Florida Journal of International Law

Volume 10 | Issue 2 Article 3

June 1995

Nationality, Veil Piercing, and Successor Liability

Michael Wallace Gordon

Follow this and additional works at: https://scholarship.law.ufl.edu/fjil

Recommended Citation
Gordon, Michael Wallace (1995) "Nationality, Veil Piercing, and Successor Liability," *Florida Journal of International Law*: Vol. 10: Iss. 2, Article 3.
Available at: https://scholarship.law.ufl.edu/fjil/vol10/iss2/3

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

only provide a format for discussion of these issues but also offer some solutions.

Before we begin, I would like to thank a few persons. First, I would like to thank Professor Gordon, without whose help this symposium would not have been possible, and whose encouragement has helped this journal grow and prosper. I also would like to thank Sharon Stark for organizing this symposium; she has done a terrific job. At this time, I would like to introduce Dean Currier.

DEAN BARRY A. CURRIER:

I am standing in for Jeff Lewis to provide a brief welcome. Last night, a number of us had the opportunity to watch a wonderful concert at the Center for the Performing Arts where four musicians, each world-renowned, came together and played. It was a terrific experience. What you are going to see today is in a similar vein. Those four people enjoyed getting together and working on their music; in this symposium, three people from three different places have come together to interact intellectually. I know they are going to have fun doing it, and I know that you are going to enjoy listening and participating.

This symposium is unique. This problem-oriented symposium, to use a very high-tech and elegant word, is nifty. It is a nifty idea to put together a problem like this and to march through it. I would like to thank Professors Blumberg and Prentice for coming all this way to participate. I also would like to thank Professor Gordon for helping me to understand the importance of an international program at the law school. This symposium and your presence is a tribute to his work.

III. NATIONALITY, VEIL PIERCING, AND SUCCESSOR LIABILITY

PROFESSOR MICHAEL GORDON:

We are able to hold this fourth symposium only because of the support that we have received from Deans Lewis and Currier over the last four years and because of the efforts of the *Journal* staff. I especially would like to thank Karen Clark for her efforts in putting this program together with me over the last six months. As the law school has grown in size, it has become quite difficult to become acquainted with many of the students and faculty and to learn more about the students than the impressions that one gains in class. I look forward each year to working with the editors and the symposium chairperson.

Judge Cardozo's "mists of metaphors," which he believed enshrouded the relationship between parent and subsidiary corporations when he decided the

Berkey v. Third Avenue Railway Co. case in 1926,[4] seems little diminished as we reach its seventieth anniversary. But our colleague Professor Dan Prentice, who has come from England, has an older legacy of entity law with which to deal. We are exactly a century beyond the *Salomon*[5] decision of the House of Lords in 1896 which contributed to rendering English courts ineffectual in dealing with the problems presented by corporate groups under statutes of general application where Parliament has not specifically addressed the issue.

Lest one believe that a century diminishes the value of precedence, the House of Lords revisited *Salomon* in 1989 to affirm that "the decision of this House in *Salomon* . . . is as much the law today as it was in 1896."[6] I suspect that the considerable criticism of this decision is as appropriate today as it was a century ago.

In the decades since *Salomon* and *Berkey* were decided, the use, the locus of control, and the regulation of the private corporate form have grown with a geometric progression that would have amazed Malthus. Some form of privately owned corporate entity is common in essentially every nation except a diminishing few that retain nonmarket economies. But as those nations enter a transitional stage to become market economies, an early enactment of some form of private corporate or company law verifies that transitional stage. The locus of control has changed from shareholders to board of directors to management. Regulation has changed the corporate entity from a Crown-granted privilege of specific contours, to a highly limited grant of the legislature, to a more flexible entity enabling those who formed it to do all that is not specifically prohibited rather than only that which is specifically permitted. During these decades, the corporation has been the principal entity that has led domestic economic growth and allowed nations to help others, whether in reconstruction after conflict or in emergence from underdevelopment.

The characteristics of a corporation — I hesitate to say internal affairs for fear of being asked for a definition — has been the subject of extensive domestic control on state, provincial, and federal levels. Successive stages of legislation have changed the regulatory nature of corporate characteristics from restrictive to enabling. In this federal system, many of those characteristics have been harmonized by model acts. In the United States and in the European Union, attempts to federalize corporate law have failed for the most part. As of yet, no "U.S.A., Inc." form exists to replace state forms, and no "Societas Europaea" form exists to supplement, if not replace, the various

4. 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).
5. [1897] App. Cas. at 22.
6. J.H. Rayner Ltd. v. Department of Trade & Indus., [1990] 2 App. Cas. 418, 506 (1989) (appeal taken from Eng.).

forms of corporations permitted by the different European Union member states.

Domestic regulation of the activities of corporations, in contrast to the regulation of their characteristics, has increased dramatically with the passage of antitrust, labor, securities, safety, environmental, and other laws. On the international level, regulation has been considerably more elusive. Formation of a world trade organization to govern corporations in the late 1940s, when the World Bank[7] and the International Monetary Fund[8] were established and the General Agreement on Tariff and Trade (GATT)[9] was concluded, failed due to opposition in the U.S. Senate. The surge of postcolonial nationalism in the 1960s and 1970s made regulation of multinational corporations a priority of the developing nations through structured organizations, such as the United Nations, and less-structured debates such as the North-South Dialog. Codes of conduct were heatedly debated, rarely adopted, and essentially never implemented. Today, the U.N. Center for Transnational Corporations is part of the "Jurassic Park" of the United Nations.

Efforts for self-regulation of the nations of the Organization for Economic Cooperation and Development (OECD) have been marginally successful. Clearly, the greatest success seems to be the inclusion of foreign investment provisions in the new agreement of the World Trade Organization on trade-related investment measures or trends. But most of these measures have not addressed the nature of a corporation when it fragments into a structure that would do justice to Henry the Eighth's family tree. Fragmentation of a corporation within a nation, especially a federation of states, creates numerous issues for which we have yet to establish clear rules. These issues include veil piercing, successor liability, and perhaps even more fundamentally, "Whose corporation is this?"

When the fragmented corporate structure crosses national borders, these issues become far more complex as they collide with differing concepts of the nature of a corporation. It is to a few of these collisions that we devote this discussion. The hypothetical and organizational schematic forms the basis for our discussion of these issues.

Our two guests are Phillip Blumberg, Professor and former Dean of the University of Connecticut School of Law, and Professor Dan Prentice, Professor at Pembroke College, Oxford University. Professor Blumberg is

7. The International Bank for Construction and Development, also known as the World Bank, was established on July 22, 1944 by the United Nations.

8. The International Monetary Fund was established on July 22, 1944 by the United Nations.

9. GATT was established after World War II to promote the expansion of international trade on a nondiscriminatory basis. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

Published by UF Law Scholarship Repository, 1995

a graduate both of Harvard College and Harvard Law School and practiced law in New York City before commencing teaching at Boston University in 1968. He moved to Connecticut in 1974 to serve as Dean of the School of Law for ten years. He has written extensively, especially the series of books on the law of corporate groups, our topic today. I have close connections with Professor Blumberg's school. I was born and raised in Connecticut, and my most cherished years of education were at the University of Connecticut Law School to which I returned after several years of practice in order to teach and become assistant dean. I came to the University of Florida twenty-eight years ago just a few years before Professor Blumberg assumed the deanship at the University of Connecticut. He proved to be an outstanding caretaker of my old school, in addition to being the only professor in this country to have the vision that one day we would have to confront the issues involving corporate groups about which he has written so eloquently and which we will only partially discuss today.

Professor Prentice, a native of Belfast, Ireland, was educated at Queen's University in Belfast and then at the University of Chicago. He lived in Canada before returning to England to begin his teaching career at University College, which is part of the University of London. He has been a member of the College of Oxford for more than twenty years. Professor Prentice is one of the leading authorities in Europe on today's subject.

I welcome you both and appreciate the work of the *Journal* staff in arranging for this day. The format will be a discussion. Let us turn to the subject of our program. Perhaps we should turn to the first of our questions, which deals with nationalities of corporations. It certainly seems that it is important to know whose corporation a corporation is. It is important when we make decisions where to locate and when we speak of what rules are going to govern corporations. How and why is it important to determine nationalities of the corporations?

PROFESSOR PRENTICE:

I would like to thank the *Journal* staff and the faculty at the University of Florida for inviting me. I have been to the United States quite often. As stated, I earned my J.D. at the University of Chicago. My sister lives in New Jersey. My son works in the United Nations, so I have extensive U.S. connections. It is quite true that I did come from Belfast; I then married an Englishwoman, and in those days, marriage relationships were slightly different. My wife said to me, "Dan, you're the most intelligent one. You will make the important decisions. Should China be admitted to the United Nations? Should we have nuclear disarmament? etc. I will make the trivial decisions: how many children we will have, where we will live, what car we will have, whether we will privately educate our children, and so on." So, being English, she brought me back to England, and that is the reason why

I did not stay in North America, as I had originally planned.

Regarding the first question: English law is really pretty clear on this. The nationality of a company is determined by the place of its registration, by the place of incorporation. There is a division on this within the European Community. There is a fault line that runs right through this question, which causes harmonization and company law to be extremely fraught with difficultly. There are at least three jurisdictions, Ireland, England, and the Netherlands, that use the place of incorporation to determine nationality. The other member states determine nationality roughly along the lines of where the center place of management is carried out. So, you get a split. This has caused considerable difficulty in introducing European legislation designed to harmonize the field of company law and more importantly, the field of financial services, which is probably the most interesting and significant development within the European Community. However, an English court would just look at the place of registration; and the place of registration would determine the nationality of the company.

PROFESSOR GORDON:

Is there any concept that parallels the "pseudo-foreign" idea in this country? Perhaps the major case is the California decision where although the parties incorporated in Idaho, they were essentially California shareholders, and the location of the business was in California.[10] They did this to avoid cumulative holdings. This is an area that seems to be becoming more important as time goes on.

PROFESSOR PRENTICE:

Let me give you an example. This actually is part of the *Salomon* legacy. In England, many companies are what is called "shelf-companies." The large law firms in London will incorporate companies by the hundred. Then, when they need them, they pick them off the shelf. That is why they are referred to as shelf-companies. They are used for all sorts of purposes, such as holding a patent or transactions at the end of the tax year. Now, one of things about England, and it is the same in the United States, is that it makes access to the corporate form extremely simple. There are incorporation agents who you can telephone to buy a company: £250 is the going rate. So, you can be incorporated, as it were, in an afternoon. In some continental countries, particularly the Netherlands, access to the corporate form is restricted. Most continental countries see the corporate form as a type of privilege, and they try to impose, sometimes not very effectively, some limitations, some quality controls in getting your hands on

10. Western Air Lines v. Schutzbank, 258 Cal. App. 2d 218, 66 Cal. Rptr. 293 (1968).

a company. Now the Dutch solicitors, or Dutch attorneys as you would call them, are telephoning their English counterparts through agency relationships and incorporating their companies in England, even though they are going to carry on their business in the Netherlands.

We have no doctrine of the pseudo-corporation. Many English companies actually will be registered in England, but then they will locate their place of management outside the jurisdiction. The reason for this is tax. Our tax laws do not focus on the place of registration; they focus on the place where the central management of the company is being conducted. It is very common to find in English Articles of Association of Companies provisions to the effect that all meetings of the directors and shareholders will be held in Paris or the Channel Islands; provisions to the effect that no business conducted by the company in the United Kingdom and its shareholders' or directors' meeting shall be valid. That is to get you outside the range of the tax laws. It is the place of registration that determines nationality.

PROFESSOR GORDON:

Even if English law were very restrictive in a particular area, such as directors' meetings, if a company became chartered in the Netherlands or somewhere more accommodating, like the Cayman Islands, in order to avoid being deemed an English company based on the nationality of shareholders and the place of business, would English courts apply the law from the place of incorporation as opposed to English law?

PROFESSOR PRENTICE:

You have to be very careful. It depends on why you are applying the law.

PROFESSOR BLUMBERG:

Bravo! That is the whole point of the discussion. It is pointless to talk about nationality in the air. It is a concept. The law borrows the concept and applies it in one way for particular purposes and in another way for other purposes. Professor Prentice gave one example of that. We should try to avoid referring to nationality without also saying, "Nationality and for what purpose?"

What of other relationships that do not satisfy the conventional definitions of nationality but might be analogous to nationality or serve as links to nationality, and therefore serve very much the same function for some purposes? This is the approach of the Restatement (Third) of Foreign

Relations Law of the United States, section 213.[11]

Nationality for corporations is very clear: it is the state of incorporation. However, there are other factors such as the nationality of the shareholders controlling the corporation. In certain circumstances, this may serve as a substitute or supplement for nationality in determining the application of legal concepts or statutory scope.

For internal structural questions, such as the questions of the law governing shareholder relations with directors and the application of statutory requirements for valid corporate action, the system obviously needs one clear and readily ascertainable source of law. The state of incorporation serves as a ready answer. However, the minute one is concerned about external issues, such as the corporation and the government or the corporation and third parties, this presents serious problems. The issue is too important to be determined by the decision of corporate counsel whether to incorporate in Florida, Connecticut, the Netherlands, or England.

One cannot discuss nationality in the air. One must inquire into the context in which the concept of nationality is being applied. Imposing tort liability? Determining the applicability of the Cuban Assets Control Regulations? Determining the applicability of the antiboycott law? Each situation is a separate legal universe. The concept has a different role in these various universes.

PROFESSOR GORDON:

I think you are suggesting that there really is not any harmonization, and perhaps that there *cannot* be a harmonization of the concept of nationality because it is so dependent upon function.

PROFESSOR BLUMBERG:

As I have suggested, one should confine oneself to a discussion of nationality for a particular purpose in a particular context under a particular legal system. Throughout the world, large business is operating as part of a global economy. Everything we will be discussing today reflects the inadequacy of dealing with problems of world business through systems of national law. Ultimately, I would hope that there would be a harmonization of the various legal concepts in different legal systems. International law attempts to give such a harmonization to some areas, including nationality. In *Barcelona Traction, Light & Power Co.*,[12] the International Court of Justice accepted the conventional rule and concluded that corporate

---

11. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987) [hereinafter THIRD RESTATEMENT].

12. *Barcelona Traction*, (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 20).

Published by UF Law Scholarship Repository, 1995

nationality was determined by the state of incorporation. The Court, unfortunately, did not make it clear that its pronouncement was directed toward the particular issue before it. This was the determination of the nation or nations entitled under international law to represent the interests of a corporation affected by the actions of another nation, that is, whether it was the state of incorporation of the corporation or of the state of residence of its shareholders. Canada was the state of incorporation, whereas the great bulk of the shareholders were located in Belgium. Canada had dropped out of the controversy that challenged the acts of Spain affecting the corporation that conducted its business in Spain. The Court had to decide whether Belgium could conduct the litigation after Canada had chosen not to continue. There was no allegation that Canada was opposed to the Belgian action.

The Court answered this question in reliance on the traditional view of corporate nationality. The Court held the corporation was a Canadian corporation because it was incorporated there. Canada, accordingly, could have appeared. The Court concluded that reference to the state of incorporation was the sole criterion of nationality, and that a state, such as Belgium, relying on the nationality of the shareholders lacked standing to represent them under international law. It did so even though Canada had elected not to pursue the litigation itself and apparently had no objection to Belgium doing so.

PROFESSOR PRENTICE:

I tend, actually, to feel that nationality, at least regarding most of the problems that I have come across involving crossborder issues, has not been a major problem. For example, consider a foreign corporation that is carrying on business in the United Kingdom. Assume its placement corporation is the Netherlands. Its nationality would obviously be Dutch, but if it sets up business in the United Kingdom, it must establish a place of business there. That means there must be some permanent connection with the United Kingdom, and then we require that company to register under the 1985 Companies Act.[13] We subject the corporation to a number of provisions in the Companies Act: details of directors, filing of annual accounts, registration of charges over its assets in our company's register. So, despite its nationality, we make it subject to certain regulatory rules, which we impose on all companies that carry on business activities within the United Kingdom.

The issue of nationality, with many of these regulatory problems, simply is not a serious one. You can regulate the company even though it may not have the nationality of the jurisdiction in which it is being regulated. We

13. Companies Act, 1985 (Eng.).

have overseas companies; there is a whole provision in our Companies Act that regulates their activities, provided they have established a place of business. That is the connector. We also wind up foreign companies. Perhaps you would think that the only jurisdiction that can wind up a company would be the place of incorporation. After all, it is the jurisdiction that created it and should be the jurisdiction that can dissolve it. But we wind up overseas companies even though they have not been incorporated in our jurisdiction. It is a slightly complex area. We normally do it where the company has assets in the United Kingdom that could be made available to the company's creditors. Curiously, it is not essential to have assets but that is the normal situation.

So again, when it comes to protecting creditors within the U.K. jurisdiction, we will extend our winding up jurisdiction, and I agree that it is controversial when it involves companies that were not incorporated in the United Kingdom. It just depends on what regulatory issue you are facing. Of course, we could wind up the company, and it could still exist; it could carry on business in the Netherlands and Belgium. The most famous cases concerning this type of situation are called the *Bank of Moscow* cases.[14] The Bank of Moscow was nationalized by the Bolsheviks shortly after 1917. But in the 1930s, it was discovered to have assets in the United Kingdom, and we wound it up. We were winding up an entity that no longer existed. Provided there are assets in the United Kingdom that can be made available to creditors, the court will assume jurisdiction. So, it really depends on the issue in front of us. In most situations, you can extend your national laws to foreign legal entities, if they are within your jurisdiction. And we do it extensively.

PROFESSOR GORDON:

For the limited purposes for which we try to use nationality, where Europe and most civil law countries tend to look at the seat of the business, is that essentially the equivalent of the principle place of business?

PROFESSOR PRENTICE:

That is correct.

PROFESSOR GORDON:

What about corporations, such as Unilever or Royal Dutch Shell, that extend across borders, having several seats of business and headquarters in different countries?

---

14. *See* Russian & English Bank v. Baring Bros. & Co., [1936] App. Cas. 485; *Re* Banque Industrielle du Moscow, [1952] Ch. 919.

PROFESSOR PRENTICE:

Well, I do not know how civil lawyers answer the problem of whether you can have more than one seat. For the United Kingdom, it is not a problem. It is where you are registered. But if you carry on business in the United Kingdom, the proper phrase being "establish a place of business," and normally that means some type of permanent commercial connection with the United Kingdom, it is just a matter of fact. Then we will wind the company up. But it is a problem for the European Community where there is a split in legal traditions. If you are a legal entity within the Community, then you have free movement within the Community and can benefit, as it were, from the internal market. A lot of the European Union Directives, these are the European legislation of financial services, require a double connector. They require registration within a member state of the European Community and a principle place of business.

PROFESSOR BLUMBERG:

In response to Professor Gordon's question, I would say that insofar as U.S. corporations are concerned, there is a rich body of analogous material on the standards used by the federal courts in determining the "principal place of business" of a corporation for purposes of establishing diversity of citizenship jurisdiction. A number of doctrines have been applied. These include the "nerve center" test, the center-of-operations test, the place-of-activity or physical assets test, the maximum-public visibility test, and the totality-of-corporate activity test. These doctrines attempt to resolve the dilemma of designating the single principal place of business of a giant enterprise that conducts major activities in a number of states. Thus, the board of directors may meet in one state, while the office of the chief executive may be in another. Major plants may be located in still other states, and so forth.

PROFESSOR GORDON:

Since we have discussed nationality, we should look at both the protective principle and the territorial principle to determine whether we have similar or different views. Perhaps, we should discuss the territorial principle, which currently seems to be very important regarding the Cuban situation. How is the English government responding or how do you respond, as a professor who is from outside the United States, to the kind of extraterritorial principle that the United States has used in governing the conduct of its corporations abroad.

PROFESSOR PRENTICE:

I should say that this is an area where I do not claim any particular expertise. I will just look at it as someone who is viewing the United States

Gordon: Nationality, Jurisdiction, and Successor Liability

and comparing it with, for example, mainland Europe. One thing that always strikes me is that there is a morality to U.S. foreign policy that is completely absent in Europe. We do impose certain restrictions on the foreign trading activities of our national entities, and there are provisions in our legislation that require an export license for certain types of commodities, usually in the field of military hardware and software or that type of thing. But the extent to which we are willing to conduct our foreign policy through economic and commercial regulation of our multinational companies is very limited, indeed.

PROFESSOR BLUMBERG:

Echoing what Professor Prentice has said, in a variety of areas, it is perfectly clear that not only England but also the rest of the developed world is very hostile to attempts to implement U.S. law abroad. On some matters, such as our rules on worldwide discovery, there are fifteen to seventeen nations that have made it illegal to force citizens or persons subject to their law to comply with orders of U.S. courts with respect to discovery. With respect to other problems, you have similar national legislation, and that is the heart of the problem. In terms of the interests of England or Canada, these actions are entirely understandable.

On the other hand, as the United States seeks to achieve effective enforcement of its laws with respect to discovery proceedings in litigation and antitrust or the regulation of U.S. exports, it is not acceptable to permit foreign subsidiaries of U.S. companies to ignore U.S. laws affecting their parents where such action would open the door to ready evasion and prevent implementation of the statutory objectives. Accordingly, if the United States concludes, for example, that for national security or foreign policy considerations it is in its best interests to impose sanctions against a particular country, it is equally understandable why the United States would not be prepared to permit foreign subsidiaries of major U.S. corporations to take action to the contrary.

Thus, international conflict will almost inevitably arise whenever world business is involved and the national laws of the various countries involved reflect differing national objectives. This is a problem that succeeding generations will have to resolve, that is, the inadequacy of our present concepts of corporation law and international law to provide a civilized resolution to the inevitable conflicts that may be expected to arise from the applicability of systems of national law to world business.

Current systems of corporation law and international law were formulated years ago when nations were insular, and business was conducted within a single nation. Nations then naturally thought solely of domestic law as the decisive legal standard.

This view reflecting solely national concerns is anachronistic today. It is inadequate for dealing with the current problems of world business. In

Published by UF Law Scholarship Repository, 1995

consequence, nation-states exist today in a global economy in which national laws bring even closely allied nations into conflict whenever extraterritorial exercise of one nation's laws is based on important concepts of law and policy that differ from those of the host countries in which the global corporations conduct their business.

PROFESSOR GORDON:

In a past symposium, Professor Harold Maier of Vanderbilt University made an interesting comment about extraterritoriality and its international legitimacy under jurisdiction to proscribe rules.[15] Where jurisdiction extends beyond your territory, and there is overlap and concurrent jurisdiction, the tendency is try to balance interests. This idea comes out in the Third Restatement,[16] *Timberlane Lumber Co. v. Bank of America,*[17] and *Mannington Mills, Inc. v. Congoleum Corp.,*[18] but it is not fully accepted in other jurisdictions. However, Professor Maier thought that the Cuban Democracy Act,[19] which just had been passed at that time, had been so detailed in terms of its control of corporations that it made it impossible to balance interests.[20] It essentially removed the balancing process from the courts to diplomatic circles in order to resolve these questions, which in reality were foreign policy questions. The United States has not come up with a very good solution because it appears to be micromanaging the activities of U.S. multinationals abroad whenever they relate to Cuba, Libya, and so forth to such an extent that the courts' power to effectively deal with these cross border conflicts may be somewhat emasculated. And that is a sad situation, if it is indeed true.

PROFESSOR BLUMBERG:

I think it is true. In practice, this means that when such a confrontation arises, these issues are ultimately determined by power. When the United States tried to enforce an embargo directed against Communist China and decades later an embargo against the Soviet Union with respect to the Siberian Pipeline, numerous nations, including England, France, and Canada, were hostile and resisted the application of the embargoes to U.S.-owned subsidiary corporations in their countries. Ultimately, the major powers that opposed these embargoes, such as England and France, prevailed, and U.S.-

---

15. Harold G. Maier, *Extraterritorial Jurisdiction and the Cuban Democracy Act*, 8 FLA. J. INT'L L. 391, 394-96 (1993).

16. THIRD RESTATEMENT, *supra* note 11, § 403(3).

17. 549 F.2d 597, 614 (9th Cir. 1976).

18. 595 F.2d 1287, 1297-98 (3d Cir. 1979).

19. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994).

20. Maier, *supra* note 15, at 398.

owned English and French subsidiaries ignored them without penalty. The embargoes were seen as a failure and eventually abandoned.

However, other nations, such as Canada, were not in as strong a political and economic position to resist U. S. policy. While Canada continued its public opposition to the embargoes, it ultimately had to accept the realities. The acquiescence of Canada to U.S. policy was masked by a much publicized agreement for consultation between the United States and Canada in order to avoid injury to Canadian business from the application of the embargoes. In the end, however, U.S.-owned Canadian firms complied with the embargoes.

This problem will not go away. Whenever the foreign policies of countries differ, the exportation of domestic law, however valid from domestic points of view in preserving the integrity of domestic regulation and preventing evasion, inevitably brings about this sort of conflict.

PROFESSOR GORDON:

In your three-tiered division of principles, in addition to nationality and territoriality, you mentioned the protective principle. Is that where you protect vital interests or national security? Is that truly a part of the extraterritorial concept? It certainly seems that with the Cuban case we have gone so far in extraterritorial application that we have had to justify such an application. When we have attempted to justify extraterritorial application, the justification tends to fall back on the national security rationale. The new Helms-Burton Law is specifically based on national security. Is the protective principle really a separate idea of nationality or is it more of a justification for the export of domestic law?

PROFESSOR BLUMBERG:

I would suppose that in this context, it is a recognition of the limitations of the nationality principle. There is a Dutch decision that is very interesting. In *Compagnie Européenne des Pétroles, S.A. v. Sensor Nederland B.V.*,[21] the Dutch subsidiary of an U.S. parent breached its contract to provide goods to the plaintiff. The U.S.-owned subsidiary attempted to justify its refusal to carry out the contract by asserting that its performance had been rendered illegal by the promulgation of the Siberian Pipeline Embargo by the United States. The Dutch court refused to accept the subsidiary's defense based on U.S. law. The court concluded that the subsidiary, though U.S.-owned, had been incorporated in the Netherlands and accordingly, was a Dutch corporation. It applied Dutch law and rejected the application of U.S. law.

---

21. Hague Dist. Ct. No. 82/716, Sept. 17, 1982 (Neth.), *translated in* 22 INT'L LEGAL MATERIALS 66 (1983).

The court recognized that under Dutch law, a Dutch court would indeed recognize U.S. law where great public interests were at stake, such as U.S. national security or the integrity of U.S. currency, under the protective principle of jurisdiction of international law. In *Sensor*, however, the court found that there was no occasion for application of the doctrine. Extraterritoriality rested not on the existence of a major threat to the integrity of the foreign state but only on an application of foreign policy that did not involve the essential interests or the security of the country. The court, accordingly, rejected the defence resting on U.S. law and enforced the contract.

Professor Prentice will tell you that while English law is hostile to extraterritoriality in general, it is, of course, fully prepared to reject the conventional concept of nationality and apply English law during wartime where required for implementation of its trading with the enemy law. In times of war, great issues are at stake. One would expect every nation in the world to recognize that under such circumstances, it would be a legitimate action by a government under international law. Not only the House of Lords in the *Daimler* case,[22] but the French courts have so held.

PROFESSOR GORDON:

We do not have a very good record, as evidenced by the *Sensor* case,[23] the *Fruehauf* case,[24] and the *Vencap*[25] case, of attempting to exert this territoriality aboard.

PROFESSOR BLUMBERG:

I think it depends on the purpose of the record. If the purpose is the development of a jurisprudence that is respected worldwide, the answer is unquestionably that the United States has a wretched record. However, in terms of achieving a high degree of implementation of policies of importance in U.S. national law, the record is mixed. There were failures in England and in France, but at least surface success in Canada.

In this case, which doctrine of law prevailed? As a matter of economic power not of acceptance of legal principles, U.S. law ultimately governed the conduct of the U.S.-owned Canadian firms. However, the U.S. triumph was hollow. China purchased the products it wanted from Canadian, English, and French firms rather than U.S. firms, and the U.S. firms paid the price of U.S. policy.

---

22. Daimler Co. v. Continental Tyre & Rubber Co., [1916] 2 App. Cas. 207 (appeal taken from Eng.).
23. *Seneor*, Hague Dist. Ct. No. 82/716.
24. Société Fruehaf-France v. Massardy, CA Paris, 14e ch., May 22, 1965, J.C.P. 1965, II, 14247 (France), *translated in* 5 INT'L LEGAL MATERIALS 476 (1966).
25. IIT v. Vencap, 519 F.2d 1001 (2d Cir. 1975).

PROFESSOR GORDON:

Let us move on from the idea of nationality, which you have indicated is not usually the focal point when simply trying to look at different specific actions. When addressing specific actions and attempting to identify what becomes important, much of the legislation focuses on ownership or control. Although ownership presumably refers to corporate shares, control is an essential element. What do we mean by control? Do we need to determine what are we trying to govern before we discuss the definition of control?

PROFESSOR BLUMBERG:

Well, I think we do. In the United States, for example, we immediately have to divide the jurisprudence into statutory law and common law. In many statutes, the Congress has determined the scope of application of the statute by referring specifically to "control" and by extending the statutory coverage to all corporations interconnected by "control." I have called these statutes, statutes of "specific application."

In the simplest statutes of this nature, the Congress has simply stipulated that a percentage of the shares of stock or voting stock, for example, fifty percent, represents "control" and thereby, defined the outer boundaries for the application of the statute. This simple approach in most contexts is not effective because it may readily be evaded by manipulation of the corporate structure.

More sophisticated statutes speak of control in different terms. While these statutes, or the regulations thereunder, frequently contain one definition of "control" that rests on a percentage of stock ownership, the percentage tends to be much smaller than fifty percent. In the great holding company statutes, for example, the percentages range from five percent to twenty-five percent of stock ownership.[26] The statutes not only contain such a standard but also employ a functional test that looks to the realities not to the forms of the relationship between the corporation and particular shareholders. Thus, under the securities laws, which like most statutes provide for flexible administrative interpretation, the Securities and Exchange Commission (SEC) generally defines "control" as the power to control the direction of the management and policies of a company.[27] In the actual administration of the various securities laws and related statutes, the SEC has expanded its functional standard in certain contexts to include situations where a person or group has a veto power over certain dealings or even situations where a person or a group has to be consulted before certain decisions are made.

26. Bank Holding Company Act (BHCA), 12 U.S.C.A. § 1841(a)(2)(A) (1996); Public Utility Holding Company Act (PUHCA), 15 U.S.C. § 79b(7) (1994); Savings and Loan Holding Company Act (SLHCA), 12 U.S.C. § 1467(a)(2) (1994).

27. 17 C.F.R. § 230.405 (1997) (SEC Rule 405) (Securities Act of 1933).

Accordingly, we should not talk about control in the air, but should consider control in light of the particular purpose of the statute under consideration. Thus, to determine whether the seller of securities is a member of the "control group," the SEC defines "control" as the power of a holder to get the company to join in the registration statement. This is different from the application of "control" to determine whether a shareholder is a "controlling person" for purposes of liability for a company's violation of the statute. There are many other examples arising under the statutes of specific application, where the legislature or the administrative agency has defined "control" in functional terms.

Let us move to control at the other end of the jurisprudential spectrum, that is, judicial decisionmaking. In common law, in controversies between private parties, control normally enters through the form of equity jurisprudence that has come to dominate our thinking in corporation law and that we term "piercing the veil." This is best understood as an application of equity jurisdiction.

Courts typically will not depart from the established principles of company law sanctified in cases such as the *Salomon* decision, namely that each corporation is a separate juridical legal unit, separate and distinct from any other legal units such as its shareholders. Courts will do so only when empowered by traditional equity principles. Under the formulation of principles, such as "piercing the veil" or "alter ego," it is necessary to show both the excessive exercise of control destroying the operational independence of the subsidiary (or controlled) corporation and the fraudulent or inequitable use of the subsidiary (or controlled) corporation to the injury of the plaintiff.

For piercing the veil, control is frequently described as the exercise of the parent's (or controlling shareholder's) power so to dominate the controlled corporation that the corporation has no independent existence. In a celebrated purple passage from the *Lowendahl v. Baltimore & Ohio Railroad* decision, which is often quoted by U.S. common law courts, the subsidiary (or controlled) corporation was said to have been so dominated that it had "no separate mind, will or existence of its own."[28] Such a definition of control for purposes of common law is very different from the standards of control utilized in the statutes of specific application previously discussed.

---

28. 247 A.D. 144, 157, 287 N.Y.S. 62, 76 (1st Dep't), *aff'd*, 272 N.Y. 360, 6 N.E. 2d 56 (1936); *see* Edwards Co. v. Monogram Indus., Inc., 713 F.2d 139, 142 (5th Cir. 1983). It is easier to "pierce the veil" for problems of jurisdiction and certain other procedural purposes than to do so for substantive purposes. It is easier in tort than in contracts or property and so forth.

PROFESSOR PRENTICE:

I do not want to go into the technicalities of English law, but we tend to refer to these control concepts as cutoff points. There are points where you cut off, and if that is satisfied, then you have control for the purpose of that provision. For example, we restrict loans to directors, and we restrict a wide range of transactions between directors and companies that you do not in North America. But, of course, a transaction may be entered into not with the director, but with the company in which that director has an interest. And then we simply have a cut-off point to determine if the director controls that company. We just say arbitrarily that at thirty percent he is deemed to have control, and the loan is made to him. It is crude but it works reasonably well.

By far the most interesting concept of control was introduced in 1986. I think it is one of the most important developments, at least in English company law, in this century. As you all know from your company law courses, limited liability provides the members of a company with a perverse incentive, particularly the directors if they are members. Once a company is insolvent, that is, there are no assets available for distribution to the members, it is in the interest of the members to continue to trade, because if the company is successful they gain. If the company is unsuccessful, if in other words it goes further into the hole, then in actual fact, it is the creditors of the company who will bear the burden. So, once you reach the point of insolvency, limited liability introduces a perverse incentive to continue trading.

In 1986, in order to try and deal with this problem, we introduced the concept of wrongful trading with section 214 of the Insolvency Act.[29] Broadly, it provides that if the directors of a company continue to trade under circumstances where they realize the company will go into insolvent liquidation, then the court can enforce an order on the directors to make an independent contribution to the company's assets company.[30] That is a very simplified explanation.

In 1980, a regulatory device was introduced to deal with persons who control companies but who are not elected directors. It is the concept of a "shadow director." A shadow director is someone in accordance with whose instructions the board of the company normally acts. This can give rise to a number of difficulties. For example, a company is in financial difficulty, and the bank decides to strictly monitor its loan, so it says it wants weekly reports or even daily reports on the health of the company. The company directors remain in constant contact with the bank. The bank controls very

29. Insolvency Act, 1986, § 214 (Eng.).
30. *Id.* at § 214(1)-(2).

Published by UF Law Scholarship Repository, 1995

carefully the overdraft facility. Is the bank a shadow director?

Actually not. What you have to do is ask yourself why are you putting the definition in, why is the legislature formulating it? And it will change for each purpose, and there is nothing the matter with that. Sometimes, you simply will have bright-line tests, for example, thirty percent. They are crude, you know can get around them, but they may provide a satisfactory legislative solution to what is a complex problem.

PROFESSOR GORDON:

Yet, when we try to devise a statute to govern a specific purpose, we seem to be incapable of making a definition of control. You mentioned thirty percent control as being a crude stab at doing this. Would it be better to leave the issue of control in the hands of the court? I am not sure that any state has attempted to statutorily define control for purposes of piercing the corporate veil.

PROFESSOR BLUMBERG:

That is very true. By contrast, we have defined it to a fare-thee-well in the statutes of specific application, such as those dealing with economic activities. There, we have done it very extensively.

I would like to echo what Professor Prentice has said. All of these concepts have to be applied in the particular context for which they were devised. The general concept otherwise becomes incoherent. We have no counterpart for the doctrine of wrongful trading, which is a fascinating development in English law and has been followed by some of the Commonwealth countries. We have, however, the comparable development of lender liability in the very area to which Professor Prentice has adverted. This is evident not only for purposes of common law and bankruptcy but also for statutes such as CERCLA that deal with environmental matters.

PROFESSOR GORDON:

Mexico attempted to legislate the definition of control when they passed their 1973 Investment Law. They indicated that the maximum foreign equity allowed in a corporation was forty-nine percent. There was another provision at the end of that statement that the foreign management and control of the corporation could not be greater than the foreign equity. The assumption was that as long as the number of directors from abroad did not comprise more than forty-nine percent, the company would carry out the functions of the corporation according to Mexican development goals.

After having done a series of joint-venture studies on foreign corporations that do business in Mexico, I went to Mexico. In meetings with a series of ministers, they said, "We do not know what has happened, because we have this law that we drafted so carefully to govern the corporations from

abroad, and yet, we are not developing any faster, and we still have corporations that are functioning the same way as before." I said that if they looked at the nature of the control, that is, who is on the board, it would reveal a great deal. In the case of Pemberly-Clark Co., which held forty-seven percent equity in its subsidiary, it had only three U.S. directors on a board of directors comprised of about fifteen. They had appointed forty-seven percent of the directors and could have appointed more Americans, but they did not. Instead, they appointed Mexicans. This was the same pattern with many other U.S. corporations. They would have only two or three people on the board of directors. It seems clear that when you look at who the people on the board were, the Vice-President of the International Division of Pemberly-Clark and the Vice-President for Latin America, that they were not going to travel to Mexico every month or two to be out-voted by the other twelve or thirteen directors. So, in terms of the area of control, the control certainly appears to rest with specific individuals. You need to analyze who they are, and what is the nature of their positions on the board. In the same way, it is quite possible to have, as we know through the proxy system, a very small percentage of shares and yet still have absolute control over a corporation.

PROFESSOR PRENTICE:

I will give you another example. In the United Kingdom, there is a statutory requirement to publish consolidated accounts, so you have to get a definition of what constitutes a subsidiary. In many situations, parent companies do not want to consolidate the subsidiary's accounts into their balance sheet, consequently, a practice has developed known as "off-balance sheet financing," that is, sometimes trying to use a vehicle that you control but not within the terms of the legislation.

We require the controller to be a member, that is, to own shares. One test of control is the composition of the board. But we always require "members" to have a connector. Many people would say that this is just a technical requirement and could be jettisoned. We have a department store called Marks and Spencers. Sometimes in allocating contracts, it allocates them to a single supplier, and it takes up all that supplier's productive capacity. It controls minutely the production process. Then the question arises: Would that company be controlled for consolidated balance purposes? And that is why the member requirement was put in.

It may have been wrong to put it in, but there was a policy reason behind having the membership connector. There are other companies in the United Kingdom that also conduct their business in that way. They have a single supplier, they take all the productive capacity of that supplier, and then they control the quality. It may be argued that even Marks and Spencers should have consolidated its suppliers into its accounts. Control just changes

according to the purpose for which you need your definition. We will always need some type of statutory definition. Statutory definitions can provide a certain benchmark, so that once you know you have satisfied certain conditions, you have to do certain things. Consolidated accounts are a good example of when you simply need to bring the controlled entity within the consolidation. We need a degree of certainty as to what is and what is not in the consolidated accounts.

PROFESSOR BLUMBERG:

In response to Professor Gordon's question about the definition of control and the importance of clarity, I would like to point to two very different examples from U.S. law. In the Securities Acts, the Congress made "control" the governing standard for certain purposes of the statutes, but deliberately chose not to define it lest it provide a blueprint for evasion. As previously discussed, definition and application of the term was left to the SEC through its rulemaking powers and its adjudicatory powers, and it has done so vigorously and expansively.

In consequence, the jurisprudence of corporate groups under the Securities Act,[31] the Securities and Exchange Act,[32] the Public Utility Holding Company Act,[33] and the Investment Company Act,[34] represent one of the great bodies of U.S. law widely applying enterprise principles through reliance on the concept of "control." It also provides considerable insight into the problems of shared control.

That is one model of control. We have another model. It is a Pennsylvania affirmative action statute that is designed to encourage female and minority enterprises.[35] The legislation goes into great detail with respect to the degree of control required to qualify for benefits under the Act. It requires that in addition to a majority of stock ownership, the chief executive person and numerous other executives in the firm must be female or minority persons, and they must themselves operate the business, not merely serve as figureheads. The detail in the law seeks to make it impossible for banks or other enterprises to qualify for the statutory benefits unless they are in fact owned and operated by women or minority persons.

These are two contrasting models. One statutory model is a vacuum without any definition. The other model is filled with excruciating detail. Yet, however different in form, they represent serious attempts to achieve the same objective: effective implementation of the statutory policies.

31. Securities Act of 1933, 15 U.S.C. § 77b (1994).
32. Securities and Exchange Act of 1934, 15 U.S.C. § 78t (1994).
33. PUHCA, 15 U.S.C. § 79(b) (1994).
34. ICA, 15 U.S.C. § 80a (1994).
35. PA. STAT. ANN. tit. 18, § 41072 (Purdon Supp. 1993).

PROFESSOR GORDON:

What is the English perspective?

PROFESSOR PRENTICE:

We have had some splendid scandals in England over the last decade or so, for example, *Re Polly Peck International plc (in administration)*[36] and *Maxwell*.[37] Really splendid frauds. But my own limited experience in practice, I am a barrister not a solicitor, is that within the English financial and commercial community, there is a very strong concept of legality. People want to comply with the law and will take advice to ensure that they do. We draft our statutes very precisely. One French professor said we draft our statutes in England as if we do not trust our judges. Actually, we have a very good bench, particularly in the area of company law with very strong judges indeed, who will have spent twenty-five to thirty years as barristers just doing company law work. Our statutes are precise because we assume, rightly or wrongly, that this brings about a certain standard of legality and certainty. But the down side, or should I say the corollary to that is, if your transaction does not fall within the strict reading of the statute, which is our approach, or alternatively, if you go to your lawyers and they can keep you outside the strict, literal interpretation of the statute, that is one of the consequences of legality. You are not behaving improperly. In fact, you are behaving properly. You are trying to structure your transaction so that you can keep it outside of the reach of the statute and therefore, behave in a way that is seen as being perfectly legal. I can see all of our arguments against that: a purposeful construction of statutes is arguably preferable.[38] But the approach in England is this a rather narrow, technical concept of legality, which I think is complied with. On the whole, when you give advice to companies and financial institutions, even though they may not like it, they will comply with that advice.

But the converse, of course, is if they can get outside the reach of the statute that is a perfectly proper thing to do. And there is a game that goes on between the legislature and the professional community. They will introduce one concept of control, the professional lawyers will get round it, and five years later, it will be tied up. It seesaws back and forth.

Our companies legislation is like your tax code. In fact, your tax code

---

36. [1996] 2 All E.R. 433 (Ch. 1995).

37. *See, e.g.*, Maxwell v. Department of Trade & Indus., [1974] 2 W.L.R. 338, [1974] 2 All E.R. 122 (C.A.); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); *see* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 68-77, 97 (1993).

38. There is some evidence that this is now occurring. *See* Bristol Airport plc v. Powderill, [1990] Ch. 744 (Eng.).

Published by UF Law Scholarship Repository, 1995

reads much better than our companies legislation.

PROFESSOR BLUMBERG:

The relationship between clients and the law and their lawyers presents serious questions. All Americans are familiar with the stereotype of the imperious person in enterprise who is supposed to say, "I want a lawyer who will tell me what I *can* do, not a lawyer who will tell me what I can't do." However, the legitimacy of the legal system rests on a high degree of independence of the profession and upon the readiness of lawyers to risk the loss of an important client by telling the client not simply what the law is, but what the wise and sensible course in response to the law should be. This is quite another problem; one that deserves serious consideration in every U.S. law school.

PROFESSOR PRENTICE:

It is the solicitor who has the client and wants to permanently keep that client. The barrister is instructed periodically by the solicitor. When solicitors are having difficulties getting their clients to comply, they will often say, "We will take counsel's opinion." The client will come along, and then counsel will say, "Well, you can't do this." This lets the solicitor off the hook because the solicitor still has the client, and the client realizes that it is not the solicitor who is giving this unattractive advice, but the barrister. Although I think there are many criticisms of the split profession in the United Kingdom, I think this ability to inject into it an independent element that lets the other professional off the hook is really a very important strength. There is a high level of legality in the United Kingdom.

PROFESSOR BLUMBERG:

It is said that no matter what the rules of law, you can redistribute the relationships to deal with them. That also is true of taking advice. Is the client genuinely seeking advice or simply looking for a lawyer who will express the opinion that the client desires?

PROFESSOR GORDON:

Next, we will consider specific topics, such as piercing the veil and successor liability. In discussing the nature of control, the nature of a corporation, the seat of the corporation, the principle place of business, its nationality, and so forth, we should focus on these specific areas, whether we are talking about extending boycott laws abroad or corrupt acts abroad.

Have international organizations, such as OECD, the United Nations, and the European Union, been considering this? Are we too content with the status of the nature of control? Or would it be better to leave it, for the most part, in a vacuum and let the courts figure it out, depending on the purpose?

PROFESSOR PRENTICE:

It is a very complicated question. It involves the distribution of responsibility between the legislature and the courts, which really depends upon the national system within which one operates. In the United States, you have a federal system; you do not have one-party rule as we do, and you do not have the type of powerful executives that we have. Our legislation is not a matter of compromise. The legislation that is driven through is the legislation that the Secretary of State wants. Normally, he does not compromise with any other political group within the legislature. The technique of legislation will be driven by his civil servants. So, within the United Kingdom, we can get a technical package that is not suffused with political compromise and normally is of a high technical order. That allocates a particular role to the legislature and a particular role to the judge.

However, in a system where the legislation is full of compromise and is extremely diffuse, judges are going to play a much different role in interpreting it. Let me give you one example. There is a European Union directive on regulation of prospectuses, that is, public offerings of securities. You would think that one of the most critical factors in that piece of legislation would be the definition of an "offer to the public." But in the preamble to the directive, they come clean, stating that they have not defined "offer to the public" because they could not get agreement among the member states as to what that actually meant. It was left up to each member state to introduce their own definition, or alternatively use "offer to the public" and leave it up to the judges to define it. Legislation can be a process of political compromise when you cannot get agreement. You settle for second best. If that is the structure, the courts will play a particular role. If it is not the structure, then the courts will play a different role. For example, in the United Kingdom, because of the extent to which we have the majority party in control, which dominates the executive, and because we have a fairly high level of good technical civil servants, we get a particular product. And our judges then will play a particular role.

PROFESSOR BLUMBERG:

There is another approach, not of solution, but of accommodation. For the first time starting in 1994, the U.S. Congress has taken very productive steps in the direction of international harmonization. It has done so in the securities and antitrust laws. It has directed the U.S. agencies in charge of the administration of those statutes to establish links with the comparative agencies abroad to encourage the development of international coordination, cooperation, and enforcement of such laws in the participating countries.

Within the last few years, the United States has entered into such understandings with the European Union and a number of European countries. For example, if the United States has an antitrust matter with

consequences in Europe, the U.S. antitrust people are enjoined to visit with the European antitrust people to elicit their cooperation and to resolve any areas of conflict. In a very forward looking step, these agreements also have introduced an entirely new doctrine called "positive comity." In the past, comity has meant that before the courts of one jurisdiction would exert their jurisdiction in a matter with international dimensions, they should take into account the national interest of the other country involved and evaluate the relative importance of the opposing interests of the two countries affected. Where foreign interests are more seriously affected, domestic courts under the doctrine should abstain from exercising their jurisdiction. Positive comity goes beyond this. It asserts that before the antitrust or securities agencies of one country attempt to exercise their power extraterritorially in the country of the other signatory, they should turn to their counterparts abroad to see to what extent the necessary action can be achieved by cooperative efforts from the comparable foreign agency.

Now this is splendid. It may be expected to work well, but only in those areas where the foreign policy objectives of the different countries involved are congruent, if not synonymous. Almost all nations oppose restrictive trade practices. Similarly, all nations reject securities fraud. It is therefore feasible for nation-states to join forces to deal with "evils" that all perceive as evil. However, in other areas where the policies of nations are very different, attempts at harmonization are not going to work.

So, a common international policy on a problem must precede accommodation of this nature. "That's the rub." How many years or decades will it be before the very different policies of different nation-states on major issues will be harmonized into a common policy for the world? In the meantime, we must try to accommodate the inevitable conflicts. We have taken the first steps, but they represent only limited progress.

PROFESSOR GORDON:

Next, we will turn to more specific issues, such as veil piercing. In reviewing all of the corporation cases in Florida, the largest number of cases in a substantive law area involving questions other than long-arm jurisdiction, which itself comprises a large number of cases in Florida, are those that deal with veil piercing. There are probably six or eight cases each year in the Florida District Court of Appeals or the Florida Supreme Court that address issues of veil piercing. This seems to be true in other states as well.

PROFESSOR BLUMBERG:

Perhaps, 750 cases per year nationwide.

PROFESSOR GORDON:

You are all probably familiar with *Zaist v. Olson*,[39] which is not a particularly good case coming out of the Connecticut court.

PROFESSOR BLUMBERG:

Let me digress in order to make a point that has serious jurisprudential implications. Professor Prentice stated that the bench in the United Kingdom is composed, in significant part, of former barristers who have extensive company law experience. That is not generally true of U.S. state appellate justices, except perhaps in Delaware and to a limited degree, in some of the federal courts. We are dealing with judges who are guided in significant measure by the concepts learned decades ago when they were in law school. In consequence, we are getting the continued application of conventional corporate law. However well-suited those doctrines may have been for the problems of the relatively simple corporations of yesterday, they are anachronistic for application to the modern global multinational enterprises that dominate the world economy today.

PROFESSOR GORDON:

Most of the consulting work I do that is not international deals with domestic veil piercing. In the last three or four years, I have represented five of the Fortune 500 companies in fairly large cases, such as the *Catfish* litigation,[40] which was just settled with Hormel. I go into depositions representing the defendant, wondering and sort of hoping, (I do not tell my clients this), if someone is going to ask, "What about enterprise liability, Professor Gordon?" No judge or opposing attorney has ever raised that question. We are behind in our development of this. Why do you suppose this is so? More decisions than just the *Salomon* decision show that it is a concept that came out of the late nineteenth century.

PROFESSOR PRENTICE:

There is a very famous Irish joke, where someone is in the middle of Ireland, and an English traveller stops an Irishman and says, "How do I get to Dublin?" And the bloke thinks for a while and then says, "Well, if I wanted to get to Dublin, I wouldn't start from here." We started at the wrong end of the telescope. We developed *Salomon* at a time when we simply did not have corporate groups.

---

39. 154 Conn. 563, 227 A.2d 552 (1967).
40. *In re* Catfish Antitrust Litig., 908 F. Supp. 400 (N.D. Miss. 1995).

PROFESSOR GORDON:

Would you briefly explain the *Salomon*[41] case?

PROFESSOR PRENTICE:

Mr. Salomon ran a boot-shoe business. He sold the business to Salomon and Company, Ltd. It paid Mr. Salomon 21,000 shares and also a debenture, which was secured. Also, six shares went to Mr. Salomon's family, one to each of five his children and one to his wife. The business went into liquidation. It could have gone into liquidation because feet had gone out of fashion but that is probably not the explanation. The explanation is that Mr. Salomon was one of the first examples of a situation in England where semiorganized labor, rather than striking against the industry, decided to strike against a single employer. This was not common in England; normally when a strike takes place, it is against the total industry, whereas your auto workers, if I understand correctly, pick out one employer, stage a strike against that employer, and that sets the benchmark for wages in the industry.

Now, what does that tell us about Mr. Salomon? Well, the trade unions in England can be on occasion be foolish, but they are going to strike against the most unpopular employer in the industry. The company goes into liquidation. As you know, liquidation is a collective scheme for distributing assets. The assets are distributed according to the pre-insolvency entitlement of the creditors. At the top of the queue, we have the debenture-holder with the charge. Of course, it is a characteristic of insolvency that the creditors are paid off according to their seniority. They are paid off in full, and there is no compulsory sharing. Although Mr. Salomon had assigned this debenture, the assignee takes no better rights than the assignor. So, at the top of the queue of distribution in actual fact was Mr. Salomon.

Then came the unsecured creditors for whom there was no money. And since the company was insolvent, there was nothing available for the shareholders. The real reason the liquidator brought the action was because Salomon seemed to be able to finance the company in such a way that the risk of failure, given limited liability, was moved to the unsecured creditors; he could exit his position.

Salomon is really a case of a missed opportunity. We should not have gone down the route of veil piercing. We should have developed a subordination doctrine to the effect that if a person setting up a company injects both debt and equity into the company, we will treat that debt as equity, so that the unsecured creditors are protected. The court said that the company was separate and distinct from Mr. Salomon. Therefore, Mr.

---

41. Salomon v. Salomon & Co., Ltd., [1897] App. Cas. 22 (P.C. 1896) (appeal taken from Eng.).

Salomon could have the payment against the company. This is the essence of the corporate entity doctrine that has become an entrenched aspect of English company law.

The enterprise argument has actually been put to the court. What you have is a simple situation. You have the principal debtor, the principal creditor, and the guarantor of the debtor's debt. It was a contract between guarantor and principal creditor. The creditor will have the right of indemnity against the principal debtor. So there are two possible claims. There is the creditor's claim against the debtor for the debt. There is the guarantor's claim against the debtor because the guarantor will have the right of indemnity. Out of this single transaction, there are two potential claims against the debtor. You have the claim of the creditor to be paid, and you have the continued claim of the guarantor, because if the guarantor has to pay up, then the guarantor is entitled to an indemnity. If it is the principal debtor who goes into liquidation, there is the possibility of two claims. The creditor will lodge proof for the loan; the guarantor has a contingent claim and also may want to lodge proof. All insolvency laws have developed some type of doctrine of double proof. There can be only one claim with respect to the single debt. In liquidation in the United Kingdom, normally the principal creditor will claim against the principal debtor, but then the guarantor cannot lodge any proof. It is called the principle of double proof. You can have only one claim with respect to the single debt.

There is a company called Polly Peck International (PPI). It used to own the Jolly Green Giant brand of foods; it was a conglomerate. In 1990, it went into what is known as administration but for all intents and purposes, we will treat it as liquidation.[42] Polly Peck International, an English-registered company, sets up a Cayman finance vehicle, which is called Polly Peck Finance (PPIF).[43] Polly Peck Finance borrows over £450 million from various banks, and PPI guarantees it with eight bond issues.[44] The parent sets up the wholly owned subsidiary, the subsidiary borrows £450 million, and the parent guarantees the debt. Polly Peck is now in liquidation. The banks want to claim on their guarantee saying, "We want to lodge proof." Polly Peck Finance wants to claim the £450 million that had been loaned to the parent as just a financing vehicle, but the argument is that this is double proof. These are exactly the same claims.

The judge, Justice Robert Walker, rejected the argument of double proof.[45] One argument put forward was that in actual fact, these companies

42. *Re* Polly Peck Int'l plc, [1996] 2 All E.R. 433, 433 (Ch. 1995).
43. *Id.*
44. *Id.* at 436.
45. *Id.* at 441-42.

were a single economic entity.[46] The argument was put forth by counsel, a Mr. Kosmin Q.C. and a Mr. Chivers. They said that PPI and PPIF were a single economic entity.

> (i) [Polly Peck Finance] was incorporated solely for the purpose of the bond issues; (ii) it had no separate, independent management; (iii) it had a very small paid-up capital; (iv) it did not pay the costs of the transactions and could not have done so; (v) it had no normal bank account and no separate financial records . . . ; (vi) the terms of the on-loan [the PPIF on-loan to PPI] were not independently negotiated . . . [and in fact, they] were never finally agreed . . . ; [and] (vi) no lender could or would have relied on PPIF's covenant.[47]

What they really wanted was the guarantee from the parent, which was an asset-wealthy company. In the course of his judgment, Justice Walker stated that the principle of *Salomon* was the principle recognized by the English courts.[48] He held that PPI and PPIF were separate entities.[49] He found that PPIF was not the agent of the parent, and the Court was not willing to pierce the corporate veil.[50] The argument was not enterprise liability, but the language they used was "single economic unit." But the conceptual apparatus was exactly that idea. Although Justice Walker said that he found Mr. Kosmin's submissions most persuasive on this part of the case, he was not ultimately persuaded by them.[51]

That is the way English courts approach group problems. Notice what is happening. Kosmin argued that the reason for treating this as a single economic entity was that the principle of double proof is the basis of insolvency law.[52] Therefore, they wanted it to be treated as a single economic entity in circumstances where it will uphold or bolster up an existing public policy. They did do not want the judge to create new public policy, but to defend existing public policy, which has been in cases since the middle of the nineteenth century. It was an attractive argument. Counsel was not asking the judge to do very much. In fact, they were asking the judge to take a small step. Knowing the way the English courts work, Kosmin could have formulated a principle that we will, in certain circumstances, treat a group as a single economic entity where that furthers an

46. *Id.* at 447.
47. *Id.* at 445.
48. *Id.* at 444-45.
49. *Id.* at 445-46.
50. *Id.* at 447.
51. *Id.*
52. *Id.* at 448.

existing public policy. However, again, Justice Robert Walker refused to go down that road. This illustrates how ironclad the regime is.

PROFESSOR BLUMBERG:

Well, I believe that there is a ready explanation for this phenomenon, which you have heard described in splendid detail. This is the essence not only of the *Salomon* decision but of traditional corporation law in this country as well. Where did this jurisprudence, so unrealistic in today's global business economy, come from? Most legal historians conclude that English concepts of the corporation are derived from the perceptions of medieval scholars of Roman corporation law. They thought that under Roman law, quoting Roman commentators such as Ulpian, each juridical entity had its separate, legal existence and its own rights and duties entirely separate from any other entity; that the rights of the corporation and the duties of the corporation were separate and distinct from the rights and duties of the shareholders. This concept of the corporate legal personality became firmly fixed in English law centuries before acceptance of limited liability and the decision in the *Salomon* case decades later. Corporation law formulated in this manner is U.S. law as well as English law. It also is the law in the other developed countries of the Western world, including Russia. The separate judicial personality of the corporation is the common inheritance of nation-states in the Western world from the Romans.

These principles of corporate law originally were developed with respect to municipal corporations, such as towns and boroughs, and to the bishops of the church with respect to church property (the so-called corporation sole). They did not arise in connection with business corporations. In fact, there were no business corporations during the centuries in which English law took shape. It was not until centuries later that the first business corporations emerged in the form of great trading companies, of which the East India Company is the best example. Indeed, in the aftermath of the South Seas Bubble and the Bubble Act,[53] there were only six corporations formed in all of England during the eighteenth century.

Similarly, in the United States, there were only six corporations in 1776. Of these, only one was a manufacturing corporation and that soon became insolvent. Thus, the formulation of our corporation law has roots that have very little to do with economic activity. It was borrowed lock, stock, and barrel from the law distinguishing between a town and its residents. Nevertheless, the doctrines accepted in this manner served quite well in resolving the legal problems of the small economic enterprises of the time, consisting

53. The Bubble Act, 6 Geo. I, ch. 18 (1719) (for preventing of joint stock corporations with transferable shares). It was ineffective and repealed in 1825. *Id.*

of a corporation and its individual shareholders.

Corporation law emerged before there were corporate groups. Until late in the nineteenth century, a corporation was barred from owning shares of another corporation unless the legislature expressly gave it the power to do so, a power that was almost never given to a manufacturing company. Accordingly, when the law spoke of the corporation being separate from the shareholders, it was essentially saying that the business enterprise was separate from its individual investors, investors who supplied capital but were not themselves carrying on the business.

In the United States, this framework did not change until the 1890s when New Jersey changed it corporation law to authorize all corporations to own shares in other corporations.[54] Lincoln Steffens, one of the muckraking journalists of the time, characterize this development in a well-known article, "New Jersey: A Traitor States."[55] This came at a time when trusts, the prevailing form for business concentration, were being outlawed under the great trust-busting movement of the 1880s and the 1890s. The net result was that the great corporations of this country speedily flocked to reincorporate in New Jersey. In response, the other states followed suit and adopted statutes modelled after New Jersey's.

Business structure in the United States underwent an immediate change, a change described as a turning point in U.S. business history. Major businesses changed from individual corporations conducting their own businesses to much larger corporations with enormous accumulations of capital and which issued shares of the holding company or parent corporation in exchange for shares of the formerly independent manufacturing companies. A major change in the form of U.S. business occurred with the restructuring of the major U.S. corporation into corporate groups with an increasing number of subsidiaries.

Corporation law, which was formulated before these corporate groups came into existence, soon proved inadequate to deal with the problems they presented. When faced with issues involving the legal interrelationship of the parent and subsidiary corporations, courts in the United States and in England responded essentially in a syllogistic manner. Major premise: Shareholders, being juridically separate from the corporation, are not liable for the corporation's obligations. Minor premise: A parent corporation is a shareholder of a subsidiary corporation. Ergo, a parent corporation has no liability for its subsidiaries' obligations.

---

54. Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385-86; Act of Apr. 17, 188, ch. 295, §1, 1888 N.J. Laws 445-46; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412, 414; Act of Mar. 14, 1893, ch. 171, § 2, 1893 N.J. Laws 301.

55. Lincoln Steffens, *New Jersey: A Traitor-State, Part II — How She Sold Out the United States*, 25 MCCLURE'S MAG. 41 (1905).

Applying the traditional doctrine of separate corporate personality to corporate groups ignores the reality that the economic relationship between parent and subsidiary is very different from the economic relationship between the corporate business and its investor shareholders. The parent and the subsidiary collectively are the business; they collectively conduct the business under the control of the parent. Unlike the parent shareholder of the subsidiary, the investor shareholders of the parent corporation are not part of the business.

A concept of separate juridical existence of corporations based on the distinction between the business enterprise on the one hand and its investors on the other required reexamination when it would separate one component of the business, that is, the parent corporation, from another component, that is, the subsidiary. Instead, the doctrines that were developed with respect to the very different earlier type of corporation were automatically applied to the newer corporate groups without any reexamination whatsoever.

The older law, which served the older business world consisting of two-level structures (shareholder-corporation), became applicable to the modern business world consisting of three-level structures (shareholder-parent corporation-subsidiary corporation), where it does not fit at all. Its application continues because our judges and law professors typically do not recognize this revolutionary change. They continue to analyze issues by reference to the doctrines developed with respect to the older, outmoded world of the small business, as applied in the *Salomon* case, with traditional piercing the veil with all its restrictions as the only safety valve.

Where corporate groups are involved, piercing the veil is not a useful approach in its traditional form because it turns on factors that completely ignore the economic realities of the situation at issue. It turns on such matters as compliance with corporate forms and the indicia of independent operation; standards that become ineffective when corporate affairs are conducted under the supervision of counsel. Through meticulous observance of forms, legal consequences can readily be avoided by formal procedures without independent economic significance. Further, piercing the veil is an exercise of equitable jurisprudence. For equitable intervention, fraud or inequitable conduct as well must be shown. With a governing doctrine turning on compliance with formalities and a showing of fraud or inequity, economic realities are ignored and the implementation of the underlying policies of the law in the area at issue can be readily frustrated.

Enterprise liability, where appropriate, has an entirely different foundation. It rests on the proposition that all parts of an integrated business ought to be responsible for the obligations of the business when it serves the underlying principles of the law in that area. There are limitations. First, it is not a transcendental doctrine. It should be applied selectively only where useful in implementing basic legal policy. For example, in contract law

where fulfillment of the expectations of the parties is a major objective, its application to transactions involving a bargain over credit is rarely appropriate. However, in tort, particularly in product liability matters, it serves tort law very well, as has been recognized by almost all U.S. jurisdictions.

Second, problems in formulation and application arise when a wholly integrated business is not involved. For example, it runs into difficulty when conglomerate enterprises are concerned. What then is the business of the conglomerate group? As in Professor Gordon's example, what is the business of a company that operates both mines and hotels? Mining or hotels or both or neither? Should the hotel part of the business be liable for the mining? This raises a new and very serious problem. Further, where you have partly owned subsidiaries, what is the appropriate treatment of the minority interests? These, however, are subsets of the larger problem. However, you cannot think clearly about subsets until you have satisfactorily analyzed the more common problem of the single-integrated business with sole control. At this point, one should struggle with the further issue of scope of application. Finally, we must remind ourselves that the root of the problem is the concept of the separate juridical identity of the corporation, which dates back to the jurisprudence of the Romans.

PROFESSOR GORDON:

I gathered that Justice Robert Walker did not distinguish in *Polly Peck* between the fact that the *Salomon* case was an individual and therefore belongs in that other group dealing with an individual shareholder with a claim against a corporation. I certainly agree that this was really a time for subordination theory to develop when the shareholder was attempting to have some priority. We would have to deal with it separately under some kind of veil piercing when we are talking about a shareholder who is not making a claim but is against a claim being made for the credits of the company.

In this large body of cases, 750 a year in the veil piercing area, they rarely discuss enterprise liability. For the reasons raised by Professor Blumberg, it is not taught very much in law schools. It is not being presented to the courts as something to consider. That is one of the factors retarding in its acceptance in the United States. One possible avenue of acceptance might be through judgment enforcing or through negotiation, such as the *Badger* controversy,[56] where there was the issue of severance pay and

56. This was a celebrated controversy between a bankrupt Raytheon third-tier subsidiary named Badger and the Belgian Government in behalf of Badger workers deprived of severance pay. *See* PHILLIP I. BLUMBERG, LAW OF CORPORATE GROUPS: PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS INCLUDING THE LAW OF CORPORATE GUARANTIES, § 17.09.2 (1985).

creditor's claims, or in the *Deltec*[57] case, which involved economic unit theory, the *unidad económica* theory. Is there any greater hope that a U.S. court would accept it? Would a U.S. court address an attempt to enforce a judgment that was based on a very clearly outlined judgment based on enterprise theory? Would a court in England accept that?

PROFESSOR BLUMBERG:

I will be glad to respond, but if I hope I may digress for a moment and comment on subordination in the *Salomon* case. One of the great subordination cases in the United States is *Taylor v. Standard Gas & Electric Co.*, better known as the *Deep Rock* case.[58] This involved the treatment of the bankruptcy claim of a parent corporation against a subsidiary that the parent had mismanaged to its own advantage. In the Court of Appeals, counsel relied on the theory of piercing the veil in arguing that a reorganization plan treating the intercompany claim as a valid claim was defective. Relying on the traditional concepts previously discussed, the court rejected this contention.

In the Supreme Court, Justice Roberts, who probably would have had serious difficulty in getting the Court to reverse the decree below on the issue of piercing the veil, sidestepped the issue entirely. Affirmed in its decision handed down months later in *Pepper v. Litton*,[59] the Court established a new framework for decision. The *validity* of the parent's claim was no longer at issue. Instead, the issue was formulated as a question of bankruptcy law to be determined by principles of fairness. The issue was restated as a determination of the proper order of payment of the inside and outside creditors when the insider parent corporation had treated the subsidiary unfairly. Because of the parent corporation's unfair conduct, its claim, while not disallowed, was subordinated. The parent had to wait at the end of the line of creditors. The outside creditors were to be paid first instead of being diluted by being forced to share with the parent corporation. The net effect was just as effective as if the Court had pierced the veil and disallowed the claim. The Court achieved an enterprise outcome not by challenging piercing the veil jurisprudence, but by making its application irrelevant.

This was a question of lawyering. Professor Gordon asked the question how far would you get if you argued enterprise liability to the judges? If I were counsel, the answer would be that such an approach presents many

57. *Deltec*, [1973-19] J.A. 579, 151 Revista Juridica Argentina-La Ley 516 (1973); *see* Michael W. Gordon, *Argentine Jurisprudence:* Deltec *Update*, 11 LAW. AM. 43, 43 (1979); Michael W. Gordon, *Argentine Jurisprudence: The* Parke Davis *and* Deltec *Cases*, 6 LAW. AM. 320, 329 n.10 (1974) [hereinafter Gordon, Parke Davis *and* Deltec].

58. 306 U.S. 307 (1939).

59. 308 U.S. 295 (1939).

difficulties in today's world except where statutory policies or fundamental tort law objectives are involved. Except in certain areas of procedure, bankruptcy, and statutory law, this approach has had limited success.

In my volumes, I have collected these cases in which enterprise law has been at issue. It is plain that the results are very mixed. Enterprise doctrines are unquestionably percolating through the courts. They have had considerable success in a number of areas, and a newer jurisprudence of corporate groups may fairly be said to be emerging. At the same time, it is essential to recognize that the success depends on the area of law in question. Where controversies between private parties at common law are involved, it is very difficult to consider the application of principles so long as the courts examine the issue with the frozen mindset of the traditional corporation law.

Justice Douglas was able to escape the rigid framework that separate entity imposes on the Western legal world by relying on the doctrine of equitable subordination in bankruptcy. Other U.S. courts are utilizing other legal frameworks to solve the dilemma. Of these, expansion of tort concepts and agency concepts are the most prominent examples of judicial approaches through which the courts have imposed enterprise liability without using the term. In a series of cases in Delaware, in areas of franchising law, and in areas of health care law in many jurisdictions, expanded concepts of agency or quasi-agency have served as the rationale for application of enterprise principles.

The jurisprudential transformation of tort product liability law is one example. The expansion of such concepts as apparent authority and apparent agency in agency law and nondelegable duty in tort law beyond their traditional common law limits provides other prominent examples. New wine has been poured into old bottles; enterprise results have been achieved without use of the term.

Some of this goes back to the felicitous but unhelpful opinion of Justice (then judge) Cardozo in the *Berkey* case,[60] which is taught in most U.S. law schools or at least used to be. It is an unfortunately decided case, resting on a less than correct statement of the facts. However, the language of Justice Cardozo's opinion captures the imagination, such as his celebrated observation that while metaphors provide insight into problems, they may ultimately enslave one. For purposes of the present discussion, it is useful to note that in addition, Justice Cardozo recognized that agency law provided an alternative to piercing the veil for imposing liability on a dominant corporation.

Now, in contexts where public issues of magnitude are at stake, the U.S. Supreme Court in a series of important decisions has ignored the traditional

60. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

jurisprudence of the separate juridical identity of parent and subsidiary corporations and the applicability of piercing the veil jurisprudence. One example is *First National City Bank v. Banco para el Comercio Exterior de Cuba*,[61] also called the *Cuban Trade Bank* case. Justice O'Connor allowed a U.S. bank to set off its claim against the Cuban government for confiscation against the bank's liability to a Cuban government instrumentality that admittedly had a juridical existence separate from that of the government. Justice O'Connor made it clear that large public issues were at stake. In order to implement the underlying objectives of U.S. law at issue, she disregarded the separate corporate existence of the Cuban governmental bank, expressly rejecting reliance on the "worn epithets" of piercing the veil to decide the case.[62] Public policy, not corporate forms, determined the outcome.

Another major decision is *Anderson v. Abbott*.[63] This involved the provision of the National Bank Act, that imposed double assessment liability on shareholders of national banks when required for payment of bank debts, including depositors' claims. In this case, the depositors in a failed bank owned by an insolvent holding company sought to impose double assessment shareholder liability not against the insolvent holding company, which owned the shares of the bank, but against holding company shareholders, who had several years before traded their shares in the bank for shares in the holding company. In a five-to-four decision, the Court said that it would not be bound by traditional notions of corporation law where the imposition of double assessment on the holding company shareholders (although they were not shareholders of the bank itself) was required to implement the federal policies of double assessment liability. Otherwise, a statutory policy to protect bank depositors would be frustrated by corporate restructuring and the interposition of the holding company between a bank and its public shareholders.

Yet another example of the Court's application of enterprise principles is the series of decisions referred to as the *Unitary Tax* decisions.[64] These decisions hold that a state may determine its corporate taxes on an in-state member company of a multinational corporation according to apportionment

---

61. 462 U.S. 611 (1983).

62. *Id.* at 623. Justice O'Connor warned "against permitting worn epithets [such as piercing the veil jurisprudence] to substitute for rigorous analysis." *Id.* (citing *Berkey*, 244 N.Y. at 84).

63. 321 U.S. 349 (1944).

64. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983); F.W. Woolworth Co. v. Taxation & Revenue Dep't, 458 U.S. 352 (1982); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980).

of the consolidated income of the group to the in-state affiliate, typically according to the fraction that the sales, payroll, and assets within the state bear to the group or enterprise as a whole. In five or six cases presenting this issue, the Supreme Court has consistently applied an enterprise view and has developed a standard for determining the constitutionality of state corporate tax, resting on the concept of "the unitary business."

In summary, it is important to note that in each of these cases, a profound governmental policy underlies the readiness of the Supreme Court to depart from the concept of separate juridical existence and apply enterprise principles in the implementation of legislative policy. By contrast, in common law controversies between private parties, the prospects of U.S. courts at this stage, through the gradual evolution of the common law shaking loose from the bonds of the separate entity concepts symbolized by *Salomon*, which are widely accepted in the United States for common law purposes as well as in England, are less promising except in very special areas.

PROFESSOR GORDON:

Your comment about public policy issues in the *Cuban Trade Bank* case invokes the English-Poland *Rolimpex* case,[65] dealing with the Polish sugar issue, because the *Cuban Trade Bank* case was able to get away from the strict veil piercing theory. Rolimpex, a Polish sugar company, which sold sugar through a state enterprise, had contracted to sell sugar to an English company, but was later ordered by the Polish government not to sell the sugar due to a national shortage. There was a question as to whether there was adequate separateness between the company and the government. The mentality that came out of the *Salomon* case kept the English court in the *Rolimpex* case from being as adventuresome as Justice O'Connor was in the U.S. case, even though this was a public issue because it dealt, to some degree, with preserving a resource within the country in a time of shortage. Do the English courts respond differently on public issues?

PROFESSOR PRENTICE:

Well, there might be some public issues that could affect the court's approach. When it gets to areas central to public policy for society, then the courts may be willing to try to enforce the policy and override *Salomon*. We have no written constitution in the United Kingdom and therefore, no provision that protects property. Therefore, it is possible for our criminal legislation to empower the government to impound and expropriate property

65. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex, [1979] App. Cas. 351, [1978] 2 All E.R. 1043 [hereinafter *Rolimpex*].

that they suspect is the proceeds of criminal activities. They can then place the onus on the property owner to prove that the property is not derived from a tainted source. One of these powers is under our legislation enforcing customs and excise; it is a tax on alcohol in this case. The court can appoint a receiver, and the receiver can then appropriate the property, making a confiscation order against the alleged delinquents in order to confiscate the property. In one case, involving massive fraud, a group of companies had been set up and were avoiding tax at the rate of a million pounds a week.[66] The government made an expropriation order against the property of the companies. The companies said that they were not committing an unlawful act, rather it was the directors and the shareholders who were defrauding the government. At the end of the judgment, the judges stated that they were all the same people, and it was a single orchestrated fraud; the court upheld the granting of the confiscation order.[67]

In cases of critical dimension like *Re H*, a court might override *Salomon*, but those cases are very rare. In 1990, there was a famous case, *Adams v. Cape*.[68] It is a very complex case because it was an attempt to serve an order made in Texas, which was a default judgment against an English company or a series of English companies in Texas with respect to liability to asbestosis claims. It involved quite complex problems of conflicts of laws. Lying behind the scheme was that in 1974, the English company had carried on its distribution activities in the United States through a wholly owned Illinois subsidiary. It was then that the claims of asbestosis began to develop. So, it was agreed that the motive of the company was to minimize their future liability with respect to these claims. They liquidated their Illinois subsidiary and another company, which was run by the managing director of their English subsidiary, started distributing in Illinois. Now, you can serve the judgment so that it can be enforced in England, if you show that the English company was present in the United States actually distributing the asbestos. It would depend on whether the court can pierce the corporate veil and say that this company in the United States was in actual fact the English company. There were number of points, but the *Adams* court refused to do so.

But we do have a doctrine for fraud, but it is very tightly defined. Fraud means depriving a person of an existing proprietary interest. I agree to sell you my property but before the conveyance to you, I set up a company and convey the property to the company. I then argue I do not own the property, therefore, you cannot get specific performance. The courts have said that is

66. *Re H*, [1996] 2 All E.R. 391 (Eng.).
67. *Id.*
68. Adams v. Cape Indus. plc., [1991] 1 All E.R. 929, [1990] 1 Ch. 433, 544 (C.A. 1988) (Eng.).

a fraudulent scheme. But how does this play out for a victim? To show how entrenched *Salomon* is, the argument was put forward thus: This whole arrangement of liquidating their Illinois company was designed to minimize liability. One of the judges, a strong judge, Lord Justice Slade, said that we do not accept as a matter of law that the court is entitled to lift the corporate veil as against the defendant company that is the member of a corporate group, merely because the corporate structure has been used to ensure that the legal liability, if any, in respect of particular future activities of the group, and correspondingly, the risks of enforcement of that liability, will fall on another member of the group rather than the defendant company.

So you can organize your affairs in such a way that the risk of the activity will be isolated within a component of the enterprise. That is a legitimate use of the corporate form in the United Kingdom. We are light years away from any form of enterprise theory.

PROFESSOR BLUMBERG:

What is the extent to which courts have been able to get away from the rigors of corporate separation by using other theories? I would to ask Professor Prentice to comment on *Daimler Co. v. Continental Tyre & Rubber Co.*[69] This case was decided at the height of World War I. It involved the applicability of the English Trading with the Enemy Act to a company incorporated in England but which had German directors and shareholders and a secretary who was German by birth although a naturalized English citizen. It is especially interesting how the various judges on the House of Lords divided on this issue. While some concluded that English incorporation made the company English as had the lower court, the Court ultimately held the statute applicable. It did not challenge the separate corporate existence of the company or its English incorporation, but instead turned to end-run theories such as the German residence of the directors and the lack of corporate authority for the company's secretary to institute the lawsuit. It is evident how great public policy concerns dominate consideration where an issue such as trading with the enemy arises, particularly during wartime. By contrast, tort and contract cases involve controversies among private individuals.

PROFESSOR PRENTICE:

Daimler has been cul-de-sac'ed by *Adams*.[70] The courts have simply said that in turns on the language of the Trading with the Enemy Act, in defining whether this is the enemy you can look at who composes the board.

69. [1916] 2 App. Cas. 207 (appeal taken from Eng.).
70. [1991] 1 All E.R. at 929.

PROFESSOR BLUMBERG:

There is a great public policy concern in the Trading with the Enemy problems. Tort cases, however, involve a controversy among private people.

PROFESSOR PRENTICE:

There is a case *Lee v. Lee's Air Farming Ltd.*,[71] an appeal to the Privy Council from New Zealand, that involved a one-man company. Director Lee ran it. Lee was killed while carrying out the company's activities. It was crop-dusting. His wife then brought an action against the Social Security authorities, saying that because Lee had a contract of service, she was entitled to certain compensation. The added question was: Was there a contract of service? How could Mr. Lee, as director of the company, enter into a contract with Mr. Lee, the employee? The Court, stating that they did not understand what the difficulty was, held that the company was separate from Mr. Lee. Mr. Lee, as managing director, could enter into transactions for the company with Mr. Lee, the potential employee.

PROFESSOR BLUMBERG:

There are many U.S. cases that have considered the same problem that was raised in *Lee*, and most have had similar results. However, they have done so on the theory that it is simply a question of the corporate hat the person is wearing at the time of the particular action. In Professor Prentice's example, Lee is wearing Director Lee's hat when he signs the contract, but when he runs around to the other end of the table, he is deemed as putting on another hat, Employee Lee's hat, when he signs the contract. In matters involving statutory enforcement, however, U.S. courts are increasingly repudiating the "hats" doctrine.[72]

I would like make another comment about asbestos cases, such as *Adams*. Although we are talking about the law, the presumably objective law, courts are not immune from the passions and emotions surrounding the claims of victims in massive tort catastrophes for compensation. If you look at the great massive tort cases of our time, in the end, the plaintiffs have frequently prevailed against the parent companies. They have prevailed in cases like the *Union of India v. Union Carbide Corp. (Bhopal)* case,[73] which is held out

71. [1961] App. Cas. 12; [1961] N.Z.L.R. 325 (P.C. 1960).

72. *See* United States v. Sealey, Inc., 388 U.S. 350, 353 (1967) (antitrust); Resolution Trust Co. v. Stone, 998 F.2d 1534 (10th Cir. 1993). *But see* United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985) (False Claims Act).

73. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 809 F.2d 195 (2d Cir. 1987), *cert. denied sub nom.* Executive Comm. Members v. Union of India, 484 U.S. 871 (1987). For complaint, *see* Government of India v. Union Carbide Corp., No. 86 Civ. 2696 (S.D.N.Y. 1985). For Indian decisions, *see* (1989) 1 S.C.C. 674, (1989) 2 S.C.C. 540, (1989) 3 S.C.C.

as a great example of enterprise liability. However, if you read the pleadings in the *Bhopal* case, you will see that the lawyers, sharing the analysis that Professor Prentice and I have advanced, had but one cause of action resting on enterprise liability and five causes of action resting on the direct liability of Union Carbide for its own negligence. If you turn to another great case of this nature, the *Amoco Cadiz*[74] case, you will find exactly the same thing. The complaint contains one count relying on enterprise liability and endless counts alleging direct liability.

The *Bhopal* case never went to judgment in the United States on the merits. But the plaintiffs ultimately prevailed in India, receiving a US$470,000,000 settlement. In the United States, *Amoco Cadiz* went to judgment, and the plaintiffs prevailed. The judge upheld the concept of enterprise liability, but only after also upholding many counts of direct liability. On appeal, the defendants never challenged the finding on enterprise liability. Thus, while *Amoco Cadiz* is a square holding in favor of enterprise liability, it is an alternative holding. Accordingly, it is of limited use to the advocate.

It is very useful from an advocacy point of view to include a count of enterprise liability in situations of this sort to demonstrate the folly of applying traditional law where it is contrary to the economic realities. However, it also is essential to provide alternative grounds, based on accepted legal doctrine, on which liability can be supported. Enterprise liability has served as a useful advocacy tool while counsel really hopes to prevail on a more traditional theory.

We are beginning to see the same thing in the *In re Silicone Gel Breast Implants Products Liability Litigation*[75] consolidated in Alabama, involving thousands of claimants. Thus, Judge Pointer already has held that Dow Chemical, a fifty percent shareholder, is not liable as the parent for the torts of its subsidiary, while setting down for hearing the other question of whether Dow is liable for its own negligence by reason of its own acts in connection with the design and research of the product.

The problem that arises for corporate counsel is that in the integrated group, it is very hard for the parent to police its participation in the business activities of a group to the extent that lawyers might prefer and that would be quite costly in terms of the development and marketing of the products. Management needs to use the group talent wherever it can be found. It is very useful to have group research and development, for example, available

---

38 (India).

74. *In re* Amoco Cadiz Oil Spill, 1984 A.M.C. 2123 (N.D. Ill. 1984), *aff'd* 954 F.2d 1279 (7th Cir. 1992).

75. *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 837 F. Supp. 1123, 1126-27 (N.D. Ala. 1993), *confirmed* 887 F. Supp. 1455 (N.D. Ala. 1995).

for all of the subsidiaries. In the end, the corporation has a trail of direct involvement. Therefore, enterprise liability as a legal theory is still very useful. But it has to be harnessed with something else in order to be effective in many cases.

To return briefly to piercing the veil, there has been somewhat greater success by counsel who have been successful in persuading courts to apply, even in common law controversies with private individuals, somewhat watered-down notions of piercing the veil. In a few jurisdictions, counsel has been successful in persuading courts considering tort cases that the tort itself will constitute the unfairness required for application of the traditional doctrine. In statutory matters, courts are even more ready to conclude that the statutory violation will satisfy that element of piercing the veil.

In some other jurisdictions, on proof of an excessive utilization of control, it may be possible to achieve success on an alternative theory of the sham corporation, which the court will disregard. It is interesting to note from the example provided by Professor Prentice that this would not be successful in England.

PROFESSOR GORDON:

You have partly answered the question raised previously on whether there are other theories to supplement or replace piercing the veil piercing. In the *Catfish*[76] case, which is in the advance stages of litigation, we thought we were fully prepared to show that directors of parent company serving on the board of the subsidiary and a consolidated balance sheet are typical of other corporations; consequently, the situation in our case was no different than how all other U.S. corporations work. That was how we planned to defend. In looking at all the information, we discovered a directive that came from one of the senior officers of the home company, who was neither a board member nor a manager of the subsidiary, that went directly to the issue of price fixing in Alabama and Mississippi. I thought that this was a direct liability issue, which was why we settled for over US$10 million.

In civil law countries in Europe and in some Latin America countries, the enterprise theory is more palatable than the veil piercing theory. If the German court were to render a decision clearly on the enterprise theory that involved a parent in England, would the Brussels Conventions require that they uphold it?

PROFESSOR PRENTICE:

I think that the English courts would have to enforce the judgment. Yes,

76. *In re* Catfish Antitrust Litig., 908 F. Supp. 400 (N.D. Miss. 1995).

we do pierce the corporate veil. There is no overriding public policy against the practice. If a German court did hand down a decision holding the English parent liable on some theory, we would have no option but to enforce. You do get a certain forum hoping to try to drag the parents in. Most civil law jurisdictions are much more flexible about holding parent companies liable for their subsidiary's activities. For example, the big oil companies in the United Kingdom, Shell and perhaps BP, incorporate each one of their bulk tankers as separate companies. The reason is that if a bulk tanker goes aground and destroys the mussel beds of Northern Europe, which occasionally happens, only the tanker and its cargo are liable. I find it a little odd myself that an English court would recognize the separate legal entity of a bulk tanker. If you read our judgments, the courts realize that parents control subsidiaries. On the other hand, the French courts would not. There is a French decision where they settled, but it was settled because the lawyers said, "You have not a hope in hell."

One other example shows how *Salomon* pervades our culture. It is the legal culture of the separate legal entity. In the 1970s, the House of Lords, in a decision from which they have since departed, held that a builder of a house, basically, could be liable not only to the original purchaser but also to future purchasers, down the line. In other words, they created a tort liability. If you built a defective house and were negligent, then you could be liable not just to the purchaser in contract but to third parties who purchase from the purchaser. There is one construction company that built luxury homes. It became quite concerned about its potential liability down the line. So, what was seriously discussed, but did not come through, was to have the parent company vest house one, house two, and house three in separate companies. When a house is built, you sell the house and pass the cash upstream to the parent, who then collapses the subsidiary. So when the house develops a feature that was not in the advertising brochure, that is, a three-foot gap in the bedroom wall, who do you sue? The builder is not there and the vendor has gone into liquidation. Note that in this case, there was no existing liability. It is not like *Jones v. Lipman*.[77] Instead you go back to *Adams*. It is permissible to organize corporate structures in such a way that you can isolate the risk to the group within a separate entity. That is all you are doing; you are saying that in this world of risk, risk can be put in different compartments. And if this risk happens to come home, it will not contaminate the rest of the group. In *Adams*, you could have an argument that this is perfectly proper.

77. [1962] 1 All E.R. 442, [1962] 1 W.L.R. 832 (Eng.).

PROFESSOR BLUMBERG:

I would like to respond to Professor Gordon's question as to the extent to which one country will enforce judgments of another in this area. In the United States, there is only one decision that is on this point. The Court of Appeals for the First Circuit upheld and enforced an Israeli judgment resting on piercing the veil.[78] The court emphasized the English roots of the Israeli doctrine and the similarity of the Israeli doctrine to U.S. law. It then inquired into the standard principles for enforcement of judgments: Was there notice? Was there an opportunity to be heard? Was there jurisdiction? Did the case involve an action that deeply affected concepts of U.S. public policy?

In analyzing this case, the court tried very hard to demonstrate that Israel's law is very much like our own. The Israeli law on piercing or lifting the veil, which was derived from English law, does not differ very much from U.S. law. Accordingly, it was difficult to contend that the Israeli action was deeply offensive to U.S. concepts of public policy. Thus, this decision is of limited help. It does not present the issue of whether a foreign judgment imposing liability against a foreign parent (or controlling shareholder) on an enterprise liability theory would be enforced. It tells us little as to whether a judgment, such as the Argentine action involved in the *Deltec*[79] case, would be enforced.

Deltec involved the imposition of enterprise liability against the foreign parent conglomerate, its foreign affiliates, and Argentine affiliates of a bankrupt Argentine meat-packing subsidiary by an Argentine court with jurisdiction only over the Argentine subsidiaries. The *Deltec* court acted under the theory that the group was a "unified socio-economic entity."[80] When enforcement in *Deltec* came before a New York court, the court abstained from exercising its jurisdiction under the doctrine of forum non conveniens. But, it also condemned the Argentine action in *Deltec* as not being in conformity with U.S. law since it might amount to "confiscation."[81] The dicta of the New York court provides an interesting insight; if that court had to apply its concept of public policy to the question of whether the Argentine judgement represented a policy acceptable for our courts, the chances for enforcement would not be rosy. This is a fascinating and unresolved problem.

---

78. Tahan v. Hodgson, 662 F. 2d 862 (1st Cir. 1981) (individual controlling shareholder).

79. Compañia Swift de La Plata, S.A., *conv.*, 15 J.A. 350, 146 La Ley 601 (1972), *aff'd in part, rev'd in part*, 15 J.A. 368, 146 La Ley 612, *rev'd* (reinstating commerical court's decree); 19 J.A. 579, 151 La Ley 516 (1973).

80. *See* Gordon, Parke Davis *and* Deltec, *supra* note 57, at 339.

81. Deltec Banking Corp. v. Compania Italo Argentina de Electricidad S.A., 171 N.Y. L.J. 2, 18, at col. 1, Apr. 3, 1974 (Sup. Ct.), *aff'd mem.*, 46 A.D.2d 847, 362 N.Y.S. 2d 391 (1st Dep't 1974), 68 AM. J. INT'L L. 741 (1974).

PROFESSOR GORDON:

Do you suppose the *Badger*[82] controversy was settled by the company paying the severance pay, but not the creditor's claims, because the company feared a judgment coming out of Belgium with which the courts would have to wrestle? If they had done an enterprise liability judgment at that time, the U.S. courts would not have enforced it.

PROFESSOR BLUMBERG:

The *Badger* controversy was a minor fly-speck as far as the enormous Raytheon group, of which it was a small part, was concerned. Raytheon was becoming notorious throughout Europe by resisting workers' claims for a million and a quarter dollars. Any counsel with any sense would say, "For "Pete's sake, settle! Win or lose, you are better off than having this issue resounding in the press, particularly since you are being opposed, not by private parties, but by the Belgian government and by the European trade union movements." It should be no surprise in view of the scale of Raytheon operations elsewhere in Europe that it ultimately decided to settle.

If one were to be consulted by a large U.S. company on how it could structure itself in order to avoid having this sort of liability, one might readily respond, "Oh, you can do it. There is little question about that. Structuring the business into compartments kept so completely walled off from the other parts of the business, as to prevent any serious possibility of imposition of enterprise or piercing or direct liability, can be accomplished. However, it is not likely to be something that you can afford. Our advice is to forget about it. If the business engenders liabilities, these are simply foreseeable costs of conducting the business, which will, no doubt, be taken into account in your price policies and passed along to your customers."

PROFESSOR GORDON:

One question regarding piercing the veil that the courts have not addressed very well is: What law applies? The law of the parent or the law of the subsidiary? In 1972, the International Academy of Comparative Law, in their meeting in Caracas, considered this issue. When looking at all the U.S. cases as of that date, dealing with either a U.S. parent and a foreign subsidiary or vice versa, not one case identified the question of whether the law of the parent or the law of the subsidiary prevailed. I tend to believe that the law of the company whose veil you are piercing prevails and yet, that is not consistent. *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*[83] clearly states that it is the law of the parent, by referring to the parent

82. *See supra* note 56 and accompanying text.
83. 904 F. Supp. 644 (N.D. Ohio 1995).

corporation, not after having raised it as a choice, but by simply referring to it as being the law of the parent.

PROFESSOR BLUMBERG:

Law schools should require students to take conflict of laws. That is one of the most important courses in a lawyer's education. Students may learn torts and contracts on their own, even if they did not study them in the law school. However, a knowledge of conflict of laws is essential and less likely to be acquired on one's own. My own experience in reading the U.S. common law cases on parent and subsidiaries, which have involved this topic, is entirely consistent with Professor Prentice's observation. Counsel and courts often ignore the problem. When you find courts who are alert to the problems, many times you will find reference to it in a footnote where the wiser judge says something like, "Neither party has argued the question of which law applies. Therefore, in accordance with our practice, we will apply the law of the forum."

As for the ultimate problem, conflict of laws in corporate matters, most courts treat such issues as piercing the veil as involving the internal affairs of the corporation and to be determined by the law of the state of incorporation of the corporation involved. It is the subsidiary whose veil is being pierced, and accordingly, it is the law of the state in which the subsidiary was incorporated that should be applied under corporation law. Although some courts have failed to recognize this and have applied the law of the state in which the parent was incorporated, most courts considering the issue as a corporate issue have applied the law of the state of incorporation of the subsidiary.

Many other courts, however, have not looked upon the problem as a corporate problem. In tort matters, they treat the choice of law as involving a problem in tort. Where the tort occurred in the forum, these courts often apply the forum's standards on piercing the veil. In the end, however, the standards of the various states on piercing the veil differ but to such a small extent that the issue is not as vital as it appears. It seems to be a question of mindset. Corporate law problem or tort problem or contract problem? Looking upon choice of law from an advocacy point of view, if it does make a difference and if you conclude that you are likely to lose under choice of law as a corporate law matter, you still have tort. Still other courts have adoped the "most significant contacts" both for tort or contract matters. More may be expected to do so in the future.

There are two special areas to be considered as well. One is Delaware law in common law matters. The other relates to the cases involving federal statutory law. Many cases have arisen in Delaware, and it is of interest that whether it is a Delaware parent or a Delaware subsidiary, it seems that in the end, the Delaware courts, one way or the other, will apply Delaware law.

PROFESSOR GORDON:

Until recently veil piercing law has been state law when there are more public issues, such as antitrust litigation, particularly violation of federal law. The more recent cases indicate that a federal court that is involved with a violation of a federal law, where there is a fairly strong policy such as antitrust, will make up a new federal common law of veil piercing. Very often, the court does not refer to the question of what choice of law would apply, but rather refers only to a variety of federal court cases on veil piercing from around the country, not from its own particular district. This is going to be a very interesting development.

PROFESSOR BLUMBERG:

Federal law on choice of law with respect to piercing the veil or enterprise treatment for statutory purposes is even more interesting. Of course, in federal cases arising under diversity jurisdiction, issues of substance are, since *Erie Railroad v. Tompkins,*[84] to be governed by state law. However, where a federal question is involved, such as the construction of a federal statute, the Supreme Court doctrine is somewhat amorphous. Where federal objectives are involved, such as where there is a need for a uniform federal standard, where state law would frustrate federal objectives, and where federal law will not disrupt commercial relationships predicated on state law, federal common law is applied. Otherwise, state law will govern.

In many any areas, the courts indeed have done just as Professor Gordon has described. They have developed a federal common law. In some areas, this has meant giving the statute a "broad" or "expansive" interpretation and the imposition of enterprise liability to implement federal statutory objectives. In other areas, they have achieved the same result through a modified version of piercing the veil, which some courts have stated gives less importance to corporate formalities in the area of public law than it does under state law. In such a manner, the federal courts have considerably watered down the requirements for piercing the veil in federal statutory matters.

One battleground in which this issue is being hotly litigated is the environmental laws under CERCLA. Most circuit courts have held that imposition of statutory liability on a parent (or controlling shareholder) as the "owner" or "operator" of a property with hazardous waste to which the subsidiary holds title is a matter of federal law. While they seem to agree that whether the parent is the "owner" will be determined by traditional piercing the veil, the majority of the circuit courts have held that whether a parent corporation is liable as an "operator" is to be determined by the

84. 304 U.S. 64 (1938).

economic realities concerning the degree of its participation in management of the subsidiary's environmental operations, not by piercing the veil;[85] however, two circuit courts have disagreed. They have held that traditional piercing the veil is the only remedy.[86] This is a matter that is in vigorous dispute and to which there will be a final answer only when the Supreme Court chooses to hear the issue.

PROFESSOR GORDON:

We do not know very much about successor liability on a worldwide basis; therefore, it may be helpful to know about it as an internal issue before we address it as a cross border issue.

Is the idea of successor liability becoming more of a problem? How does England approach successor liability?

PROFESSOR PRENTICE:

I suspect that an English paper on successor liability would be very brief indeed. Basically, it is not a concept that we have recognized in our company law jurisprudence. The other curious thing is, it is not even discussed. I must say from my ignorance, I came across it a number of years ago. What happened was an English company that mined in Butte, Montana had issued a prospectus that did not comply with English company law; it complied with the English Stock Exchange listing rules, but not the 1985 Companies Act.[87] The Americans decided to sue. The only pocket around was the English law firm that was responsible for putting on the listing rules. We had to get advice from the United States on the successor liability issue. It was a concept the barristers had never come across.

It is not something we are familiar with; it is not discussed. I am not quite sure why there is this absence of interest and a fairly profound absence of knowledge.

PROFESSOR BLUMBERG:

This is surprising. In the United States, we have many well-developed notions of successor liability with no less than five well-accepted theories of successor liability that have been vigorously applied. There are two more concepts of successor liability that are quite controversial, but nevertheless

85. Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996); Lansford-Coaldale Jr. Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

86. United States v. Cordova Chem. Co., 59 F.3d 584, *vacated*, 67 F.3d 586 (6th Cir. 1995); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990).

87. Simon Eng'g Plc v. Butte Mining Plc, [1996] 1 Lloyd's Rep. 104 (Feb. 27, 1995), [1996] 1 Lloyd's Rep. 91 (Oct. 3, 1995).

have been adopted by a number of important jurisdictions. The expanding application of successor liability is a lively topic in U.S. law today. It is a topic that has given rise to much litigation, both at common law and in issues under the environmental laws such as CERCLA.[88]

88. *See* Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 388 (1996).