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Piercing the Corporate Veil

Karen Vandekerckhove



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Piercing the Corporate Veil

by

Karen Vandekerckhove

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Piercing the Corporate Veil

European Company Law series

VOLUME 1

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The CECL-bookseries on European company law is closely linked to the bimonthly journal *European Company Law* ('ECL'), also published by Kluwer Law International. The persons comprising the ECL's editorial board and the editors of the CECL-bookseries are one and the same. The aims and objectives of CECL can be found at <http://www.cecl.nl>. The series covers subjects of company law in a broad sense, including insolvency, co-determination and securities law. The editorial board sees to it that all parts of this series are well written, of sufficient scientific depth and at the same time useful for legal practitioners and academics alike. The board's credo is that international and comparative law should never degenerate into a theoretical *l'art pour l'art-exercise*, but must always be subservient to the requirement of practical applicability and a further development of the law.

Series Editor's Foreword

*Steef M. Bartman**

Piercing the corporate veil has always been a somewhat controversial subject in legal theory and practice. On the one hand this judicial technique is sometimes indispensable to optimally attune legal reasoning in case law to economic reality, and—by doing so—to offer a reasonable solution to a subsidiary's creditor in the form of recourse against the parent company. On the other hand this reasoning *prima facie* seems to imply a violation of one of the basic features of corporate law itself, namely the concept of the company as a separate legal entity being solely liable for its own debts. Ms. Vandekerckhove's monumental book shows that in most European jurisdictions—civil law and common law systems alike—courts are quite creative in finding a workable route between the Scylla of upholding the legal system and the Charibdis of the needs of legal practice. The basis for veil piercing may be different—identification, abuse of legal personality or false appearance, tort or a specific statutory rule—from a substantive point of view the criteria applied are more or less the same. Also, as regards the question of the applicable law—covered by Part III of the book—the outcome of case law in various European jurisdictions is fairly comparable. In view of the ever intensifying internationalization of business and the growth of group structures in Europe and beyond, this is a comforting conclusion. We are glad—and proud—to present Ms. Vandekerckhove's book as Volume 2 in the CECL Series on European Company Law.

* Professor of Company Law, Faculty of Law, Leiden University, the Netherlands, and coordination director of the Centre for European Company Law, the Netherlands (www.cecl.nl).

Foreword

The quintessence of a corporation is its separate legal personality which makes that it cannot engage the individual shareholders' liability. Exceptionally, however, a shareholder may be held liable despite the corporation's separate personality and limited liability. Such piercing of the corporate veil is one of the most debated issues of company law.

The literature on the topic is abundant and court decisions are numerous. However, they nearly always focus on a given legal system and on the specific context where the piercing is envisaged.

Karen Vandekerckhove's perspective has risen above domestic law and topical context. She examines the piercing of the corporate veil under the common law (US and UK) as well as under the civil law (Germany, Belgium, France and The Netherlands). She not only focuses on the many legal systems where corporations belonging to the same group remain separate legal entities but also on German law and, to a certain extent, EU or OECD practice – where they are considered part of an economic group.

Within each legal system she subjects the companies' liability to a fourfold litmus-test, reflecting four hypotheses where piercing the corporate veil is most solicited: undercapitalization, fraudulent transfer of assets or asset-stripping, unduly continuation of loss-making activities and the appearance as an economic unit. The legal theories that allow piercing of the corporate veil go from general principles such as the alter ego and abuse doctrines, over contractual schemes, such as fraud, agency and breach of contract, over corporate law, such as director's liability and subordination of shareholders' claims, to torts and insolvency law. Dr. Vandekerckhove not only places each of these theories in their respective context but ably shows their interrelation.

In view of the great variety of piercing-techniques and the different conflict of laws approaches in Europe and the US, the relevant law to admit piercing in transnational situation, differs as well. Here again, the respective solutions (*lex societatis*, *lex fori*, *lex concursus*, *lex causae*) are analyzed clearly and in great detail.

The depth and multilevel comparative analysis makes this book a treasure chest for those who study company law or conflict of laws. Moreover, thanks to

its clear and systematic country-by-country descriptions, it offers also precious guidance to the international lawyer who wants to hold shareholders liable but is not sure where and on which grounds he should best do so.

Karen Vandekerckhove obtained a Doctorate in 2005 from the Leuven Law School with an earlier version of this book. Her research was financed by the Flemish Fund for Scientific Research.

As her 'directeur de thèse', I much appreciated Karen's professionalism, intelligence and practical mind, which she uses fully in her present position at the E.U. Commission, streamlining conflict of laws and procedural law.

Prof. Hans Van Houtte,
Institute for International Trade Law
Kuleuven (Belgium)

June 2007

Abbreviations

<i>AcP</i>	<i>Archiv für die Civilistische Praxis</i> (DE)
<i>AFT</i>	<i>Algemeen Fiscaal Tijdschrift</i> (BE)
<i>AG</i>	<i>Aktiengesellschaft</i> (DE)
<i>AktG</i>	<i>Aktiengesetz</i> (DE)
<i>Am. Bankr. Inst. L. Rev.</i>	<i>American Bankruptcy Institute Law Review</i> (US)
<i>AnfG</i>	<i>Anfechtungsgesetz</i> (DE)
<i>Ann. Dr.</i>	<i>Annales de Droit</i> (BE)
<i>Ann. Inst. Dr. Int.</i>	<i>Annuaire de l'Institut de Droit International</i>
<i>Arr. Cass.</i>	<i>Arresten van het Hof van Cassatie/Arrêts de la Cour de Cassation</i> (BE)
<i>BB</i>	<i>Betriebs-Berater</i> (DE)
<i>BGHZ</i>	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i> (DE)
<i>BRH</i>	<i>Belgische Rechtspraak in Handelszaken</i> (BE)
<i>Bull. Joly</i>	<i>Bulletin Joly</i> (FR)
<i>Bus. Law.</i>	<i>Business Lawyer</i> (US)
<i>CA</i>	<i>Companies Act</i> (UK)
<i>Cass.</i>	<i>Cour de Cassation belge</i>
<i>Cass. Civ. fr.</i>	<i>Cour de Cassation française, chambre civile</i> (FR)
<i>Cass. com.</i>	<i>Cour de Cassation française, chambre commerciale</i> (FR)
<i>Cass. Crim</i>	<i>Cour de Cassation française, chambre criminelle</i> (FR)
<i>Cass. fr.</i>	<i>Cour de Cassation française</i> (FR)

<i>Cass. soc. fr.</i>	<i>Cour de Cassation française, chambre sociale</i> (FR)
<i>Chi.-Kent L. Rev.</i>	<i>Chicago-Kent Law Review</i> (US)
<i>CMLR</i>	<i>Common Market Law Review</i>
<i>Colum. L. Rev.</i>	<i>Columbia Law Review</i> (US)
<i>Comp. Lawyer</i>	<i>The Company Lawyer</i> (UK)
<i>Conn. J. Int'l L.</i>	<i>Connecticut Journal of international law</i> (US)
<i>Conn. L. Rev.</i>	<i>Connecticut Law Review</i> (US)
<i>Cornell L. R.</i>	<i>Cornell Law Review</i> (US)
<i>D.</i>	<i>Recueil Dalloz Sirey</i> (FR)
<i>DAOR</i>	<i>Le droit des affaires/Het ondernemingsrecht</i> (BE)
<i>Den. L.J.</i>	<i>Denver Law Journal</i> (now <i>Denver University Law Review</i>) (US)
<i>DMF</i>	<i>Droit Maritime Français</i> (FR)
<i>Dr. Soc.</i>	<i>Droit Social</i> (FR)
<i>EBLR</i>	<i>European Business Law Review</i>
<i>EBOR</i>	<i>European Business Organization Law Review</i>
<i>ECFR</i>	<i>European Company and Financial Law Review</i>
<i>ECL</i>	<i>European Company Law</i>
<i>E.L.Rev.</i>	<i>European Law Review</i>
<i>Envtl. L. Rep.</i>	<i>Environmental Law Reports</i> (UK)
<i>FSR</i>	<i>Fleet Street Reports</i> (UK)
<i>Gaz. Pal.</i>	<i>Gazette du Palais</i> (FR)
<i>Georgia L. Rev.</i>	<i>Georgia Law Review</i> (US)
<i>GmbH</i>	<i>Gesellschaft mit beschränkter Haftung</i> (DE)
<i>GmbHG</i>	<i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung</i> (DE)
<i>GmbHHR</i>	<i>GmbH-Rundschau</i> (DE)
<i>IA</i>	<i>Insolvency Act</i> (UK)
<i>InsO</i>	<i>Insolvenzordnung</i> (DE)
<i>Harv. L. Rev.</i>	<i>Harvard Law Review</i> (US)
<i>Hastings Int'l & Comp. L. Rev.</i>	<i>Hastings International and Comparative Law Review</i> (US)
<i>ICLQ</i>	<i>International & Comparative Law Quarterly</i> (US)
<i>ICR</i>	<i>Industrial Cases Reports</i> (UK)
<i>IDR</i>	<i>Journal of International Dispute Resolution</i>
<i>Ins. Lawyer</i>	<i>Insolvency Lawyer</i> (UK)
<i>IPRax</i>	<i>Praxis des Internatinalen Privat- und Verfahrensrechts</i> (DE)

<i>IRLR</i>	<i>Industrial Relations Law Reports</i> (UK)
<i>JBL</i>	<i>Journal of Business Law</i> (UK)
<i>JCP</i>	<i>Jurisclasseur Périodique</i> (FR)
<i>J. Corp. L.</i>	<i>Journal of Corporation Law</i> (US)
<i>JDI Clunet</i>	<i>Journal de Droit International</i> ('Clunet') (FR)
<i>JIBL</i>	<i>Journal of International Banking Law</i> (UK)
<i>JO</i>	<i>Journal officiel</i> (FR)
<i>JOR</i>	<i>Jurisprudentie, onderneming en recht</i> (NL)
<i>JT</i>	<i>Journal des Tribunaux</i> (BE)
<i>JZ</i>	<i>Juristenzeitung</i> (DE)
<i>KO</i>	<i>Konkursordnung</i> (DE)
<i>LMCLQ</i>	<i>Lloyd's Maritime and Commercial Law Quarterly</i> (UK)
<i>Loy. L.A. L. Rev.</i>	<i>Loyola of Los Angeles Law Review</i> (US)
<i>LQR</i>	<i>Law Quarterly Review</i> (US)
<i>Marit. Lawyer</i>	<i>The Maritime Lawyer</i> (US)
<i>Modern L. Rev.</i>	<i>Modern Law Review</i> (UK)
<i>N.C. J. Int'l L. & Com. Reg.</i>	<i>North Carolina Journal of International Law and Commercial Regulations</i> (US)
<i>NILQ</i>	<i>Northern Ireland Legal Quarterly</i> (UK)
<i>NIPR</i>	<i>Netherlands International Private Law Review</i> (NL)
<i>NJ</i>	<i>Nederlandse Jurisprudentie</i> (NL)
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i> (DE)
<i>NTBR</i>	<i>Nederlands Tijdschrift voor Burgerlijk Recht</i> (NL)
<i>Nw. U.L. Rev.</i>	<i>Northwestern University Law Review</i> (US)
<i>OR</i>	<i>Ondernemingsrecht</i> (NL)
<i>Pac. L.J.</i>	<i>Pacific Law Journal</i> (US)
<i>RabelsZ.</i>	<i>Rabels Zeitschrift für Ausländisches und Internationales Privatrecht</i> (DE)
<i>RDAI/IBL</i>	<i>Revue de droit des affaires internationales/ International Business Lawyer</i>
<i>Rec. Dalloz Sirey</i>	<i>Receuil Dalloz Sirey</i> (FR)
<i>Rev. Dr. Int. & Dr. Comp.</i>	<i>Revue de droit international et de droit comparé</i> (BE)
<i>Rev. Not. Belge</i>	<i>Revue du Notariat Belge</i> (BE)
<i>Rev. Prat. Soc.</i>	<i>Revue pratique des sociétés</i> (BE)
<i>Rev. Soc.</i>	<i>Revue des Sociétés</i> (FR)

<i>Rev. Trim. dr. comm.</i>	<i>Revue Trimestrielle de Droit Commercial</i> (FR)
<i>RCDIP</i>	<i>Revue Critique de droit international privé</i> (FR)
<i>RCJB</i>	<i>Revue Critique de jurisprudence Belge</i> (BE)
<i>RHA</i>	<i>Rechtspraak van de Haven van Antwerpen</i> (BE)
<i>RIDC</i>	<i>Revue Internationale de Droit Comparé</i>
<i>RIW</i>	<i>Recht der Internationalen Wirtschaft</i> (DE)
<i>RMC</i>	<i>Revue du Marché Commun et de l'Union européenne</i>
<i>RPS</i>	<i>Revue Pratique des Sociétés</i> (BE)
<i>RW</i>	<i>Rechtskundig Weekblad</i> (BE)
<i>St. Mary's L. J.</i>	<i>Saint Mary's Law Journal</i> (US)
<i>TBBR/RGDC</i>	<i>Tijdschrift voor Belgisch burgerlijk recht/Revue générale de droit civil belge</i> (BE)
<i>TBH/RDC</i>	<i>Tijdschrift voor Belgisch Handelsrecht/Revue de Droit Commercial Belge</i> (BE)
<i>Temp. L. Q.</i>	<i>Temple Law Quarterly</i> (now <i>Temple Law Review</i>) (US)
<i>Texas Int'l L.J.</i>	<i>Texas International Law Journal</i> (US)
<i>Tex. L. Rev.</i>	<i>Texas Law Review</i> (US)
<i>TFR</i>	<i>Tijdschrift voor Fiscaal Recht</i> (BE)
<i>TIPR</i>	<i>Tijdschrift voor Internationaal Privaatrecht</i> (BE)
<i>TOB</i>	<i>Tijdschrift voor Ondernemingsbestuur</i> (NL)
<i>TPR</i>	<i>Tijdschrift voor Privaatrecht</i> (BE)
<i>TRV</i>	<i>Tijdschrift voor Rechtspersoon en Vennootschap</i> (BE)
<i>Tulsa J. Comp. and Int'l L.</i>	<i>Tulsa Journal of Comparative and International Law</i> (US)
<i>TVVS</i>	<i>Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen</i> (NL)
<i>U. Cin. L. R.</i>	<i>University of Cincinnati Law Review</i> (US)
<i>UCLA L. Rev.</i>	<i>UCLA Law Review</i> (US)
<i>U. Colo. L. Rev.</i>	<i>University of Colorado Law Review</i> (US)
<i>Univ. Pittsburg L. Rev.</i>	<i>University of Pittsburg Law Review</i> (US)
<i>U. Pa. L. Rev.</i>	<i>University of Pennsylvania Law Review</i> (US)
<i>Vand. L. Rev.</i>	<i>Vanderbilt Law Review</i> (US)
<i>Wash. L. Rev.</i>	<i>Washington Law Review</i> (US)
<i>Willamette L. Rev.</i>	<i>Willamette Law Review</i> (US)
<i>WPNR</i>	<i>Weekblad voor Privaatrecht, notariaat en registratie</i> (NL)
<i>Yale L.J.</i>	<i>Yale Law Journal</i> (US)

<i>ZGR</i>	<i>Zeitschrift für Unternehmen-s und Gesellschaftsrecht (DE)</i>
<i>ZHR</i>	<i>Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht (DE)</i>
<i>ZIP</i>	<i>Zeitschrift für Insolvenz- und Wirtschaftsrecht (DE)</i>
<i>ZPO</i>	<i>Zivilprozeßordnung (DE)</i>
<i>ZvglRWis</i>	<i>Zeitschrift für vergleichende Rechtswissenschaft (DE)</i>

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