factor for veil piercing in Finnish literature, but it is backed by case law. With it, I refer to situations in which the business was originally practiced in one entity and later a part of it; holding an especially high risk for costs was transferred to a separate entity without the reality of the operation changing in any way. This supporting factor is especially vulnerable to the existence of legitimate business reasons, i.e., if the divided part of the business developed into something more than what it was when it was part of the original. The artificial division of an existing business speaks to artificiality and unacceptable consequences or motives.

Finally, I proceeded to inspect a very widely discussed piercing factor from the United States. Neglecting corporate formalities is controversial there, and it has also appeared in Finland a few times. Based on my analysis, this factor has little to do with piercing situations and would lead to a mountain of problems if adopted. Still, its significance could not be entirely explained away. Thus, neglecting proper documentation of transaction and contracts, not following the formal decision-making procedure, and even oversights in accounting could potentially play a minor role in support of piercing.

7. Who Should Be Held Liable?

7.1. Introduction

Now that we have established a test for veil piercing along with the supportive factors, I will proceed to examine who could be claimed liable through piercing. Before delving into this, a quick preliminary question should be addressed: at what point can the piercing claim be made?

Although bankruptcy typically brings the need to rely on veil piercing claims, it should not be considered a requirement or the sole environment.¹⁰¹⁹ If the formally liable corporation has not been found to be unable to meet the obligation, the claimant arguably has no concrete need for protection to make the piercing claim. Thus, the starting point should be that veil piercing liability be secondary.¹⁰²⁰ The corporation should be primarily liable for the damage, and only after it has been found unable to satisfy the claim, veil piercing could extend the liability to other parties. However, this was not adopted in the KKO 2015:17 decision. The original demand was to hold both corporations liable from the beginning without even examining whether the subsidiary could cover the claim, although the decision brings up the fact that the subsidiary's operations had been shut down after it was demanded payment.¹⁰²¹ It would thus seem that the inability of the formally liable corporation to meet the creditor's receivable either has no significance, or the piercing claim is allowed if the inability is apparent enough. Current case law hints toward the latter, though it is not discussed anywhere.

Having established this, we can proceed to who should be liable. Per the definition adopted in the very beginning chapter of this work, veil piercing liability does not

1019 See *af Schultén* 1984 at 81. See also KKO 2015:17, where the insolvency or capital structure of the subsidiary were not addressed. It was clear that the subsidiary had seized its operations, but it was not declared bankrupt.

1020 See KM 1992:32 at 358 and *af Schultén* 1984 at 96. Also, the duty of mitigation found in tort law would offer some analogous support for this view.

1021 For the same, see *Savela* 2015 at 413.

target a specific group of persons in the corporate environment. The shareholders and parent corporations are the ones traditionally named as potentially liable parties when veil piercing is discussed. Other possibilities include board members. Outside the formal corporate actors, the corporation's actual controller could be held liable, that is, if the formal control has been separated from the control in reality. Sister corporations can face liability as well, as shown in KKO 2017:94. A little more adventurous liability form would be the liability of the economic whole of the business. Although liability has been placed in case law on persons in all of these positions, the liability should not rely on formal position. In KKO 2017:94, the Supreme Court deemed it appropriate to place liability on the entity that received the benefits of the arrangement.¹⁰²²

I will discuss here the traditional view of shareholder liability, liability based on control and influence, liability of the economic unit and finally the liability of the beneficiary. Discussing these is perhaps not necessary, but deviation from the traditional view in the literature merits its justifications, even if that deviation is backed by the Supreme Court.

7.2. Liability of a Shareholder

Shareholder liability is possible when a shareholder has used the corporation to escape some obligation. The obligation was either originally held by the shareholder and later transferred to the corporation, or the corporation was founded only for the purpose of acquiring something for the shareholder without attaching the obligations that usually follow. Often, the legal literature specifically defines piercing as holding the shareholders liable for the obligations of the company.¹⁰²³

Exclusivity to shareholders is a view many adopt in the legal literature. In the US literature, a division has been suggested between veil piercing liability and enterprise liability, the former being liability of the shareholder and the latter being liability within the corporate group.¹⁰²⁴ As the following inquiries into potentially liable parties will show, the US courts have not restricted themselves to this view.¹⁰²⁵

1022 Similarly, see *Toiviainen* 1995 at 280.

1023 See *Huttunen* 1963 at 150–187, whose work operates solely around the question of whether the shareholder can be held liable or the separateness disregarded.

See also *Tanmi-Salminen* 2001 at 291 and the Company Act Committee of 1990 memo at 355. The committee memo limits veil piercing exclusively to shareholders.

1024 See *Bainbridge* 2000 at 61–71 and *Oh* 2013 at 131. See also *Berle* 1947 at 354, arguing that the disregard means looking to the enterprise.

1025 For an express statement of this, see *Collet v. American National Stores, Inc.* (1986) at 285.

Similar views have appeared in Sweden also. The NJA 2014 s. 877 decision names the board members as potentially liable parties. Still, in the literature, their liability has been argued as secondary and only applicable when the shareholders cannot be named.¹⁰²⁶

The shareholder should not face veil piercing liability due to their position as a shareholder or their legally appointed set of rights.¹⁰²⁷ Traditionally, piercing has been viewed as shareholder liability doctrine. However, if we look closer at why shareholders have been thought liable by piercing, we discover that it is mostly due to the control they possess and how they use that control. This is not a feature unique to the shareholder, though, as I will demonstrate next. Nothing prevents the shareholder from constructing such an arrangement where they act under a corporate name. Yet veil piercing does exactly that. If the earlier presented argument is accepted, formal control is enough for veil piercing, and the assessment should focus on the impropriety of the arrangement. Shareholders do definitely control the corporation. To be exact, liability is not attached due to the position or the rights of the shareholder but rather how they are used. This essentially turns the analysis back to the question of when the shareholder controls a corporation. A shareholder can be held liable, but not due to their position.¹⁰²⁸ The illegal or disloyal actions of a shareholder controlling the corporation can create a liability, though.¹⁰²⁹ One

1026 See *Sandström* 2015 at 10.

1027 See *Huttunen* 2007 and the Supreme Court cases he discusses therein. He argues that the Supreme Court has taken a strong stance in emphasizing the separateness of corporations. The parent corporation is not considered the owner of a subsidiary's property. This is definitely the default position when considering corporations. He aims to prove that veil piercing has not been accepted, not that it could not be accepted. Most of the cases he discusses do not address piercing at all, but only have to do with separateness of a corporation and its owners when other remedies are available. *Huttunen* manages to prove the strength of the default rule, though later developments in case law have shown that exceptions are possible. See KKO 2015:17.

1028 KKO 2008:20 at 79. Full ownership without a specific basis is not a justification for liability. A municipality acted as a shareholder of a few housing co-ops. The municipality, among others, was demanded liable for the damage caused by a mold problem in the apartments owned by the co-op. The Supreme Court found that the municipality had only exercised its legal rights and duties in controlling the co-ops and had not attempted to free itself from obligations or liabilities. Liability requires a basis other than full ownership.

See also *Huttunen* 2007, who argues throughout the article that the owner of the stock is not considered the owner of the corporation's property. This is definitely the rule, but it is not without exceptions. *Huttunen* 1996 at 30–33 and the KKO 24.8.1989 no. 2240, S 86/993 analyzed therein are also of interest. They expressly deny piercing based on full ownership, control or use of legal rights. In addition, see KKO 1982 II 184, KKO 1983 II 185 and *Tammi-Salminen* 2001 at 292 and 299.

See *Leppänen* 1991 at 277 footnote 18. Limited liability means that the shareholder cannot be held liable for corporate obligations because of their position in the corporation.

1029 See *Savela* 2015 at 403 and the Danish case, UfR 1998 s. 166, cited there. Similarly in the United States, see *Barber* 1981 at 373.

important distinction is that the passive shareholder should not be held liable,¹⁰³⁰ meaning that the damage caused needs to be somehow causally related to the control.

7.3. Controller Liability

No one should be held liable for an action they had no control over. As veil piercing requires the use of the corporate group structure, intercorporate relationships or shareholder's control, it would seem natural that veil piercing liability can attach to someone who is able to control these factors. The controller of the corporation is thus a potential bearer of liability.¹⁰³¹ *Controller's liability* seems justified since they are the person who is able to determine the actions taken. They can decide whether the illegitimate arrangement is undertaken in the first place, and their decision is causally necessary for the results to materialize. Moreover, without the existence of the corporate shield, the controller would be the one liable for the fulfillment of the obligation.

In the criminal liability case KKO 1995:99, A and B held control over the corporation. Together, they also derived the benefits from illegal actions performed under the corporate guise. The Supreme Court held them jointly liable with the corporation to return the economic benefits of illegitimate actions. Liability can be attached if someone behind the corporation conducts the corporate operations.¹⁰³² Although it was a criminal liability case, it addressed the placement of liability in a reasonable fashion and can be taken into account when piercing. The control was found rather formally, as both A and B held positions in the corporation. The existence of benefits was found to be equally formal. The court deduced that the formal controllers of the corporation gained economic benefits directly from the corporation. The decision emphasized both the control and the benefits; they happened to coincide, though that might not always be the case. I will later discuss the beneficiary's liability and why it should be primary.

The controller's liability seems to be the obvious liability placement when the arrangement involves only one corporation. The controller uses this one entity to escape an obligation that would otherwise be theirs. The only players involved are the corporation and the controller, who had the initiative and motivation to go through with the arrangement. In the legal literature, it has sometimes been argued that only the controller could be held liable by piercing the veil.¹⁰³³ Holding the controller liable would also conform well with the wording of the KKO 2015:17 decision,

1030 See *Nerep* 2015 at 30.

1031 See *Savela* 2015 at 414.

1032 See *Savela* 2015 at 402.

1033 See *Toiviainen* 1995 at 280.

which notes the connection between using the corporate form and the undesirable result.¹⁰³⁴ Only the person controlling the use can cause the result. It cannot be the only possibility, though, as the situation may require different solutions,¹⁰³⁵ e.g., holding sister corporations or corporations connected by the same controller liable as was done in KKO 2017:94. Then, holding the corporate controller liable would seem excessive since the harmful operation includes multiple entities, and the harm could be removed without holding the controller liable. The arrangement was disregarded only to the extent to remove the benefits it created.

In the United States, the inclusion of the causal relationship between liability and one's actions is a common suggestion for the improvement of the veil piercing test. Opinions in the literature seek to reform the piercing test to only induce liability when the shareholder's actions have caused the damage.¹⁰³⁶ The courts have adopted more creative solutions, though, holding sister corporations and passive shareholders liable on occasion. Veil piercing claims are usually targeted at one or a few shareholders responsible for the wrongdoing.¹⁰³⁷ Even those critical of veil piercing see the minimum reform as tying the liability to actions taken by the persons involved.¹⁰³⁸ This would effectively exclude any passive shareholder and anyone not directly influencing the arrangement or whose actions are not in direct causation to the damage. Liability would follow the capability and the exercise of that capability to make a decision in the corporation leading to siphoning, misrepresentation, fraud or other wrongdoing. Liability would be that of the controller.

Swedish case law has gone in a slightly different direction. If a person is to be held liable by veil piercing in Sweden, that person needs to have a controlling influence over the corporation.¹⁰³⁹ No causal relation is required. The NJA 2014 s. 877 decision mentions the board members as potentially liable by piercing. An earlier committee memo mentions just "persons who have decisive influence without being shareholders."¹⁰⁴⁰ Based on this, there is a strong connection between liability and control in Swedish piercing.

The Swedish literature mentions some abuse of control in the corporation. If one abuses their position of influence to the detriment of the creditors, liability can be extended to that person.¹⁰⁴¹ Although not expressly mentioned,

1034 KKO 2015:17 at 29.

1035 See KKO 2017:94, where this approach was taken.

1036 For example, see *Marcantel* 2011 at 227–228.

1037 *Cheng* 2010 at 527.

1038 See *Gelb* 1982 at 18–21 and *Marcantel* 2011 at 226.

1039 NJA 2014 s. 877 and SOU 1987:59 at 128.

1040 SOU 1987:59 at 128.

1041 See SOU 1987:59 at 15 and *Larsson* 1995 at 347 and 352.

some causality seems required between how the control rights are used and the damage to creditors.¹⁰⁴² Similarly, the control needs to be used abusively, thus requiring an element of reprehensibility.

Similar considerations are not unheard of in England, either, although the hostile environment for veil piercing certainly curbs these considerations there. In *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co Ltd* (1921), the court stated: “if a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences...”¹⁰⁴³ Both control and the causal relationship its exercise has to the damage would constitute liability.

If controller liability is accepted as one potential outcome of a veil piercing claim, then any party capable of exercising control over the corporation could be held liable. The question of who can control a corporation was discussed earlier in chapter V.3. Any of those parties, including the powerful creditor and outside parties controlling straw men, could be held liable. It should still be noted that the position as a creditor or financier in itself is not enough.¹⁰⁴⁴ Piercing would still require using the influence of such a position to compel the corporation to do something abusive.

The United States courts rarely accept creditor’s liability by piercing, even if the creditor does take part in corporate affairs and is quite powerful.¹⁰⁴⁵ No clear standard exists, however. The creditor was successfully held liable in *A. Gay Jenson Farms Co. v. Cargill, Inc.* In it, the creditor retained rather obtrusive rights to itself: (1) the creditor’s constant recommendations; (2) the creditor’s right of first refusal to buy grain; (3) the debtor’s inability to mortgage its property, purchase stock or pay dividends without the creditor’s approval; (4) the creditor’s right to inspect Warren’s premises; (5) the creditor’s criticism of the debtor’s business practices; (6) the creditor’s belief that the debtor needed “strong paternal guidance”; (7) the debtor’s drafts and forms containing the creditor’s name; (8) the creditor’s financing of all of the debtor’s grain purchases and operating expenses; and (9) the creditor’s power

1042 See *Moreno* 2006 at 349–350. Cf. Mark- och miljööverdomstolen, judgment 2013-06-26, M 11429-12.

1043 At 476.

1044 As with the environmental damage compensation. See III.2.3. of this work and HE 165/1992 at 27. Similarly also in asset recovery context, see *Ovaska* 1991 at 155 and *Tuomisto* 2012 at 31.

1045 *Gelb* 1982 at 20 and *Lundgren* 1984. See also *Harris Trust & Savings Bank v. Keig (In re Prima Co.)* (1938) at 962–967, *Ford v. CE. Wilson & Co.* (1942) *Credit Managers Association of Southern California v. Superior Court* (1975), *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.* (1973), *A. Gay Jenson Farms Co. v. Cargill, Inc.* and *Collet v. American National Stores, Inc.* (1986) at 285–286.

to discontinue the financing of the debtor. The court did not base liability on the financing of an operation. In the case, the financing only allowed the creditor to establish control over the debtor. This control, in turn, enabled creating an enterprise that was markedly different from ordinary bank financing. The creditor was an active participant in the debtor's operation rather than simply a financier. The reason for financing was not to make money as a lender but rather to establish a source of market gain for the creditor's business. In *Credit Managers Association of Southern California v. Superior Court* (1975), the creditor assigned a consultant for the debtor. That consultant was able to overrule and supplant the board of directors and shareholders in the operation of the business. This created a fiduciary duty for the consultant. Although the case was not a piercing case, it provides a good example of how the creditor's control can exist.

The creditor's liability by piercing has also been discussed in Sweden, where it is tied to the decisive influence a party holds.¹⁰⁴⁶ In a controversial decision, a Swedish court held the parent corporation liable for environmental damage caused in a subsidiary's operation. Liability was not based on the exercise of that control but the mere possibility of influencing the operation combined with the financial enabling.¹⁰⁴⁷

7.4. Liability of the Economic Unit or Enterprise liability

The economic unit is one potential liable party for veil piercing. The concept of an economic unit entails entities that are economically dependent on each other, albeit formally separate; they have their own actions, but only when those actions are seen as part of a larger whole do they make sense. The operation is divided into smaller units to isolate externalities, much the same way a ship is compartmentalized into smaller blocks to prevent sinking if the hull is breached in one place. They operate as a whole in all matters other than liability.

Enterprise liability means deeming the corporate group or corporations under the same person's control as the economic unit and holding it liable. In the US, Bainbridge has suggested a strict division between veil piercing as holding a shareholder liable and enterprise liability in corporate groups.¹⁰⁴⁸ Although this division could be made in Finland also, the test construed in KKO 2015:17 does not differentiate. It names using the corporate group structure, intercorporate relations or shareholder's control as the actions targeted by veil piercing. Still, it remains

1046 SOU 1987:59 at 15 and *Larsson* 1995 at 347.

1047 Mark- och miljööverdomstolen, judgment 2013-06-26, M 11429-12.

1048 *Bainbridge* 2000 at 61–71.

useful to confess that veil piercing considerations and relevant facts adapt and differ based on which of these named actions is assessed in the case.

As noted above, the US literature usually, though not exclusively, regards veil piercing as a liability of the shareholder and separates it from enterprise liability theory, which would allow for reaching other entities within the arrangement.¹⁰⁴⁹ *Peter Ob* remarks that enterprise liability borrows heavily from traditional veil-piercing; and, not surprisingly, they can be confused for the same purpose.¹⁰⁵⁰ In this work, veil piercing is understood from the Finnish perspective, and it unquestionably covers enterprise liability also.¹⁰⁵¹ In *Harris v. Kupersmith* (2009), the result was described as piercing and the two doctrines considered capable of reaching the result were instrumentality and enterprise liability.¹⁰⁵²

In the UK, the *DHN Food Distribution Ltd. v. London Borough of Tower Hamlets* (1976) decision introduced the liability of the economic unity theory of piercing. It was highly criticized¹⁰⁵³ and has not been used in high-profile cases ever since.¹⁰⁵⁴ However, some authors have recently recognized the disparity of economic reality and separate personality within corporate groups. The separate personality within the group is viewed as inappropriate because most commercial activities are integrated within the group.¹⁰⁵⁵

1049 See, for example, *Angelo Tomasso v. Armor Construction & Paving, Inc.* (1982), stating that if [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by *permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise* (emphasis added). See also *Tzovolos v. Wiseman* (2007) utilizing the Angela Tomasso decision. Further affirmation in *Harris v. Kupersmith* (2009) at III.B.

About the theory of enterprise entity in its original form, see *Berle* 1947. The debate between Landers and Posner is also noteworthy. They discussed whether a group of affiliated companies seeks profit through enterprise or separate profit centers. *Landers* 1975, *Posner* 1975 and *Landers* 1976.

1050 *Ob* 2013 at 132. For a deeper analysis arriving at the same conclusion, see *Bainbridge* 2000 at 31–63. He admits that the line is blurry and similar factors come into consideration in both.

1051 As evidenced by the Supreme Court of Finland in KKO 2017:94.

1052 At III.B. Although the doctrine there was not called enterprise liability but “identity” doctrine. The formulation was the same as the one used here under the label enterprise liability.

1053 See *Mujih* 2018 at 388–389 for a description on the criticism. See also the decision *Woolfson v. Strathclyde Regional Council*.

1054 About the theory in the US and in the UK, see *Cheng* 2011 at 59–82 and the cases cited there. It has even been suggested that the liability of entities should be entirely replaced with the liability of the enterprise. See *Blumberg* 1985 at 699–704 and *Thompson* 1994 at 35–40.

1055 See *Mujih* 2018.

Although the economic unit theory has not found much support in Finland,¹⁰⁵⁶ veil piercing liability can attach to whoever holds the benefits of the arrangement. Who would have been liable if the obligation had not been evaded? The economic unit within which both assets and obligations are moved around and arranged rather freely may be held liable. These potential units are corporate groups and corporations that have identical or similar control structures. Even then, the easier and less controversial solution would be to ignore the economic unit theory and focus on the controller and beneficiaries of the arrangement.

Defining exactly the relevant economic unity required for liability is impossible. Derived from the Asset Recovery Act, it would be a fundamental connection of economic interests. The preparatory works define this interest through ownership, control, share in profits or loss. The party's right to profit or part of the loss would qualify it as a close party only if their legal position concerning profits and loss resemble that of the shareholder. Actual control, control in fact and corporate group relationships are mentioned in the preparatory works as relationships constituting close party status.¹⁰⁵⁷ Naturally, corporations in business with each other always share economic interests, and these do not render fundamental interest.

Corporate groups make it possible to move around assets and even hide them from the creditors. A corporation as a controller always increases the negative risk of the creditors, especially those of the subsidiary.¹⁰⁵⁸ Often in legal literature, the parent corporation is thought to be a more justified target for veil piercing liability.¹⁰⁵⁹ The status as the parent is not enough for piercing, though, as corporate groups and corporations as shareowners are accepted in the legal order almost universally. Holding a group of companies liable by piercing seems easier to accept since the original investors of the parent still enjoy their limited liability shield.¹⁰⁶⁰ Multiple layers of limited liability are easier to condemn than just one. Sister corporations are potentially liable if the assets are moved and hidden within the group. If the corporations in the group are, in reality, only parts of a larger economic unit, veil piercing applies more easily.¹⁰⁶¹

It is possible to split the business into several corporations so that the operation is not reasonable when the corporations are viewed as single units. The division and the totality, however, start to make sense when these corporations are considered

1056 Although Leppänen (1991 at 297–303) does mention it.

1057 HE 102/1990 vp. at 45.

1058 *Koski* 1977 at 304–307.

1059 See *Savela* 2015 at 414 and *af Schultén* 2003 at 10.

1060 See *Savela* 2015 at 414, *Kaisanlähti* 1996 at 249 and Appellate Court of Turku 28.11.1986 no. 974 and Appellate Court of Turku 21.4.1989 no. 326 and THO 8.12.1989 no. 1121. About all, see *Leppänen* 1991 at 297, 301 and KM 1992:32 at 372. The court justifies piercing with the argument that the involved corporations form a single whole.

1061 See *Huhtamäki* 1999 at 143 and THO 8.12.1989 no. 1121.

part of a whole. The business itself is such that it could be practiced under one entity, but it has been divided to achieve some results, acceptable or not. If the division cannot be explained as reasonable with acceptable motives, the economic whole could be held responsible for the debts of its units.¹⁰⁶²

Enterprise liability is also the default rule in European competition law. There it does not matter, whether the business is separated into multiple entities. Liability for violations of competition law and damage caused by such violations is joint. Not even dissolving the primary company responsible for the violation stops this liability.¹⁰⁶³ EU-law interprets the concept of enterprise in a manner that often resembles veil piercing assessment. The emphasis is on control rights and whether the companies are economically identical.¹⁰⁶⁴

The controller does not necessarily keep the original business corporation active. In so-called chaining,¹⁰⁶⁵ a person uses a corporation to conduct business, invests the profits into the business or channels them for personal use, amassing debt to the corporation. When further amassing becomes overly difficult, she sells the business to another corporation under her control while leaving the liabilities to the old corporation. The operation is continued in this fashion, and the business is moved from one corporation to another. The business in its entirety should be liable for the damage caused, meaning all the corporations that once held the business should all be jointly liable for the damage.

In chaining cases, it might be feasible to hold the controller liable alongside the companies used. After all, the controller conducted the business and extended its operation past its viable lifespan for her own benefit. The controller's liability needs to derive from the facts of the case, yet it seems likely that, in the case of chaining, improper reasons influenced the activity. It should not matter whether the controller drew personal benefit or used the funds to expand the business. It could be thought that the original corporation was a legitimate attempt at business, and only the consequent corporations were improper conduct.

1062 See NJA 1975 s. 45 and *Huttunen* 1996 at 12. The manner in which the business was run in the NJA 1975 case was deemed decisive justification for piercing. The case was about a business split in two, where the profits were channeled into one corporation and liabilities left with the other. Both corporations were held liable. See also UfR 1997 s. 1642.

1063 See C724/17.

1064 See C516/15 P, EU:C:2017:314 at 52 and C-597/13 P, EU:C:2015:613 at 35–36.

1065 About chaining corporations and veil piercing, see *Laine* 2011.

7.5. Liability by Removing the Advantage

Whereas liability could be explained to follow the aforementioned criteria, they are only possible allocations. These constructions describe parties that can be held liable by piercing and why. These descriptions do not answer the question of who should be held liable. How should the court determine the liable party in the case at hand? Veil piercing is an *in casu* doctrine, and as such, it cannot adopt a standard solution. Some guidelines could be derived by asking another question: who would have been liable without the disregarded corporation? This allows any of the aforementioned parties to be liable while providing the criterion and the basis of why. It simply removes the externalities created and spares others.

The KKO 2017:94 decision did mention that liability is reasonably placed on the party that received the benefits from the arrangement. In that case, the business was divided into two corporations under the same controller and shareholder. The insight of the Supreme Court to allocate liability was sort of a surgical extraction. *It removed the externalities of the use without extending liability further than was absolutely necessary.* This should be the guiding principle in veil piercing liability. At this point, I would cite an opinion from the United Kingdom for greater clarity of expression. “The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.”¹⁰⁶⁶ The removal of externalities and advantages are interchangeable here—the advantage of the arranger is simply the externality suffered by the damaged party.

Unfortunately, the Supreme Court has not adopted this extraction completely. If we limit the liability to what is absolutely necessary to remove the externalities, then the liability amount should also be measured in this manner. The Supreme Court did not discuss this in KKO 2017:94, and liability was placed simply as the amount of neglected payments covered by pay security. Arguably in that case, however, the complete liability and minimal involvement to remove benefits would have been the same. The obtained benefit was the isolation of risks caused by the employees, and when that realized, the resulting benefit was the entirety of neglected payments.

In addition, the KKO 2015:17 decision can be cited in support of this solution. It named three possible ways to use the corporate form. All three allow piercing, and each of them demands a different inspection of a liable party also. If the piercing claim is about an arrangement where the corporate group structure is used, the liable party is the parent or sister corporation. If the use is about the shareholder’s control over the corporation, the controller should be demanded liable by piercing. If the intercorporate relationships are used, then the liable party should be the corporations involved in that relationship. Some support can also be derived from

¹⁰⁶⁶ *Prest v. Petrodel Resources Ltd* (2013) at 35.

the KKO 1997:146 decision, which was made *in casu* but was tailored to deviate from the law only for the part that concerned the claimant.¹⁰⁶⁷

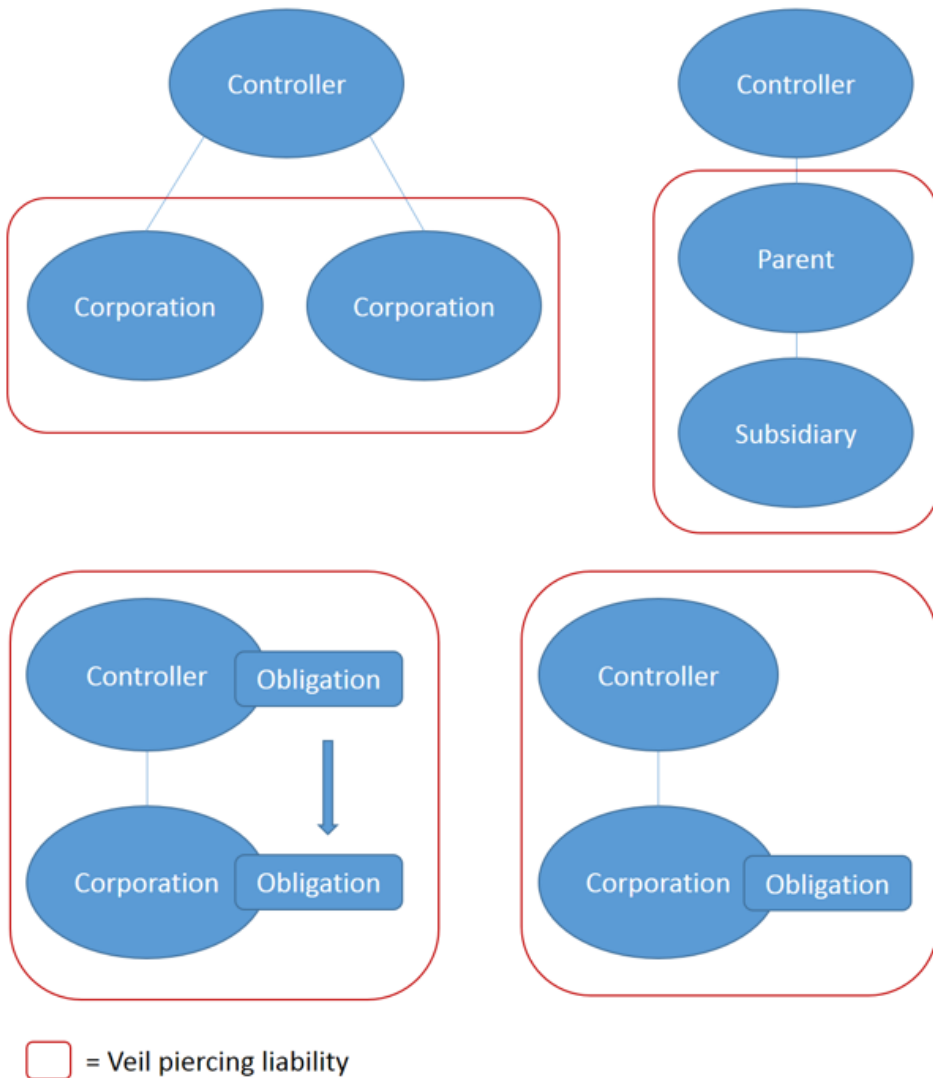


Figure 7. Who could be liable based on the allocation of advantages?

¹⁰⁶⁷ The same argumentation can be found in the appellate court's opinion in the decision in KKO 1997:17. The appellate court would have pierced the veil and held the mortgage on company assets as ineffective in relation to other creditors of the company. The Supreme Court did not pierce and thus did not address this question in the decision. Similarly *Tammi-Salminen* 2013 at 361.

Control always makes it possible to hold the controller liable, but this should not be the primary answer to the allocation. The externalities can often be remedied without it. Control is the primary tool used to achieve the arrangement, whereas it is not always the tool used to cause the externalities. The upper left relationship in the chart represents using intercorporate relationships to extract benefits. The controller can allocate the profits to one of the controlled corporations. Removing the advantage in the case does not require the controller to be held liable but the corporations to be held jointly liable. If the controller tunneled the benefits back for personal gain, liability would need to be attached to the controller to remedy the externalities. Liability was allocated like this in the UfR 1997 s. 1642 and KKO 2017:94 decisions. Similarly, it could be argued that the controller in the case has not abused the separate personality between themselves and the business, only the separateness between the two entities used to run the business.

The upper right situation represents using the corporate group structure. The use enables the controller to accrue more gains for the parent, for example. Then the parent and possibly the sister corporations should be liable, and this would remove the externalities. On the other hand, if the controller has allocated the benefits of the arrangement from the parent to themselves, removing the externalities might require holding them liable as well. The KKO 2015:17 decision is an example of this sort of liability allocation.

In the United States, Cheng and Oh have separately suggested reforming the piercing doctrine in a manner that would place liability based on unjust enrichment. In this model, liability assessment would focus on whether a corporation's inability to satisfy a judgment results in an unjustifiable allocation of benefits.¹⁰⁶⁸

The bottom left situation is meant to describe a situation in which the controller has an obligation or a restriction and then transfers it to a corporation to avoid it. The externalities in the case are suffered by those who held interest in the controller's obligation. Removing the externalities requires holding the original holder liable as they benefit from the removal of that restriction or obligation. An example would be the Migrit Solarna Energija decision made by the government. The Russian investors held the control, and they needed the corporation to circumvent nationality restrictions. Their advantage was being free from the restriction. In this case, externalities were suffered by the one setting these restrictions, i.e., the Finnish government.

A similar case can be found in the UK. *Daimler v. Continental Tyre and Rubber* (1916) was about whether a corporation incorporated in the UK,

¹⁰⁶⁸ *Cheng* 2010 at 528–540 and 582–585 and *Oh* 2013 at 118.

all but one of whose shareholders were German, should be deemed an enemy company during the First World War. The nationality of the shareholders was deemed decisive instead of the nationality of the corporation. The key aspects were whether the resources from the corporate operations would end up in enemy hands. This is also a good example of how the nature of the applied statute and the policy goals behind it affect the factors relevant for veil piercing.

Last, the bottom right picture shows where the corporation contracts the obligation. This is a situation in which control combined with limited liability is the primary cause of the externalities. Yet it is also the primary method of a sensible business operation. Only when the control is used in a reprehensible manner should liability follow. And this is most easily proved by elimination—showing that the corporation had no purpose other than the illegitimate restriction of liability. This is by far the hardest piercing situation to show in court since the arrangement is so close to the legitimate use of the corporate form. Discerning factors are hard to come by. Should the controller tunnel the benefits so that they themselves become the beneficiary, the externalities are suffered by the corporation's creditors. Removing the advantages requires holding the controller liable. If the benefits are left with the corporation, there is no case for piercing the veil. One should note that a more beneficial risk position is a benefit in itself. Isolating the potential liability in a corporation that is in no way capable of covering it is a benefit. It is like a forced discount on a lottery ticket. A prime example of piercing in this fashion would be the NJA 2014 s. 877.

From the perspective of using veil piercing to remove the externalities, the most acceptable allocation can be found. This does place a lot of significance on control structure and the allocation of benefits. One could argue that removing the externalities does not require locating the benefits. However, in cases where the corporate arrangement is designed to benefit at the expense of others, the benefits and externalities coincide.

It could also be argued that placing liability this way is for the protection of the controller. The initial real person investing in the corporation does not need to lose the limited liability shield if the benefits can be returned from another corporation within the arrangement. Also, locating the benefits does help deem the use of control as reprehensible because, combined with control, it can qualify as seeking self-interest at the expense of others.¹⁰⁶⁹

¹⁰⁶⁹ In a similar fashion, the benefits help determine whether an arrangement is artificial in the Enforcement Code Chapter 4, Section 14 sense.

The creditor's liability is potentially available if they become the controller.¹⁰⁷⁰ Even the creditor of a company can acquire the position of a controller with or without a formal legal device bestowing it.¹⁰⁷¹ It is easy to imagine a situation in which a corporation is dependent on a large creditor, and the creditor starts to protect their interests by demanding certain actions of the corporation. Should the corporation deny these requests, the creditor threatens to withdraw the credit. The corporation has no choice but to comply because losing the credit would mean the end of the business.¹⁰⁷² The creditor uses its financial leverage to protect its own interests; in other words, it exercises control over the corporation to better its own risk position at the expense of other creditors.¹⁰⁷³ For the creditor to have such a high degree of control, it needs to be able to regulate the major part of the corporation's finances. If there are many creditors, one is less likely to obtain control.¹⁰⁷⁴

7.6. Conclusions on Who Should Be Liable

The discussion in this section revolved around the liable party. Potential liable parties included the shareholder, the controller, the economic unit and the removal of advantages. Share ownership was dismissed as a criterion for liability as it would

1070 Existence of a legal device makes finding control easier, though. The creditor status itself is never enough to pierce or consider the creditor a close party. See *Villa* 1997 at 371–374 and 381–385.

1071 See *Villa* 1997 at 374 and 384. The control given with a legal device can be partial. The corporation and shareholders can bestow the creditor with differing rights such as total vote control in the general meeting, the right to determine business decisions within the competence of the board or just veto rights. These rights can be limited to certain subjects such as obtaining additional financing or sale of property. *Villa* is of the opinion that control through veto rights is not enough to make the corporation a close party. Veil piercing requires an even higher degree of control than asset recovery, so veto rights are definitely not enough.

About creditor's contractual control and specific contractual terms, see *Villa* 1997 at 361–364 and 370–374. Although *Villa* examines creditor's control in relation to the definition of close party given in the Asset Recovery Act, the same considerations about the creditor's position are valid here.

The different forms of creditor positions created by financial engineering dampen the line between the shareholder and the creditor. Sometimes, the creditor can obtain a set of rights that, in fact, renders them a shareholder. If the situation demands, the court can disregard the legal form of the credit relationship and consider the creditor a shareholder in relation to a norm. Borrowed capital can be considered equity capital. If so, then the debt changes its form and becomes equity, but only in relation to third parties. Inter partes, the capital is still characterized according to the terms of the original contract. *Villa* 1997 at 381–385.

1072 The same arrangement could possibly be established by blackmailing or even by threatening with legal action with the potential to paralyze the corporation's business. The preparatory works for the Asset Recovery Act acknowledge the possibility of controlling a corporation through financial arrangements or other contracts. See HE 102/1990 vp. at 45.

1073 See *Villa* 1997 at 372.

1074 See *Villa* 1997 at 373.

constitute too formal an approach and result in unfair treatment. The controller was found to be a potentially liable party as they are able to determine the corporate actions however they want. Still, the principle demanding minimal interference to remove externalities would suggest discarding the controller's liability also. The economic unit was thought of as a strong possibility, though the vague definition of unity makes it impractical. Instead, I would strongly support using the approach of removing the advantages. This approach can result in liability *in casu* for any of the other mentioned targets but does not compromise them in an arbitrary manner.

I proceeded to inspect four different situations in which the advantages appear in a different fashion. Each of these was backed by case law. The analysis showed that locating the advantages leads to different results depending on the construed arrangement. Even the liability allocation is made based on overall assessment and *in casu* examination. While the traditionally liable parties appeared as possibilities, they should not be viewed as the sole targets for liability and liability definitively should not be based on some formal position.

8. Further Themes

8.1. Who Can Make a Claim for Veil Piercing?

8.1.1. A Damaged Party?

The procedural standing to demand veil piercing follows this general rule: the one whose rights have been violated and who needs protection has the standing to demand veil piercing. The standing is not defined by procedural rules but follows persons' material rights. The claim can be made by those whose material right is the basis for the proceedings. Thus, the standing to demand veil piercing follows the material relationship, which usually is debt. In evasion of provision cases, the standing follows the relationship that would have existed without the evasion. The one who was affected by the evasion can make the claim. For example, the State has standing when it has been forced to cover some costs or when it has lost revenue due to the evasion.

The creditors without a doubt can make the claim. They have a relationship with the corporation and a material right, the fulfillment of which is the reason behind the claim. In bankruptcy and even in on going business, it would simply be beneficial for creditors if the liability could be extended.¹⁰⁷⁵ In the existing case law, the question of standing to claim proceedings has not been addressed. In all cases, the creditor has made the claim for piercing.

¹⁰⁷⁵ *Leppänen* 1991 at 277.

In the KKO 1997:17 case, the creditor was not directly a party to the legal relationship in which piercing was demanded. It had a standing to bring proceedings as a bankruptcy creditor. If the parent's claim had been accepted, the creditor would have been worse off since the bankruptcy estate would have had fewer funds. The right to contest a bankruptcy debt is given in Bankruptcy Code 13:4. This would allow the bankruptcy estate itself to make a veil piercing claim.

Piercing should be available only for those harmed by the dishonest operations of the business.¹⁰⁷⁶ Even if the removal of the dishonest parts by judicial action wound up destroying the rest of the business, the rest of the creditors should not be awarded the piercing remedy. They are not in a different position than they would have been had the neglected obligations been addressed properly. It could be argued that contract creditors would not have contracted with the corporation had they known of these liabilities. The situation could then be addressed as active misleading though, and no piercing is necessary. The situation is just another failed business, the same as an insurmountable tort liability or a failed product, for example.

It is contestable who is actually harmed by the inappropriate operations. It could be argued that only those who have been unable to collect their claim are harmed. This would mean that the formally liable entity must first be found insolvent or unable to cover the liability.¹⁰⁷⁷ In KKO 2015:17, the claim for remunerations were made simultaneously against both the subsidiary and the parent. No considerations were made as to whether the claim against the parent was premature as the subsidiary was still conducting business. This could partly be explained with the amount of the claim, as it would surely have severely hindered the subsidiary's capability of operating and perhaps would have even bankrupted it. This issue remains to be addressed directly in case law, as other piercing cases with monetary claims have emerged from insolvency situations. From the existing Finnish case law supplemented with international review, it would seem that a *piercing claim can be made if the original debtor is insolvent or is likely enough to be incapable of satisfying the claim.*

The United States has a clear stance on this issue. There, veil piercing is claimable only when the primarily liable party cannot satisfy the payment. This offers no help for the Finnish interpretation, however, as the US situation

1076 Similarly as the extension of the debt enforcement process duration (Enforcement Code 2:26). The extension is a remedy available for the creditor who ended up worse off due to the debtor's conduct during the enforcement process. The creditor needs to show the damage caused by the debtor's actions. If successful, the extension is awarded to them, not to all the creditors. See *Bräysson* 2017 at 54–56 and *Linna – Leppänen* 2014 at 213–219.

1077 *Savela* 2015 at 413 and *afSchultén* 1984 at 96. Similarly in the United States, see *Marcantel* 2011 at 229–230.

can be explained with the equity remedy nature of piercing. Claims in equity can only be made where there is no adequate remedy at law and equity only helps those who have done everything to help themselves.¹⁰⁷⁸

This issue has arisen in England also. In *Ord v. Bellhaven Pubs Ltd* (1998), the claimants sought to substitute the original debtors as the defendants in the case with the parent corporation of the debtors. The lower court allowed this as the claimants had demonstrated that the debtor corporation could not satisfy the claim anymore, but this was due to corporate group restructuring and not insolvency. This does match the current legal situation in Finland quite well. The court of appeals decided that such substitution was not possible because it would constitute a new cause of action.

8.1.2. The Bankruptcy Estate?

Thus, it is clear that a creditor with a reasonably predictable loss is capable of making the piercing claim. More vexing is the question about the bankruptcy estate. In the legal literature, Leppänen is of the opinion that, without a specific provision in law, the bankruptcy estate cannot make a piercing claim. This kind of collective claim would face a few practical problems, such as payment order and privileged positions. He argues instead that each creditor has the right to demand piercing liability and payment.¹⁰⁷⁹ Veil piercing is an *in casu* decision, and the obligations should be examined separately. Not all creditors are necessarily victims of abuse. The piercing assessment accommodates many creditor-specific elements, such as whether the creditor was voluntary or whether they were aware of the arrangement. Establishing reprehensibility requires an assessment of the corporation's, controller's and creditor's positions and their relationships to each other.¹⁰⁸⁰ A collective claim is hardly possible unless the arrangement was abusive toward all of them, though it should be noted that the *in casu* nature also allows the inclusion of many differing situations within the piercing doctrine.

It should not be excluded that a corporate arrangement can be abusive toward all of the bankruptcy creditors, especially since the corporation and contract as institutions are flexible and allow the arrangers much room to design. Through guarantees and other contracts, it is possible to choose the creditors that receive payment and those that are made to participate in the bankruptcy. If all the bankruptcy creditors are in that position due to design and abusive intentions, then I would not deny a collective piercing claim.

The bankruptcy estate in one specific situation can make a piercing claim. The administrator has the power to dispute a creditor's claim in bankruptcy, which

1078 See *Kennedy* 1997 at 630 and *Peterson* 2017 at 68–71.

1079 *Leppänen* 1991 at 308–309.

1080 Similarly in Sweden, see *Stattin* 2008 at 439.

would mean the disputed claim would not be taken into account. It is entirely plausible to make this sort of dispute based on piercing the veil.¹⁰⁸¹ Not one of the abovementioned arguments against the estate's right to a claim applies to this situation. The claim is not collective, it does not affect payment order or privileged positions and the piercing assessment can be limited to the facts surrounding a single creditor.

This approach would provide a favorable position for the creditors who can claim piercing. Most other methods—asset recovery, refund obligation and management's liability in damages¹⁰⁸²—return assets to the bankruptcy estate. Piercing liability would return them to the creditor directly. This does not necessarily create an issue with creditor equality. Veil piercing liability is secondary, so the piercing creditor will receive their share from the estate's assets. Piercing liability does not provide them a better position within the estate, and using the available legal remedies can hardly be thought of as unequal, even if those remedies are not available to all the creditors in the estate. The situation could simply be compared to joint and several tort liabilities when one debtor is the corporation. Naturally, if a collective claim can be made, the additional assets come into the bankruptcy estate's possession and are thus eventually divided by the creditors.

8.1.3. Self-Piercing

Aside from the creditors and the state, it could occur that the corporation itself or its controller would like to pierce the veil. The corporate form, limited liability and separate personality separate the owners from the corporation. It is entirely possible that the controller would want to disregard the corporate form in order to apply or deny the application of a statute. For example, an entrepreneur that has chosen the corporate form is ineligible for unemployment benefits. If the business fails, the entrepreneur is left standing without security, and the unemployment subsidies can be obtained only after they no longer own the corporation. Winding up the corporation could take months, and during that time, the entrepreneur is considered self-employed. It would benefit the entrepreneur greatly if the corporate form could be found as artificial and its actions as the actions of the entrepreneur. The same goes for applying for debt adjustment proceedings. The proceedings disallow the adjustment of debt from entrepreneurial activity under the limited liability company. If the company is disregarded, the debtor could even have their company-related debts adjusted.

1081 See KKO 1997:17 where a claim exactly like this was made by another creditor. The result of this dispute succeeding would be the phenomenon usually referred to as indirect piercing in the veil piercing literature.

1082 Though the liability in damages can be toward a single creditor, the circumstances creating such liability are complex and reliant on setting specific norms into the Articles of Association. Thus, this sort of liability is unlikely to realize, especially in a company that has been designed to abuse. See *Savela* 2015 at 148 and *Kärki* 2017 at 171–172.

These sorts of claims remind of those made by contract creditors. They have voluntarily made a choice and, after the damage, have attempted to change that choice; they attempt to renegotiate the deal. The same argument applies for the veil piercing claims of the controller and the corporation. They have initially made a choice to operate under the corporate form and are responsible for the results of their choice.¹⁰⁸³ Claiming ignorance or misinterpretation of the legal repercussions of their actions is generally an unacceptable defense. Everyone must be aware of the law.¹⁰⁸⁴ Therefore, they who have chosen to operate under the corporate form should not be allowed to pierce.¹⁰⁸⁵

In the United Kingdom, *DHN Food Distributors v. Tower Hamlets* (1976) is a rare occurrence of successful “self-piercing” or “voluntary piercing.” In it, the business was divided into two corporations owned by a holding company. A land title was owned by one corporation and the business operations by another. The land was compulsorily purchased. The business operation was initially denied compensation due to disruption of business because it held no title to the land. The three corporations successfully argued that they should be treated as one in regard to the compensation norm. Other than this decision, case law is almost uniform in hostility toward self-piercing. In *Woolfson v. Strathclyde Regional Council* (1978), the Court addressed the DHN decision and saw the complete control as an absolute requirement. The existence of one other shareholder owning one share was enough to distinguish from this.¹⁰⁸⁶ The owner cannot say that they are entitled to take the benefit of any advantages given to them by the formation of a company without simultaneously accepting the liabilities arising from them.¹⁰⁸⁷

In the United States, voluntary piercing is rarely accepted, though a variety of approaches exists. Cheng recognizes three categories: 1) applying the same analysis as in other piercing cases; 2) more open-ended policy analysis

1083 Similarly, one cannot seek the disregard of a fake legal action for one’s own benefit. See Helsinki Court of Appeals 18.12.2015, nro 1835, dnro S 14/311 and *Hemmo* (2003) at 315.

1084 But the *Ius finitum* argument has lost some of its relevance in the modern flood of regulation. See *Mäkelä* 2010 at 195.

1085 See *Huttunen* 1963 at 182, 194 and 200. See also *Huttunen* 2007 at 128. However, in some cases, piercing can be used to benefit the controller. One example would be the Criminal Code 6:4 cumulative punishment, as it allows assessing all the formal and actual consequences of a criminal liability. If both the corporation and the sole owner/director of it are given a sentence, the actual consequence is double, whereas the formal consequences are only personal. Then it is possible to consider the corporation and the controller a single party and leave the corporation without a punishment. See *Kuusiniemi* 2001 at 11 and *Jaatinen* 2000 at 145–146.

1086 See also *Kershaw* 2009 at 66.

1087 *Tunstall v. Steigmann* (1962) at 601. See also *Tate Acces Floors Inc. v. Boswell* (1991) at 531.

on voluntary piercing; and 3) rejecting voluntary piercing on principle.¹⁰⁸⁸ The rejection on principle has gained some prevalence.¹⁰⁸⁹ In *In re Ekstrom* (2010), the court denied reverse piercing, stating that the debtor has enjoyed the benefits of limited liability and must now accept the consequences of such estate planning.¹⁰⁹⁰

In a case decided by the Appellate Court of Turku (5.1.2016 15/948), the plaintiff managed to pierce the veil between herself and a company she owned. The company had hired a man, and the attempt was to adjust the contract. The owner of the company had acted as its representative when the contract was made. For the moderation to succeed, the owner needed her personal conditions to be taken into account. The problem was that she was not a party to the contract, but the company was. The court disregarded the separateness and allowed the personal conditions to be considered. This, in turn, allowed the contract terms to be adjusted.

Veil piercing was sort of a preliminary decision in the case. It did not facilitate liability but extended the legally relevant facts in a way that was beneficial to the corporate owner. This is a clear deviation from the argumentation presented previously. Why should the one choosing to operate under the corporate form be allowed to disregard that form if it turns out to be unfavorable to themselves? This just goes to show that every decision to pierce the veil is an overall assessment of the relevant legal facts made *in casu*. The whole purpose of the corporation was to facilitate the necessary day-to-day needs of the physically handicapped owner. The corporation received subsidies from the municipality for hiring a personal assistant for the owner. The court also found evidence of unacceptable compelling in the formation of the contract. The purpose of the moderation norms is to protect the weaker party from unduly exorbitant contract terms. The court simply identified the actual weaker party in need of protection. It was within the spirit of the law to make such a decision, which should be seen not as a veil piercing case but as a moderation case. Piercing considerations in the decision were out of place. The case would therefore not support accepting voluntary piercing, and it should remain rejected.

Unfortunately, the decision did not address the question of artificial or reprehensible use of a corporation. This opens up many problems since the element of abuse has been seen as a necessary element of piercing. One argument is to turn the table and say that the employee was able to abuse the corporate form in this case. He did not have control over the corporation, though. In this sort of case, the requirements of improper behavior, creditor damage and evading a provision should

1088 *Cheng* 2011 at 44. See also *Thompson* 1991 at 1057, noting the significantly lower success rate of voluntary piercing claims.

1089 See *All Star, Inc. v. Fellows* at 813. See also *Sparkman* 2016 at 465–471, especially at 469.

1090 Similarly in *Turner v. Andrew* (2013) at 276.

be disregarded altogether. The assessment becomes about having complete control over the corporation and the spirit of the law demanding disregard of separateness. Perhaps this decision should have been argued solely with extreme circumstances, extending the scope of acceptable conditions for moderation without relying on veil piercing doctrine. The argumentation could have resembled piercing even then, but at least it would not have further clouded the piercing doctrine.

8.2. Difference of a Natural Person or Another Corporation as a Debtor

There can be two kinds of parties deemed liable by piercing: a natural person or another corporation. It is generally more acceptable to pierce the veil when the liability is placed on another corporation. Reasons for this revolve around limited liability. The realization of the benefits of limited liability does not require legislation to allow corporations to be shareholders. Instead, corporate shareholders allow the externalities of limited liability to manifest fully. A natural person as a shareholder is the default situation considered in legislation. Limited liability is thought to be necessary to attract capital to a business. It encourages rational risk-taking and enables the realization of risky projects that are potentially beneficial to society. Nevertheless, the current legislation allows corporations as shareholders and controllers of other controllers. Therefore, it is necessary to inspect the special considerations of the controller's person.¹⁰⁹¹

The argument goes that natural persons as shareholders should be better protected from veil piercing as the corporate institution was created to facilitate investment from natural persons.¹⁰⁹² Corporations, however, should not enjoy the full benefits of limited liability. The essential difference is that there is already one layer of limited liability between the controller corporation and its shareholders. Thus, allowing the corporation to own shares encourages excessive risk-taking. The investors are already protected, and the corporation is free to gamble with whatever surplus the original corporation has created. This argument against the corporation as a shareholder is more of a moral one, as it relies on the principle of protecting the weaker party. It has been formed by thinking of a small investor and their ability to diversify their investment.

1091 See *Leppänen* 1991 at 300

1092 See *Bainbridge* at 64–65. Also, the justifications of limited liability hold true much more often in the case of natural person shareholder.

See also *Nial – Johansson* 1998 at 231, who also argue that the natural person shareholder should be protected more thoroughly than the parent corporation.

See also KKO 2015:17, the judgment of the Helsinki Court of Appeals, which held veil piercing possible at least when the entities involved formed a corporate group.

Veil piercing is often understood as a valve alleviating the externalities caused by the economic effectiveness of the limited liability.¹⁰⁹³ There are strong arguments that it would be more effective for the economy as a whole to uphold the limited liability and separate personality meticulously.¹⁰⁹⁴ The economic analysis of veil piercing does not support the different treatment of corporations as shareholders when assessing piercing for voluntary creditors.¹⁰⁹⁵ What the economic analysis finds effective is not the best solution in legal analysis, though. Favoring economic analysis over moral factors would seem the correct choice when assessing the basic principles of an economic institution such as a corporation. This seems unacceptable with veil piercing, however. Veil piercing in itself is a deviation from economic efficiency based on arguments of justice and even morals. Thus, in the veil piercing context, the moral argument on the *stricter treatment of corporations as shareholders should prevail* over the argument of the equal treatment of shareholders regardless of their person based on efficiency.¹⁰⁹⁶

The significance of this argument in veil piercing has not been addressed in Finland. The Finnish piercing test does not seem to differentiate between these two in theory either. Quite the contrary, in KKO 2015:17, the use of group structure and shareholder's control were both mentioned as potential piercing situations. This could be interpreted as recognition of the natural person shareholder as a potentially liable party, but in reality, this mention was hardly intended to include such considerations. It cannot even logically exclude the shareholder's control to address only natural person shareholders, as the parent in a group can also use it.

8.3. The Creditors of the Party Held Liable by Piercing

In the legal literature, several authors have expressed their concern over the creditors of whoever is held liable by veil piercing.¹⁰⁹⁷ The argument goes that these (original) creditors contract or make a claim against one person (original debtor) expecting that person to possess the assets they formally have. Then a veil piercing claim is made, holding this person liable for the liability of another entity. This brings in new creditors (piercing creditors) as claimants to the assets. This surprise liability would

1093 This is an often cited view. See, for example, *Cheng* 2010 at 523–524 and 549.

1094 See *Bainbridge* 2000 at 12–36 justifying limited liability and 46–49 arguing against piercing on the grounds of predictability and legal certainty. His economic analysis should be considered universal and applicable to Finland also.

1095 See *Kaisanlahti* 1996 at 243–246. See also *Bainbridge* 2000 at 66–71.

1096 See also *Krendl – Krendl* 1978 at 43–45.

1097 See *Kukkonen* 2018 at 366 and *Airaksinen – Rasinaho – Pulkkinen* 2018a at 19. See also *Könkkölä – Linna* 2013 at 790–791, who take a more moderate stance on the issue and concede it as uncertain. They identify several practical issues piercing could create.

then violate the creditors' expectations and harm them significantly. This could even mean the total absorption of the entity's creditor collective into the liable person's creditor collective.

I would object to this and view it as a lesser problem. In this work, I have adopted the view that veil piercing is a personal liability of the obligations of another entity. Still, this liability is not without basis. It is placed because the person acted in an abusive and condemnable manner. In this sense, it is similar to tort or criminal liability. The original debtor did something the legal system does not allow. When the liability is established based on criminal liability or tort, no one claims that the new claimant to the assets should be denied because it would mean fewer assets available to the previous creditors. This argument could even be turned around.

Since veil piercing liability is based on the actions of the original debtor, not holding them liable by piercing would create unjust enrichment for the original creditors at the expense of the piercing creditors. After all, piercing targets arrangements where the original debtor has sought benefits through abusive use, and these benefits indirectly improve the position of the original creditors.

The counterargument to this would be the surprising and unpredictable nature of veil piercing. As it is not yet concrete in its requirements, the original creditors cannot prepare for it as well. This would separate the situation from tort or criminal liability, which I compared it to earlier. This work is my attempt to make it more concrete, and I hope to have lessened the weight of this argument. On the other hand, criminal activity other underhanded dealings are behaviors that the original debtor no doubt wants to hide from their creditors. This would make it so that the original creditors are likely surprised even then. Tort liability, on the other hand, can be just as unpredictable. The original debtor could make a misjudgment that eventually leads to a damage claim at any time.

Besides this, many liability issues are complex, and legislation is open to interpretation. The same arguments used in the literature to allow taking the original debtors' positions into account could then be used as an interpretative argument in any situation in which the interpretation could harm them. In the extreme, we can take the following example: the tort claim needs to be rejected because the interpretation of liability for pure economic loss to a third party has no clear and strongly established interpretation, and such liability would diminish the assets available to the original creditors. This sort of argumentation should be dismissed. The piercing creditors become creditors of whoever is made liable by piercing—equally with the original creditors.

**VI CONCLUSIONS –
THE DOCTRINE OF PIERCING THE VEIL**

1. Theoretical Basis

This final chapter is meant to give a short description of the piercing doctrine based on my findings in this work. I will not repeat the argumentation behind each interpretation as those are found earlier. I will simply gather the results here. I have addressed veil piercing in this work starting with the test laid out in KKO 201:17. The test can hardly be called optimal or practical, but it is authoritative.

My attempt in this research was to make this ambiguous doctrine more concrete and predictable. For this purpose, I adopted a somewhat unusually fact-centered version of legal dogmatics, the situational sensitive legal dogmatics. This approach first appeared in the emphasized role of analogy in both interpretation and norm formulation. Discovering the relevant facts to justify analogy was necessary. Second, a fact-specific approach was necessary to discover what can be cited in support of or in opposition to veil piercing. The ambiguous doctrines and principles of the past research and case law were not enough for me. In a sense, my analysis even resembles the pondering of evidence. I sought different patterns of conduct and interpretation as to the meaning of these patterns. Almost all of the factors I discovered are ordinary in business, but when seen as part of the pattern, they take on a new meaning.

I began the work with the background theory, though. I construed veil piercing to reflect the prohibition of the abuse of rights. Based on my inspection, the Finnish legal system prohibits the abuse of rights. I formulated a synthesis between the Supreme Court decision and the reflective sections of law combined with Pöyhönen's formulation of the principle. I construed the principle as such: *The effects of a legal action can be denied if those actions are taken by unacceptable motives or if the consequences prove unacceptable. Additionally, the denial requires that the use of the legal action does not match the intended purpose of the utilized legal norm, i.e., the use is artificial.*

I also considered two other theories: the conflict of norms and judgment-proofing. The conflict of norms means that two norms of the legal system demand results that exclude the application of the other norm. One must yield. When piercing the veil, the other norm is the limited liability or separate corporate personality of the corporation. The other norm varies case by case. Judgment-proofing means that there is a symbiotic relationship between two or more entities, in which one generates disproportionately high risks of liability and another owns a disproportionately high level of assets. The business is divided into asset entity and operating entity. Through the contract that unites them, the two entities allocate between them the gains from the operation. In this work, I decided to consider judgment-proofing more as a description of a typical arrangement targeted by piercing instead of an actual background theory. Still, this division should support piercing.

I concluded that both the conflict of norms and judgment-proofing can and should be adopted as compatible with the abuse of rights theory, and therefore, there

is no need to choose between them. The prevalence of abuse theory holds a specific consequence in interpreting the reprehensibility part of the veil piercing test.

The conflict of norms theory proved especially useful in one interpretation. The conflicting norms affect the relevant fact set in a piercing decision. On one side of the conflict, there is always the separate personality and limited liability. On the other side, the conflicting norm can be pretty much any legally binding norm. As piercing decisions are made *in casu*, the assessment emphasizes different things each time based on the relevant facts to the standard interpretation of the conflicting norms. This means that the facts relevant to separate personality and limited liability are always relevant, but the other half alters. For example, the claim can be about remuneration duty or tort from mining operations. It would seem obvious that the former emphasizes distribution, customer impression and device importation. In the latter, the questions more prominently focus on control over the activity in causal relation to the damage. Perhaps the most prominent example of this kind of focus is still employee protection norms, which guide the assessment toward the one who acts as the employee and gains the benefits of the employee's work.

2. Veil Piercing Test

2.1. Use of Corporate Form

In KKO 2015:17, the Supreme Court laid out the abstract requirements of piercing:

1. The use of corporate group structure, intercorporate relationships or shareholder's control
2. in a way that is artificial and reprehensible
3. causing damage to a corporation's creditors or evasion of a legal duty.

I will now proceed to provide an interpretation of these requirements in light of my finding in this research.

The first part of the test could be dubbed the use of corporate form. It includes using the group structure, intercorporate relationships and shareholder's control. While the Supreme Court's description is more precise, it still neglects to mention the common element, which is the benefits and the damage resulting from the use of the corporate form through one of the methods mentioned. Most often, this would mean benefitting from the limited liability shield or separate personality.

This formulation of the test mentions the shareholder's control specifically. This is a deviation from the traditional piercing opinions where control was a central requirement. However, this deviation is only illusory. Using something does require one to control the used object to some degree. Therefore, control remains relevant.

For determining the one who holds control over a corporation, several methods exist. Case law has found control through formal positions as shareholders and directors. There are no specific interpretations of what level of shareholding is enough. Guidelines vary from majority control and qualified majority to complete share ownership. KKO 2015:17 made it clear that total ownership is not required. It would seem more fruitful to view whether the control was thorough enough to enable using the corporation to achieve the unacceptable results. The existence of minority shareholders should not be interpreted through the concept of control, but rather their existence has relevance to the artificiality requirement. Their existence speaks to genuine business purpose.

The control can be informal as well. The formal control holders can be disregarded in the control assessment. They could have agreed through a contract, compelling or pure authority to act per the wishes of another. Then, this other entity should be viewed as having control over the corporation. Intermediaries or straw men will not prevent piercing.

2.2. In an Artificial Manner

Artificial use is using the corporation in a manner that does not promote honest business and trade. The defined purpose of a corporation according to Company Act is to generate profits for the shareholders. Thus, anything beneficial for that group would constitute business purpose, preventing a finding of artificiality. When assessing whether limited liability or separate personality constitutes abuse, the fact that the use is beneficial to the company cannot legitimize the arrangement. However, in a definitive sense, the arrangement does have a business purpose when it is beneficial. Showing artificiality thus essentially requires an evaluation of whether the corporation has any business activity. If the company has no business whatsoever, the use of such a corporation is always artificial. Similarly, if the business is founded solely on a model that is not lawful, then the use is artificial. In these two situations, should the corporation also have a business purpose, piercing becomes a balancing act as to whether the business purposes are significant enough compared to artificial use. Alternatively, the situation could allow for piercing if the corporate use on which the piercing claim is made has no connection to the business itself.

Of the supporting factors, especially the artificial division of existing business and inadequate resourcing speak to the existence of artificiality. If the corporation has not been given enough resources to tackle the business in a sustainable manner, it could be argued that it was never meant as a real business. This sort of resourcing is even more obvious when an existing business is divided and the risks are thus more likely known. Similarly, commingling, confusion and even neglecting corporate formalities hint toward artificiality. If the entities and employees within the arrangement are

used interchangeably and without formal contracts, it could indicate that there is no genuine business purpose to include multiple entities in the arrangement.

2.3. In a Reprehensible Manner

I used two criteria as the main categories in establishing reprehensibility: unacceptable consequences and unacceptable motives. Within these categories, I found several more specific patterns to establish these more abstract criteria. The unacceptable consequences section consisted of two subcategories, the first of which was excessive or undue damage. This was understood in relation to artificiality. Excessive or undue damage criteria are more readily present when a corporation has fewer genuine business operations. This would shape the piercing assessment into a similar balancing act of business purposes and illegitimate benefits as in the tax avoidance norm. This model, however, is impossible to make completely objective and concrete. The second category was the unacceptable ramifications view, which emphasized the incentives given to business operators via a judgment accepting some form of corporate use. If the judgment legitimized some use that was obviously harmful to society, then the consequences are unacceptable in accordance with the piercing test.

The unacceptable motives section was divided into three subcategories. I first discussed the arranger's intent to damage and benefit at someone else's expense. This led to confusion in the core element of limited liability, which logically results in benefits if the negative risks realize. I solved this issue by emphasizing the difference between abstract motives to benefit and the specific, known and predictable motives to benefit. The second subcategory drew an analogy from the banning of business operations. The moral condemnation there is the systematic and unconcerned operation for personal gain. I crystalized this criterion into a *systematically construed disparity in the allocation of negative and positive risks, resulting in personal benefit at the expense of others*. This sort of behavior should be enough to deem the use reprehensible in a piercing context. The third issue I discussed was fraudulent behavior and misrepresentation. I concluded that these should be considered their own doctrine and not a part of the veil piercing test. In cases of fraud or misrepresentation, the reasonable expectations of the party receiving the false or misleading information are protected, and the legal rights are affirmed to match the representation.

Of the objective supporting factors, almost all of them hinted toward reprehensibility. Some of them hint more strongly toward artificiality, though. One should especially note the disparity of assets and negative risks when pondering reprehensibility. If done in a systematic and high-risk manner, this alone could fulfill the reprehensibility requirement.

2.4. Evading a Provision

The difference between breaking the law and evading a provision is subtle. Breaking the law means committing an act that is forbidden by law. Evading a provision of law is committing an act that is legal in itself; this act is such that the legal norm should accommodate it, but it does not match the usual or intended content of the arrangements covered by that norm. It is an act that has been made to avoid the legal consequences of another legal norm by making an artificial arrangement. It means using legal forms in a manner they were not meant to be used to achieve results that are either impossible or forbidden by law.

One can attempt to modify the prerequisites in order to either allow or prevent the application of some written norm. This modification becomes evasion when the legal prerequisites are met in form, but the actions do not match the form. The realities normally behind the chosen form are not present, whereas the action still fulfills the formal requirements. A tension between the form and reality exists, as the achieved result is either forbidden or impossible by law. This tension is present in tax evasion and artificial arrangements also, both of which address the disparity of the legal form and the economic reality of the case. It should be noted that evasion of a provision is highly case-specific, and no general rules or legal tests for detecting evasion can be crafted.

In the corporate context, this means using separate personality and limited liability shields to obtain benefits that normally are not obtainable through corporate use. The reality remains the same, as the corporate founder can assume full control over the corporation. She can act as before, only now in the name of another. The actor, in reality, has not changed, only the actor in form. So, considering the purpose of the evaded norm, veil piercing allows a norm that can be applied “through” the corporation when the situation is factually the same as it would be without the corporation.

2.5. Causing Damage to a Creditor

The first thing to determine is what should be considered damage. I arrived at the conclusion that any unbeneficial change in the legal rights of a party should be considered damaging.

The more pressing issue was the treatment of voluntary and involuntary creditors. I would derive from the traditional view to treat voluntary creditors more strictly due to their position. Instead, I would look at the arguments made in favor of this strictness: ability to influence the terms and choice of becoming a creditor. From this insight, I recommend looking into the actual influence and choice the creditor had. Different contractual creditors can be of vastly differing positions here. The bank and the employees are both voluntary creditors, for

example. I would suggest a non-exhaustive list of five criteria in the assessment of these creditors:

1. level of sophistication
2. bargaining power
3. access to information
4. capability to diversify
5. reliance on the debtor

3. About the Evidence and Burden of Proof

In a piercing claim, the claimant needs to prove that, more likely than not, the use of corporate form, control, reprehensibility, artificiality, damage and causality exist in the case. In addition, within the sphere of property law, the separation in the evaluation of these factors need not necessarily be absolute. Failing to prove one factor completely can be compensated by the strong evidence of another. It is in the nature of an overall assessment to make this sort of compensation.

It is important to note that control, damage and causality are much easier to prove and are commonly present in a piercing situation. Thus, they should not be allowed to compensate the lack of artificiality or reprehensibility extensively. Control is simply too common, and in the corporate context, it is ordinarily found to have an extensive role in the evidence. Similarly, the evasion element is almost always apparent and even obvious. It should thus only be used cautiously, if at all, when used to compensate the impropriety requirement. The ability to compensate for the other requirements of the test seems most strongly linked to the involuntary versus voluntary viewpoint I examined in this chapter. The creditor's lack of influence would support giving that person additional protection through the piercing doctrine. Then the nature of the damage could compensate the otherwise lacking impropriety requirement. Alternatively, it could just be interpreted to support the existence of improper elements in the arrangement.

4. Who Should Be Liable?

I would strongly support using the approach of removing the advantages. This means piercing the veil only to deny the advantages the arrangement has created for the users. This approach can result in liability *in casu* for any of the controller, shareholder or "economic unit" targets but does not compromise them in an arbitrary manner.

I proceeded to inspect four different situations in which the advantages appear differently. Each of these situations was backed by case law. The analysis showed that locating the advantages leads to different results depending on the construed arrangement. Even the liability allocation is made based on overall assessment and *in casu* examination. While the traditionally liable parties appeared as possibilities, they should not be viewed as the sole targets for liability, and liability definitively should not be based on some formal position.

5. Role of Veil Piercing

In hindsight the goal of making the ambiguous piercing doctrine more concrete might have been ill-placed. More often than not, I was able to detect situations, where piercing clearly could not apply. Elimination turned out to be easier than confirmation. This, however, might be completely inevitable. The nature of the veil piercing doctrine is general. It is meant to be a loose standard and giving it a too specific content would eliminate an essential part of the doctrine's capabilities in combatting abuse. The merit of my research is thus limiting the most grievously wrong and opportunistic uses of the doctrine. The result is a better balance between predictability and flexibility as well as a better understanding of veil piercings' purposes and role in the legal system.

The role veil piercing in the legal system is as complex and adaptive as that of the corporate form, separate personality and limited liability. By nature, they are tools that are widely usable for a multitude of purposes. The benefits of the corporate form appear in almost every area of the law, and new creative uses appear constantly. I am unable to conjure any other legal institution that can be used in such a multitude of purposes—to share business risk, promote funding, encourage business, escape jurisdiction, deny tort compensation or circumvent nationality requirements. The whole institution is about having someone else—another person—doing things for you according to your instructions. This privilege is meant for business ventures, but for a creative mind, the chances for mischief are obvious. The role of the corporate form is thus limited to things another person could legally do for you. This versatile nature as a person allows the corporate form to escape even the sphere of civil law in which it used to be at home. Veil piercing similarly follows this to weed out the most egregious mischiefs.

There would be no problems with the corporation if the law was created to match the reality of corporate operations. However, it does not do this. Instead, it has taken a rather formal view of corporations. The starting point is that the corporation is an independent entity separate from its shareholders. This reflects reality only in the bigger corporations and those with diversified ownership. Economic reality works

differently. Control can exist despite formal independence. Similarly, benefits can be moved freely between controlled entities. Liability, on the other hand, is strictly tied to the entity. The economic and contractual phenomena of control create a tension where the regulation relies on formal criteria that are based on the independence and separate nature of the corporation.¹⁰⁹⁸ Veil piercing can provide some answers for singleton abuses, but it does not eliminate the tension.

Still, the most uses for veil piercing remain in the civil law sphere and in connection to insolvency. There is rarely a need to demand piercing if the primary liable party is capable of fulfilling the obligation, although a connection to insolvency law and insolvency procedures seems unnecessary. The traditional view of veil piercing's application has been about the protection of creditors from the opportunistic actions of the parent corporation or natural person shareholders. The recent developments in case law show that creditor protection—especially those unable to influence the credit terms—still remains important in veil piercing. Still, the description of the typical situation should be modified a bit. The emphasis on parent or shareholder liability should be discarded, and the recipient of the benefits should be targeted instead.

The path less traveled moves toward the direction of general evasion of law. The KKO 2015:17 decision opened this path, though none have walked it yet. It is precisely the evasion situations that widen the application of the doctrine. Potential uses include nationality requirements, choice of jurisdiction, the *ne bis in idem* limitation, the application of discovery rules, etc. It should already be apparent from the pages of this work that these applications of the piercing doctrine are novelties only in Finland and the Nordic region. However, it is natural that the doctrine will develop toward these directions, as the separate personality is easily abused in the interpretation of these norms. Veil piercing can be developed to combat situations where some unwanted attribute is isolated to a separate person to allow a favorable result at the expense of another person. The more apparent direction of expansion is the procedural law, but the application should in no way be limited to that.

As such, the role of the Finnish doctrine of piercing the veil is approaching the United States doctrine, but this is specific to the general evasion part of the doctrine. The Finnish doctrine can potentially be used for similar purposes as its equivalents in the United States. Still, the Nordic region in general does have much more limited use for veil piercing. Several works before my research have noted the more comprehensive creditor protection norms in the Nordic region, but I feel the need to repeat this statement. Many of the piercing cases in the US could have been resolved with written law norms in the Nordic. As for the United Kingdom, their reluctance to pierce is unique. Their formal approach seems to make piercing rather difficult, though they have recognized some of the typical abuses of the corporate

¹⁰⁹⁸ See *Leppänen* 1992 at 119.

form and have created legislation forbidding them, for example, wrongful trading laws, shadow director norms and regulation on phoenix companies. These could also be characterized as creditor protection norms, though they are different from the ones the Nordic region has adopted. Each of the approaches in the compared jurisdictions is rather unique, and piercing seems to serve a multitude of purposes depending on which conducts are already addressed in the written law.