PIERCING THE CORPORATE VEIL:

HOW JURISDICTIONS DIFFER AND HOW TO RECOVER
Piercing the corporate veil – an offshore perspective:

- Common law jurisdictions recognize and apply the Salomon v Salomon Principle
- Courts will not lightly pierce the veil of incorporation, even in the context of a group structure:
  - *Walker International Holdings and another v Olearius Limited* [2003] CILR 457
- Circumstances in which the veil of incorporation can be pierced are limited:
  - Requirement for sham or façade:
    - *Gilford Motor Co v Horne* [1933] Ch 935
    - *Jones v Lipman* [1962] 1 WLR 832
  - Evasion principle
    - *Prest v Petrodel Resources* [2013] 2 AC 415
The modern test – Prest v Petrodel Resources

Lord Sumption considered that the ability to pierce the corporate veil was limited to cases involving evasion:

“I conclude that there is a limited principle of English law which applies 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”
Alternative approaches to piercing the corporate veil:

- **Resulting Trust**
  - *Prest v Petrodel Resources* [2013] 2 AC 415

- **Agency**
  - *Gencor v Dalby* [2002] 2 BCLC 734
  - *Trustor v Smallbone* [2001] 1 WILR 117
  - *Bonotto v Boccaletti* [2001] CILR 120

- **Direct Causes of Action**
  - *Chandler v Cape Plc* [2012] EWCA Civ 525

- **Liquidation**
Examples of cases involving offshore companies where the veil has been pierced are:

- **Trustor v Smallbone** [2001] WLR 1177 – Gibraltar company
- **Gencor v Dalby** [2000] 2 BCLC 734 – BVI company
- **Gramsci v Stepanov** [2012] BCC 182 – BVI companies
- **Penny Feathers Ltd v Pennyfeathers Property Co** [2013] EWHC 3530 – Jersey company
- **Bonotto v Boccaletti** [2001] CILR 120 – Cayman Company
United States
Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."

Several factors are considered in determining whether to pierce a corporate veil under the alter ego theory, including: 1) the absence of the formalities which are part and parcel of normal corporate existence (i.e., the election of directors, keeping of corporate records); 2) inadequate capitalization; 3) personal use of corporate funds; and 4) the perpetration of fraud by means of the corporate vehicle.

The second prong can be satisfied either by showing outright fraud, or another type of wrong, such as a "breach of the legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights." *Electronic Switching Indus., Inc. v. Garadyne Electronics Corp.*, 883 F.2d 418, 424 (2d Cir. 1987).
ALTER EGOS AND PERSONAL JURISDICTION

• If there is personal jurisdiction over one alleged alter-ego, there is personal jurisdiction over all;

• Lower threshold for success compared to transfer of liability;

• Alter ego jurisdiction, fraudulent transfer/discovery outcome.
Pre-Judgment Attachment

• Secure the assets;

• Probability of Success on the Merits;

• Bond and Damages if Unsuccessful
AROUND THE VEIL

• Equitable Receivership over Shares and Assets:
  • Federal and State Law Applicable
  • Judicial discretion. Courts consider: (1) alternative remedies available to the creditor; (2) the degree to which receivership will increase the likelihood of satisfaction; and (3) risk of fraud or insolvency if a receiver is not appointed.
• Chapter 15 Recognition of Foreign Equitable Winding Up.
Down Energy Price & “Aggressive Offshore Restructurings”

• Questions for judge (preliminarily) and then jury after plenary discovery:
  • (i) was the intent of the restructuring to put assets beyond the reach of creditors?
  • (ii) is the economic benefit of the restructuring nominal or negative compared to the result of asset dissipation?
  • Are multi-tiered corporation-webs at risk of global veil-piercing attachment in connection with New York law-governed debt upon such restructuring?
Are All Veils Cut From the Same Cloth?

• NOT ALL COMPANIES’ VEILS ARE TREATED EQUALLY – THE ANSWER IS ALREADY “NO” IN THE UNITED STATES.

• Due to the “unique corporate arrangements that exist in the maritime industry,” federal maritime law has adopted “unique rules” governing corporate liability. It applies “irrespective of whether corporate entities expected, *ex ante*, that their corporate relationship would be scrutinized in a maritime action.”

• “Special equitable need to permit piercing the corporate veil in a "world of shifting assets, numerous thinly capitalized subsidiaries, flags of convenience and flows of currencies".”
France & Europe
− *Stricto sensu*, there is no piercing of corporate veil theory in France and the courts are generally reluctant to disregard the corporate layer.

− Theory of “Interference” (“*immixtion*”):
  - The parent company can be held jointly and severally liable for its subsidiary’s debts if two requirements are met:
    a) the parent company has “interfered” in the functioning of its subsidiary, and
    b) the interference created an appearance that the parent “replaced” the subsidiary.

Alternative to piercing the veil: “Paulian” Action (“action paulienne”)

- This concept refers to a claim by a creditor against a third party to rescind a fraudulent transfer of assets made by the debtor to the third party (Article 1167, Civil Code).

- This theory can potentially be used to « pierce the veil » if there were transfers of assets between two companies of the same group:
  a. distribution of dividends;
  b. unsecured loans;
  c. waivers of contractually acquired rights, etc.
Piercing the Veil in France: Mission Impossible? (3)

Special rules applicable in the framework of *insolvency proceedings*:

- the assets of a third party can be reached by the insolvent company’s creditors if it is demonstrated that:
  
  (a) the insolvent company was “fictitious,” or
  
  (b) the insolvent company’s assets were “intermingled” with those of the third party or both companies engaged into unjustified “financial flows.”

Piercing the Veil In Other European Jurisdictions

- **Belgium** and **Luxembourg**: Historically influenced by French civil law.

- **Spain**: the courts readily apply the legal theory of “levantamiento del velo,” including to prevent the use of a corporate layer to defraud a creditors’ rights (*Tribunal Supremo*, Primera Sala, 28 May 1984).

- **Switzerland**: the corporate layer can be disregarded in rare situations of demonstrated abuse of rights or the manifest breach of third parties’ legitimate interests (Swiss Federal Tribunal, 21 February 1973).

- **Cyprus**: common law jurisdiction.
Piercing the Veil in International Arbitration

➢ In the context of arbitration, the veil has to be pierced twice:
  a) To assert jurisdiction (which is limited to « parties » to the arbitration agreement) and
  b) To determine substantive liability.

➢ Tribunals sitting in France have extended the arbitration agreement to non-signatories:
  ▪ Interim Award in ICC Case No. 4131 of 1982, Dow Chemical

➢ Substantive liability can be determined by applying the national law or the lex mercatoria:
  ▪ Award in ICC Case No. 8385 of 1995, X. (US) v. Y. (Belgium) (lex mercatoria)
  ▪ Ad hoc Award of 1991 in Switzerland, Alpha S.A. v. Beta & Co (Swiss law)
Enforcement of Judgments That Pierce the Veil

- EU Regulation No. 1215/2012 of 12 December 2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

- Pre-judgment attachments in France in support of foreign court proceedings asserting the pierce of corporate veil claim
Case Study

The Bank of International Commerce (BIC) was incorporated in the Cayman Islands in 1994 to act as a private bank, attracting a number of HNWI depositors from the US and across Europe. In addition to directly held cash and other assets, BIC carried on investment business through a series of asset-holding subsidiaries.

However, it appears that from inception BIC was operated as a fraud on its customers by Mr Nik Andrunov, who used circa US$650 million of customer deposits to fund his own lavish lifestyle. As a result of the fraud, the bank is insolvent and a group of depositors have approached the panel to consider what actions can be taken to unravel the corporate structure and make recoveries for the benefit of depositors.
Speaker Biographies

• Mark Goodman – Campbells
• Ivan Urzhumov – Foley Hoag
• Warren Gluck – Holland & Knight