LIABILITY OF CORPORATE GROUPS

Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law

An International and Comparative Perspective

BY

José Engrácia Antunes

1994

KLUWER LAW AND TAXATION PUBLISHERS
DEVENTER • BOSTON
Table of Contents

Foreword ........................................... v
Acknowledgements ................................... vii
List of Tables ...................................... xvii
List of Abbreviations ............................... xix
Table of Cases ..................................... xxiii

Introduction ...................................... 1
I. The Problem ..................................... 1
II. Structure of the Study ......................... 8

Part I. Corporate Groups and Corporation Law .......... 11

Chapter 1.
The Corporate Group as an Economic and Legal Phenomenon .... 13

I. The Corporate Group as an Economic Phenomenon:
  From the Atomistic Era to the Molecular Era of Corporation Law 13
  A. The Classical Atomistic Era of Corporation Law:
     The Paradigm of the Single-Corporate Enterprise .......... 13
     1. The Classical Atomistic Vision of Corporation Law .... 13
     2. Historical, Economic, Political and Legal Foundations of
        the Classical Vision ................................... 15
        a. The Historical Environment .......................... 15
        b. The Ideological Background .......................... 18
        c. The Original Regulatory Paradigm .................. 20
  B. The Emergence of the Molecular Era of Corporation Law:
     The New Paradigm of the Polycorporate Enterprise ....... 20
     1. The Rise of the Modern Polycorporate Enterprise .... 20
        a. Industrial Capitalism, Enterprise Concentration,
           Corporation Law ...................................... 21
           aa. Competition Model versus Concentration Model ... 22
           bb. Market Model versus Hierarchy Model ............ 26
        b. Intercorporate Stock Ownership: the Revolution in
           Corporate Foundations ............................... 29
           aa. The Common Law Experience ........................ 30
           bb. The Civil Law Development ........................ 34
     2. The Polycorporate Enterprise in Today’s Corporate World .. 37
TABLE OF CONTENTS

a. The Polycorporate Enterprise in the International Arena: EU, USA and Japanese Markets Compared .......... 38
  aa. Diffusion ........................................... 38
  bb. Structure .......................................... 40
  cc. Power ............................................. 45
b. The Polycorporate Enterprise at the National Level ........ 46

II. The Corporate Group as a Legal Phenomenon:
The Crisis of the Classical Legal Model of the Corporation ...... 52
A. The Classical Legal Model of the Corporation ............... 52
  1. The Model and its Dogmatical Foundation-Stone:
     the Institution of the Legal Personality ................ 52
     a. The Formation of the Model ........................... 53
     b. The Model Today ...................................... 55
  2. The Corporation as a Legal Person: Normative Attributes,
     Rational Substrata and Legal Content .................... 56
     a. The General Notion of Legal Personality .............. 57
     b. The Corporation-Legal Person ........................ 58
        aa. The Corporate Patrimonial Structure .............. 58
        bb. The Corporate Organizational Structure .......... 61
B. The Crisis Introduced by the Emergence of Corporate Groups:
   Reality and Fiction of the Classical Legal Model .......... 64
   1. Corporate Groups and Autonomous Patrimonial Structure
     of the Corporation ..................................... 65
      a. The Transformation of the Patrimonial Structure .... 65
         aa. The Principle of Patrimonial Autonomy in the
             Single-Corporate and Polycorporate Enterprise .... 65
         bb. Corporate Patrimonial Autonomy versus Group
             Economic Unity .................................. 68
      b. The Transformation of the Legal Status of Corporate
         Actors .............................................. 80
         aa. The Legal Status of the Corporation .............. 80
         bb. The Legal Status of Shareholders ................. 87
         cc. The Legal Status of Creditors .................... 93
         dd. The Legal Status of Workers ...................... 96
   2. Corporate Groups and Autonomous Organizational Struc-
      ture of the Corporation ................................ 98
      a. The Transformation of the Corporate Organizational
         Constitution ........................................ 99
      b. The Transformation of the Corporate Organizational
         Functioning ......................................... 105
         aa. General Rules: the Principle of the Corporate In-
             terest ........................................... 105
         bb. Specific Rules .................................. 107
C. What Is Left From The Classical Legal Model? ............... 109
Chapter 2
On the Nature of Corporate Groups: The Principles of Corporate
Autonomy and Corporate Control ........................................... 113

I. Corporate Autonomy and Corporate Control:
The Two Cornerstones of Modern Corporation Law ............... 113
A. The Dogma of Corporate Autonomy and its Fallacy ........ 113
   1. The Dogma of Corporate Autonomy as the Archetypal
      Feature of Corporation Law ......................................... 113
   2. Corporate Autonomy and Corporate Groups: Power and
      Responsibility in the Received Legal Model of Corporation 115
      a. The Concept of Legal Person:
         the Corporation as a Closed System of Power ............. 115
         aa. The Corporation as an Autonomous Decision-
             Making Center ............................................... 115
         bb. Legal Person and Intercorporate Control .......... 116
      b. The Concept of Limited Liability:
         The ‘Decision-Making Power’ – ‘Liability’ Nexus .... 122
         aa. Limited Liability Revisited ............................... 122
         bb. Limited Liability and Intercorporate Control .... 130
B. The New Feature of Corporation Law: Corporate Control ... 141
   1. The Emergence of Corporate Control ......................... 141
   2. Corporate Control and Corporate Groups ................... 144
      a. The Concept of Corporate Control ....................... 144
      b. Types of Corporate Control ................................. 146
      c. Individual Corporate Control versus Intercorporate
         Control ......................................................... 149
         aa. The Dichotomy in Corporate Practice ................. 149
         bb. The Dichotomy in Corporate Law ................. 153
C. Corporation Law, Corporate Autonomy, Corporate Control:
The Basic Dilemma ......................................................... 155

II. Unity and Diversity in Corporate Groups: Corporate Autonomy
   and Corporate Control as Legal and Organizational Constitutive
   Principles of Corporate Groups ........................................... 158
A. The Core of Corporate Group Enigma: ‘Einheit und Vielheit’ 158
   1. ‘Einheit und Vielheit’ ........................................... 158
   2. Autonomy and Control, as Constituent Legal Principles of
      Corporate Groups ............................................... 158
   3. Autonomy and Control, as Constituent Organizational
      Principles of Corporate Groups ............................... 161
      a. Autonomy and Control, as the Two Basic Patterns of
         Allocation of Decision-Making Power within Enter-
         prises .................................................................. 163
      b. Single-Corporate Enterprises and Polycorporate Enter-
         prises ............................................................... 163
TABLE OF CONTENTS

c. Autonomy and Control in the Single-Corporate Enterprise Decision-Making System 166
d. Autonomy and Control in the Polycorporate Enterprise Decision-Making System (Group Unified Management) 172

4. Autonomy and Control in Corporate Groups: the Crucial Distinction between Centralized and Decentralized Groups 179
   a. Legal Perceptions of the Distinction 180
      aa. The Distinction between ‘Factual’ and ‘Contractual’ Groups 181
      bb. The Nature of the Parent Corporation’s Control 183
      cc. The Subsidiary as a Mere Branch without Legal Personality 186
      dd. The Controlability of the Effects of Parent Corporation’s Control 187
   b. Perceptions of the Economic and Organizational Sciences 191
      aa. General Features of the Governance Structure of Corporate Groups 192
      bb. Factors Determining the Concrete Balance Autonomy/Control 194
      cc. Conclusions 206

B. Doctrinal, Jurisprudential and Legislative Approaches to Corporate Groups 208
   1. Doctrinal Images of Corporate Groups 208
         aa. The Unity Theory 212
         bb. The Moderate Unity Theory: the ‘Lutter School’ 215
   2. Jurisprudential Attempts on Corporate Groups 218
      a. The Autonomy Approach:
         the Orthodox ‘Piercing the Corporate Veil’ Jurisprudence 219
      b. The Control Approach: an Emerging Trend? 222
   3. Statutory Strategies for the Regulation of Corporate Groups 225
      a. The Autonomy Approach:
         the ‘Contractual’ Regulatory Model 226

Part II. Liability of Corporate Groups 229

Chapter 3
Intragroup Liability in Comparative Law 231
   I. The USA Legal System: The Traditional ‘Entity Law Approach’ 237
      A. General Notion 237
# TABLE OF CONTENTS

1. The USA Legal System: Entity Law and Piercing the Corporate Veil Jurisprudence . 238  
   a. Introduction ........................................ 238  
   b. The ‘Piercing the Corporate Veil’ Jurisprudence ....... 239  
      aa. Introduction ..................................... 239  
      bb. The General Doctrine: the Principle and the Exception ........................................ 240  
      cc. Main Doctrinal Variants: the ‘Instrumentality’ and ‘Alter Ego’ Theories ................. 242  
      dd. Main Doctrinal Elements: the Formalities and Fairness Requirements .................... 246  
      ee. Functional Equivalents .......................... 248  
2. Entity Law and Piercing the Veil in other Common Law and Civil Law Countries .......... 250  
   B. The Underlying Regulatory Criteria: the Principle of Corporate Autonomy ............... 258  
   C. Critical Appraisal ................................. 259  
      1. Legal Aspects ..................................... 259  
         a. Uncertainty and Unprincipledness ............... 259  
         b. Inconsistency ................................... 261  
            aa. Inconsistency with Legal Policies of Corporation Law ........................................ 262  
            bb. Inconsistency with Legal Policies of other Branches of Law ......................... 268  
      2. Economic Aspects ................................. 270  
         a. The Role of Law in Group Management and Organization ..................................... 270  
         b. The Role of Law in Group Constituency .................................................. 273  
II. The EU Legal System: The Revolutionary ‘Enterprise Approach’ . 277  
   A. General Notion ..................................... 277  
      1. Legal Consecration: the EU Legal System .................................................. 277  
         a. The Statutes for a European Company ............ 278  
         b. The Ninth Directive on Groups of Companies ........................................ 285  
      2. Other Consecrations outside the EU Legal System: the French Proposal ‘Cousté’ and the Spanish Corporation Law Draft .............................. 289  
   B. The Underlying Regulatory Criteria: the Principle of Corporate Control ............... 292  
   C. Critical Appraisal ................................. 295  
      1. Legal Aspects ..................................... 295  
         a. Uncertainty, Automatism and Rigidity ............ 295  
         b. Inconsistency with the Legal Policies of Corporation Law ................................. 304  
            aa. The Corporate Law Essentials .................. 304  
            bb. The Protection of Shareholders and Creditors ........................................ 306  
      2. Economic Aspects ................................. 308  

TABLE OF CONTENTS

a. The Role of Law in Group Management and Organization ........................................... 308
  b. The Role of Law in Group Constituency ................................................................. 312

III. The German Legal System: The Differentiated ‘Dualist Approach’ 313
    A. General Notion ........................................................................................................... 313
        1. The German Legal System:
            the Law of Affiliated Enterprises ................................................................. 314
                a. General Overview ..................................................................................... 314
            b. The Statutory Framework in General:
                Regulatory Problems, Tasks and Principles ............................................. 317
                    aa. The Regulatory Problem .................................................................. 317
                    bb. The Regulatory Conception and its Main Tasks ........................... 318
                    cc. The Basic Regulatory Principle: the Distinction
                        between Contractual and De Facto Groups ....................................... 320
            c. Liability Regimes in Contractual and Factual Groups ............................... 322
        2. Other Legal Consecrations: the Law on Groups of Companies in Brazil and Portugal ................................................................. 324
    B. The Underlying Regulatory Criteria: the Sharp Division
        between Corporate Autonomy and Corporate Control ........................................... 327
    C. Critical Appraisal ........................................................................................................ 330
        1. The Regulation of Contractual Groups ............................................................... 330
           a. The Failure of the ‘Channeling Effect’ ...................................................... 330
           b. Contract of Domination or Domination of Contract? .................................. 332
           c. The Intragroup Liability System .................................................................. 334
        2. The Regulation of De Facto Groups ...................................................................... 341
           a. The Theoretical Fallacy: the Impossible Compromise .............................. 341
           b. The Technical Problems of the Compensatory System ............................... 347
                aa. The Duty of Compensation in General ............................................. 348
                bb. Duty of Compensation and Group Organization .............................. 355
                cc. The Subsidiary Dependence Report (§§ 312 ff.)
                    and the Parent Indemnity Liability (§ 317) ....................................... 362
        3. The Global Regulatory Framework in Perspective .................................................. 364
           a. The Regulatory Principle and its Dilemma .................................................. 364
           b. The ‘Autokran Syndrome’:
               the Return to the Inescapable Question .................................................. 368
                aa. The Qualified Factual Group ............................................................... 368
                bb. Legal Treatment: ‘Verhaltenshaftung’ versus ‘Zu-
                    standshaftung’ ......................................................................................... 372
                cc. Some Conclusions ................................................................................. 376

Chapter 4
New Avenues in Intragroup Liability ................................................................. 381

I. A New Regulatory Criterion?
    Autonomy and Control as a Continuum ................................................................. 381
A. The New Regulatory Criterion ................................................. 381
B. Regime ................................................................. 384
  1. General Features ....................................................... 384
     a. Public and Private Goals in Corporate Groups Regulation: Regulatory Efficiency versus Regulatory Neutrality 384
  2. Substantive Aspects ..................................................... 390
     b. The Concept of Control: Two Approaches to its Definition ................................................................. 392
  3. Procedural Aspects ....................................................... 395
     a. The Role of Burden of Proof Distribution ...................... 395
     b. The Proposed System: the Reversal of the Burden of Proof ................................................................. 399
        bb. The System of ‘Onus Probandi’ Inversion: Scope and Comparative Advantages .................................... 401
     a. The Exhaustion of Legal Remedies .............................. 406
     b. ‘Sectorial Approach’? .............................................. 406
     c. Group Unified Management ....................................... 408
        aa. Existence of Unified Management: Minimum Level of Group Centralization? ........................................... 408
        bb. Exercise of Unified Management: ‘ordnungsmäßige Konzernleitung’? ............................................. 409
     d. The Group Liability Insurance .................................... 410

II. New Avenues In Intragroup Liability: Some Recent Jurisprudential Developments in the USA, EU and Germany ....... 413
A. European Union: Recent Developments in Intragroup Competition Liability .................................................. 414
  1. Case Law Analysis ....................................................... 415
     a. Intragroup Liability Cases ...................................... 415
        aa. *Imperial Chemical Industries Ltd. v. Commission EC* ........................................................................ 415
        bb. *ICI and Commercial Solvents Corporation v. Commission EC* .............................................................. 418
        cc. *Johnson & Johnson* ............................................ 421
        dd. *Peroxygen Products* .......................................... 422
        ee. *John Deere* ..................................................... 423
     b. Intragroup Disability Cases ....................................... 424
        aa. *Christiani & Nielsen* .......................................... 424
        bb. *Kodak* ......................................................... 426
        cc. *Béguelin Import Co. v. SAGL Import Export* ............ 427
## TABLE OF CONTENTS

- **dd. Centrafarm BV v. Sterling Drug Inc.** ............................................. 428

2. **Case Law Synopsis** ................................................................. 429
   - a. Sectorial Approach to Intragroup Liability ........................................... 429
   - b. Formal and Substantial Regulatory Criteria: the Concept
     of ‘Economic Unity’ and the Allocation of Autonomy-Control in
     the Parent-Subsidiary Relationship .................................................. 430
   - c. The Relevant Level of Enquiry: the Concrete Business
     Decision-Making Area of Subsidiary Management ................................... 434

B. **Germany: The Recent ‘Konzernhaftung’ Jurisprudence (Auto-kran, Tiefbau, Video)** ......................... 440
   1. **Case Law Analysis** ............................................................. 440
      - a. Autokran ........................................................................... 440
      - b. Tiefbau ............................................................................ 444
      - c. Video .............................................................................. 446
   2. **Case Law Synopsis** ................................................................. 449
      - a. Substantive Aspects: the Linkage between Control and
         Liability of Parent Corporations .............................................. 449
      - b. Procedural Aspects: Intrgroup Liability and Burden of
         Proof Allocation ..................................................................... 455

C. **USA: Some Recent Jurisprudence on Intragroup Liability (Miscellaneous)** ................................ 455
   1. **Case Law Analysis** ............................................................. 457
      - a. ‘Enterprise Law’ Analysis ...................................................... 457
         - aa. Tort Law: the Taxicab and Motel Cases ......................... 457
         - bb. Procedural Law: the Jurisdiction Cases ......................... 458
         - cc. Constitutional Law: the Taxation Cases ......................... 460
         in the Areas of Labor Law and Environmental Law ............... 462
      - c. From ‘Enterprise Law’ Analysis to Enterprise Liability:
         Strict Intragroup Liability in Product Liability Law ............. 466
   2. **Case Law Synopsis** ................................................................. 469
      - a. Sectorial and Economic Approaches to Intragroup Liability ...... 469
      - b. The Limits of ‘Enterprise Law’ Analysis .................................. 470

**Conclusion** .................................................................................. 475

**Bibliography** ............................................................................... 497

**Index** .......................................................................................... 543