Concernaansprakelijkheid. Rechtsvergelijkende en internationaal privaatrechtelijke beschouwingen
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Summary

1. Subject of the study. The cross-border activities of European - and non-European - businesses have increased significantly over the last few decades. Not only large, but also medium-sized and small businesses expand their territory across the border. The typical form of the multinational enterprise is the group of companies, a cluster of legally independent companies organisationally linked together in one economic unit. An enterprise may expand its activities across the border by establishing a branch office or a by incorporating a subsidiary under the law of the host country. In practice the latter option is the most frequently chosen. Unlike a branch office, a subsidiary incorporated under the law of the host country will not be hindered by legal 'problems of adaptation'. The most important advantage of the group structure is, however, that it enables the parent company to create bulkheads, which prevent the whole group from sinking if one member is 'flooded'. The group structure is used to limit risks to specific members of the group.

The area of tension between the various separate legal entities on the one hand and the image of a single economic entity on the other hand has given rise to a number of legal questions, to most of which a satisfactory answer has not yet been found. The "perhaps most controversial issue of group law" is directly linked to the possibility of limitation of liability just mentioned. The question under which circumstances the parent company may be held liable for debts of the subsidiary has intrigued - and still intrigues - many lawyers all over the world.

As a member of a group the subsidiary will have to accept that its interests may be subordinated to the interests of the group as a whole. The subsidiary's assets will not be used exclusively to cover its own liabilities, but they will be made available to the whole group. It is therefore hardly surprising that when a creditor does not receive payment from a subsidiary, the question crops up, whether the principle of limited liability applies without exception to group relationships, or whether corporate veils may be cast aside, so that the creditor can recover his claim from the parent. Even in a straightforward 'domestic' case, it will not be easy to answer this question. The courts cannot just take away with one hand what the legislator or the courts themselves have given with the other. This is made perfectly clear in the following passage quoted from a judgment of the English Court of Appeal:

"We do not accept as a matter of law that 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

1. L. Immelman, Over multinational ondernemingen en medezeggenschap van werknemers (On Multinational enterprises and co-determination of workers), p. 76.
the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than that company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our corporate law.\(^2\)

And yet there are limits to the right to limit liability, as there are limits to the exercise of any other right. Each of the legal systems included in this study provides for techniques which can be used to make a parent company liable for debts of its subsidiary. In a straightforward ‘domestic’ case the lawyer will only have to establish which technique can be used to pierce the corporate veil. The case becomes more complicated if parent and subsidiary are domiciled in different countries. In a cross-border veil-piercing case four questions must be answered successively:

1. Which is the competent court?
2. Which law applies?
3. Does the applicable law allow the corporate veil to be pierced?
4. Can the judgment be enforced abroad?

Up to now only the third - substantive - issue has been dealt with extensively in Dutch legal writing. The other - conflicts of law - issues have not received much attention, although it is evident that in a study of veil-piercing in corporate groups, conflicts of law issues cannot be avoided:

“..., intra-group liability problems raised by creditors of insolvent subsidiaries of a foreign-based group entail inevitably, by definition, private and procedural international legal implications: the issues of the appropriate choice of law to determine the liability of the foreign parent for the satisfaction of the rights of creditors of a bankrupt subsidiary and of in rem and personal jurisdiction of the court a quo (not to mention the problem of enforcement of foreign judgments) thus come inescapably to the foreground, holding a sort of legal priority regarding any type of substantive legal considerations.”\(^3\)

In Dutch and foreign legal writing the same spectacular cases always feature as examples of cross-border veil piercing. Attention is focused on environmental disasters, like the case of the shipwrecked oil tanker Amoco Cadiz\(^4\) or the tragic case of the chemical leak in Bhopal, which led to the loss of many lives. Recently, another environmental case was headline-news in England and Namibia. A former employee of a Namibian company claimed damages because he had been exposed to chemicals of a different nature in a former subsidiary of International. One of the reasons why the case is of interest is that the financial assets of the subsidiary were limited to the financial assets of the parent company. For that reason the parent entity was made liable for the losses of the subsidiary. Drawing from Dutch legal writing, the author found the case to be spectacular than the ordinary veil-piercing case, because an ordinary veil-piercing case involves a legal point of view; in the case at hand, the subsidiary claimed the right to create the false impression that the company at the time of creating the false impression had a more limited capital than was actually the case, thus creating the false impression that the company was less solvent than it actually was. The author was able to draw a picture of the work of the Dutch courts in practice, which is a great help for the reader trying to understand the Dutch system of the veil-piercing technique. The author was also able to draw a picture of the veil-piercing techniques, like the rule of the House of Lords in the case of the chemical leak in Bhopal, which led to the loss of many lives, or the case of the shipwrecked oil tanker Amoco Cadiz\(^4\). These cases are important for the reader trying to understand the Dutch system of the veil-piercing technique.

2. Method used and discussion

A comparative part and the conclusion are found in chapter five. The author compares the substantive foundations for the second part of the study. The author compares the substantive foundations for the second part of the study with the substantive foundations for the first part of the study. The author intends to draw a picture of the work of the Dutch courts in practice, which is a great help for the reader trying to understand the Dutch system of the veil-piercing technique. The author was also able to draw a picture of the veil-piercing techniques, like the rule of the House of Lords in the case of the chemical leak in Bhopal, which led to the loss of many lives, or the case of the shipwrecked oil tanker Amoco Cadiz\(^4\). These cases are important for the reader trying to understand the Dutch system of the veil-piercing technique. The author was also able to draw a picture of the veil-piercing techniques, like the rule of the House of Lords in the case of the chemical leak in Bhopal, which led to the loss of many lives, or the case of the shipwrecked oil tanker Amoco Cadiz\(^4\). These cases are important for the reader trying to understand the Dutch system of the veil-piercing technique.


4. Strictly speaking, this was not a case of international piercing, as the subsidiary and the parent were both based in the United States. The international element in this case is that the oil was spilled on the coasts of France.

5. House of Lords 24 July
employee of a Namibian uranium mine is suing the English parent company for damages because he has contracted a uranium-related disease. A spectacular case of a different nature is the notorious collapse of the Bank of Credit and Commerce International. One of the greatest difficulties in this international group insolvency is that the financial affairs of the various members of the group are so closely knit, that it is almost impossible to establish exactly which assets belong to which company. For that reason a few cooperating liquidators have proposed to pool the assets of some members of the group.

Drawing from Dutch experience a few cases can be mentioned, which may be less spectacular than the ones mentioned above, but which are just as interesting from a legal point of view. In the Osby-case, an unpaid creditor of the insolvent Dutch subsidiary claimed that the Swedish parent company had acted negligently in creating the false impression that the subsidiary was creditworthy. Also worth mentioning is the Banco di Roma case, in which the creditor of a Dutch subsidiary succeeded in preventing the Italian parent from withdrawing assets from the subsidiary, by obtaining injunctive relief in summary proceedings.

2. Method used and delineation of the subject. The study is divided into two parts: a comparative part and an part in which conflicts of law issues are dealt with. The foundations for the second part are laid in the first. In the first part Dutch law is compared with the laws of three other European countries: Belgium, Germany and England. In order to keep the size of the study within reasonable bounds, elaborate general observations on group law have not been included. After a short introduction, each national chapter focuses on the techniques which can be used to make the parent company liable for debts of the subsidiary. The study has been limited to techniques which may lead to liability of the parent company. Other techniques, like the rules on transactions at an undervalue and unfair preferences, have not been included, with the exception of the German rules on subordination of shareholder loans.

The analysis of case law forms the backbone of the first part of the study. The author takes the view that case law deserves this leading part, as the courts have greatly influenced the law in the field of piercing the veil in all four countries included in the study. Another reason for focusing on case law is that the author intends to draw a picture of 'law in practice'. In order to show how veil-piercing works in practice, a thorough analysis of case law is indispensable.

The second part of the study is of a more theoretical nature. It leans more strongly than the first part on Dutch and foreign legal doctrine, as the number of relevant reported cases is limited. Consequently, the second part of the study is more speculative than the first. Another difference with the first part is that the second part focuses on Dutch law. The conflicts of law study has been limited to the questions which arise when a Dutch court has to deal with an international veil
piercing case. The objective is to establish which Dutch rules of international procedural and private law apply to a cross-border veil piercing case. Nevertheless, the comparative method also plays a part in the second part of the study. The Dutch rules on international jurisdiction are - to a large extent - based on the Brussels Convention on Jurisdiction and Enforcement of Judgements (hereafter Brussels Convention). This Convention has also been adopted by the other countries included in this study. When interpreting the rules of the Convention, the European Court of Justice uses the comparative method. It is of equal importance to look at other laws when designing conflict rules. In order to avoid clashes and loopholes between the national conflict rules, one has to take into account how similar cases are dealt with in other countries.

3. The purpose of the study. The comparative part of the study serves two purposes. The first is a purpose which is common to all comparative studies. In order to judge national law on its merits one has to look at the solutions provided by other legal systems. The second - more specific - purpose of the comparative study is that it enables the author to assess the possibilities of harmonisation of the rules concerning group liability in the EU. The assessment departs from the proposals which were recently put forward by the Forum Europaeum Konzemrecht, an international working group of leading experts in the field of group law. It is the author’s view that the possibilities for harmonisation are limited (vide nr. 4). This means that issues of conflicts of law will not - at least not in the near future - become less important. It is submitted that these issues are only likely to gain importance, taking into account that more businesses expand their territory across the national border every year. Therefore, a closer look at the way in which a cross-border piercing case should be dealt with by a Dutch court seems justified. The second part of the study is dedicated to conflicts of law issues. In this part, the author sets out to answer two questions:

1) Under what rules may the Dutch court take jurisdiction and how should these rules be applied in specific cases?
2) According to what conflict rules should the Dutch court determine the applicable law and how should these rules be applied in particular cases?

4. Conclusions. The conclusions of the first part of the study can be found in the comparative synthesis (Chapter 5). This chapter contains an elaborate analysis of the most striking similarities and differences between the systems studied, as well as an assessment of the possibilities for harmonisation of laws in this field. In this summary only a short overview of the most important conclusions can be given.

In all legal systems included in the study liability of the parent company for debts of the subsidiary is usually based on fault. There are only a few exceptions to this rule.

In all legal systems studied piercing the veil by the courts (without a statutory basis) is seen as an ultimum remedium (last resort). This technique is only used in clear-cut cases of abuse of limited liability.

All legal systems studied provide for liability of the parent in case of wrongful trading. For a claim to succeed, it is necessary to establish that the parent was intensively involved in the insolvent subsidiary’s affairs. The plaintiff must prove that the parent has acted as a shadow director. The national rules on wrongful trading differ considerably in some important aspects. This might prove an obstacle to eventual harmonisation of these rules.

All systems studied provide for possibilities to hold the parent liable for undercapitalising the subsidiary. In this field, the rules differ even more than the rules on wrongful trading. The most stringent provisions can be found in Germany, where loans granted by the parent may under certain circumstances be subordinated to the other debts in case of insolvency of the subsidiary.

There is a marked difference between the Netherlands and the other countries included in the study, where the role of tort law is concerned. In the Netherlands, a claim based on negligence is the technique ‘par excellence’ to hold a parent company liable for debts of the subsidiary. The strength of Dutch tort law is its flexibility, which has enabled the Dutch courts to ‘solve’ a number of very different veil-piercing cases by using this technique.

Group liability and problems of burden of proof are inseparable. In all countries studied lawyers wrestle with the question what exactly should be established by the plaintiff in a veil-piercing case. Practice shows that it may be extremely difficult to prove that the parent knew that creditors of the subsidiary would be harmed by its act (or omission). Creditors usually do not possess the detailed financial information necessary to discharge their burden of proof.

It is submitted by the author that the plaintiff’s burden may be lightened by imposing a duty on the parent to clarify the subsidiary’s financial state of affairs at the time of the litigious act (or omission). Especially when the parent company qualifies as a shadow director, it is reasonable to expect it to provide information regarding the subsidiary’s financial state of affairs. For the same can be expected of formally appointed directors.

It is the author’s view that the possibilities for harmonisation are limited. Perhaps the rules on wrongful trading can be harmonised, as suggested by the forum Europaem Konzernrecht, although the differences in existing national laws will not make this an easy project. It is submitted that the eventual harmonisation of wrongful trading provisions should not be limited to group relationships, considering that wrongful trading is not a problem unique to groups of companies.
The second part of the study has led to the following conclusions.

The Brussels Convention 1968 and the Lugano Convention 1988 are not applicable to claims against a foreign parent based on art. 2:248 of the Dutch Civil Code ((shadow) director’s liability in case of insolvency). This means that the Dutch court may take jurisdiction on the basis of art. 126 para 3 of the Dutch Code of Civil Procedure (this article provides for jurisdiction of the ‘exorbitant’ forum actoris). The answer will stay the same, should the EC Convention on Insolvency Proceedings (hereafter: EC Insolvency Convention) enter into force. This Convention only provides for the enforcement of judgments concerning claims closely connected to insolvency proceedings, but it does not contain any rules on jurisdiction with regard to such claims. The EC Insolvency Convention only lays down rules regarding jurisdiction to open insolvency proceedings. It leaves open the question which court may take jurisdiction in case of a claim based on director’s liability in case of insolvency. It is submitted that this lacuna should be filled. The claim based on art. 2:248 DCC is governed by the lex concursus. This means that, if insolvency proceedings have been started against a subsidiary in the Netherlands, a claim based on art. 248 against the foreign parent will be governed by Dutch law.

In case of a claim based on negligence against a parent based outside the territory of the Brussels Convention, the Dutch court may take jurisdiction under art. 126 para 3 of the Dutch Code of Civil Procedure. If the parent is based within the territory of the Brussels Convention, the Dutch court may take jurisdiction under art. 5 (3) of the Brussels Convention. This rule provides for jurisdiction of the court of the place “where the harmful event occurred”. If the place of acting (Handlungsort) and the place where the act made its first impact (Erfolgsort) do not coincide, the plaintiff may choose whether he brings the claim before the forum of the Handlungsort or the forum of the Erfolgsort. It is submitted that this option is also available if the loss sustained by the plaintiff is direct and primary economic loss.

In the COVA-case the Dutch Hoge Raad decided that tort cases is governed by:

1) the law parties have chosen;
2) in the absence of choice of law: the law of the country where both plaintiff and defendant reside;
3) in the absence of a common residence: the law of the country where the tort was committed.

In the following I will only mention the Brussels Convention, as the provisions of both conventions are almost similar.

The important question which law applies if Handlungsort and Erfolgsort do not coincide has not been answered in this case. It is submitted that the law of the Erfolgsort should be applied if the act made its first impact in another country than the country where the act was committed. In case of direct and primary economic loss the most practical solution is to locate the Erfolgsort at the plaintiff's residence.

It is of equal importance for determining jurisdiction and for determining the applicable law to know where Handlungsort and Erfolgsort can be located in specific veil-piercing cases. It is suggested by the author that in the five most important cases of negligence in parent-subsidiary-relationships, the Handlungsort and the Erfolgsort should be located in the following way.

a) In case the parent acts negligently in allowing further trading when the subsidiary is insolvent, the Handlungsort should be located where the contract with the plaintiff was entered into. The Erfolgsort in this case is the plaintiff's domicile.

b) In case a parent has acted negligently in allowing the insolvent subsidiary to prefer a payment to another member of the group, the Handlungsort is the place where the payment was made. This will usually coincide with the seat of the subsidiary. The principle of equal treatment of creditors entails that the Erfolgsort should be located at the place of business of the subsidiary. It is submitted that, because the general body of creditors has suffered economic loss as a consequence of the preferential payment, the Erfolgsort should not be located at the various individual creditor's residences. This may lead to unequal treatment of creditors.

c) In case a parent has acted negligently in withdrawing assets from a subsidiary, the location of the Handlungsort depends very much on the facts of the case. For the same reasons set out above in the context of preferential payments, the Erfolgsort should be located at the subsidiary's place of business, rather than the various domiciles of the individual creditors.

d) If the parent was negligent by creating the false impression that the subsidiary was creditworthy, the Handlungsort should be located at the subsidiary's seat. The Erfolgsort should be located at the unpaid creditor's residence.

e) If the parent is held liable on the grounds of negligent statement (suggesting that the parent will cover the subsidiary's debts), the Handlungsort is the place where the statement was made. The Erfolgsort should be located at the unpaid creditor's residence, for this is a case of individual economic loss, like the previous case.

9 These are all cases which have been decided by the Dutch Hoge Raad.
When the court is faced with a case in which it seems justified to pierce the corporate veil because abuse has been made of the right to limit liability, jurisdiction should be determined on the basis of the underlying claim, which will usually be a claim based on contract or on tort. This means that the Dutch court may take jurisdiction in case of a claim against a parent based outside the territory of the Brussels Convention according to 126 para 3 of the Dutch Code on Civil Procedure. If the parent is based within the territory of the Brussels Convention, jurisdiction can be based on the articles 2, 5 (1) (in case of a contractual claim) or 5 (3) (in case of a claim based on tort) of the Convention. Art. 6 (1) may be used to bring a claim against the parent before the court of the domicile of the subsidiary. Art. 5 (5) can only be used to bring the foreign parent before a Dutch forum if the subsidiary has created the impression that she was acting on behalf of the parent company.

The question which court has jurisdiction to pierce veils in a group insolvency, with the result that the insolvency proceedings are consolidated, can be answered simply by saying: none. The answer will be no different, should the EC Insolvency Convention enter into force. This Convention does not provide for specific rules for group insolvencies. It also adheres to the principle that in case of a group insolvency, each group company will be subjected to separate insolvency proceedings. It is the author’s view that at least a duty to cooperate should have been adopted in this treaty, both for liquidators of companies belonging to the same group and for the different national courts supervising the various group members’ insolvencies. It goes without saying that as long as procedural consolidation across the borders remains impossible, substantive consolidation stays out of sight altogether. The author takes the view that a regulation of cross-border substantive consolidation in group insolvencies can only meaningfully be discussed when national insolvency laws have been harmonised.

It is submitted that the issue, whether the court may pierce the corporate veil because the privilege of limited liability has been abused, is governed by the lex societatis. The author is not in favour of giving the plaintiff the right to opt for the lex causae, should this prove to be more favourable than the lex societatis. It is the author’s view that direct veil-piercing by the courts should only be allowed in cases of commingling of assets, where it is impossible to establish which assets belong to which company. In these cases, the principle of equal treatment of creditors entails that the question whether the corporate veil may be pierced should be governed by one lex societatis, rather than subjecting it to different leges causae.