Piercing the Corporate Veil
Limits of limited liability

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Abstract

The study is about the general exception to the main rule of limited personal liability for stockholders in a corporation, called *Piercing the Corporate Veil* or *Veil-piercing*. The purpose with examining this field of law is to establish firstly the Swedish exception’s legal position and secondly what circumstances that constitute the exception in Sweden. A third question that will be answered is if Sweden, since the exception is not codified, is in need of a codified provision regarding the exception.

There is much uncertainty surrounding the exception in all these three aspects which is why the study initially will examine the legal situation of the exception in the United States where the American legal sources to some extent might work as ideas and guidelines for the exception in the Swedish field of law. Swedish Supreme Court cases, legislative inquiries and doctrine will be part of the study and because of the uncertainty surrounding the topic, the study also includes an empirical section where cases from the Swedish District Court instance are being examined to see how the exception is being dealt with by an instance that have the function to apply law and not to create precedents.

The gathered information from the sections above is subject for an analysis later in the research that results in the conclusion that veil-piercing is a principle within the field of association law, that lack of independence combined with an element of misconduct constitute the exception and that the exception should be introduced as a codified provision in the Swedish Companies Act.
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1. Introduction

1.1. Background

One of the main things that signify a corporation (*Aktiebolag*) is its legal separation from its stockholders when it comes to liability for the obligations of the corporation. Personal liability for the stockholders of a corporation does as a main rule not occur because of this separate legal entity that exist within the corporation. The exception to this fundamental main rule is found in what has been developed into a legal principle known as Piercing the Corporate Veil (*Ansvarsgenombrott*), which in short is a way to reach the stockholders behind a corporation by holding them personally liable for the obligations of the corporation.

As this study will show, the possible fact of a corporation being undercapitalized has been one of the factors that are taken into consideration by courts when they are about to make a decision whether to pierce the veil or not. The less existing capital within the corporation, the higher is the risk that the court sees the corporation as a sham used for making less serious businesses for the profit of the stockholders. Usually in the founding process of their creation of a corporation, people might also not have that much assets to use as their initial capital. According to the Swedish legislation, the minimum amount of money needed for initiating a corporation is 50 000 SEK, which easily can be realized not to last very long.¹ Most likely a significant part of the initial capital is going to be spent after paying already the first bills of the corporation. The question then follows if this potential scenario with a corporation not being able to account for its obligations would be enough for the criterion of undercapitalizing to be fulfilled with the consequence that the veil-piercing exception would be applicable. The Swedish Companies Act (*Aktiebolagslagen*) says nothing about this, but the answer has to be sought by analyzing the different circumstances in each and every case and make comparisons with what has been said by courts and in literature. It is a highly relevant question though, since the main reason for a lot of people choosing the corporation as their business organization surely is the enjoyment of the limited personal liability for the stockholders that comes with the corporation.

It is a fundamental exception indeed when its position as a legal principle actually can set aside the core hallmark of the corporation’s separate personality. It might become even more fundamental because of the fact that the exception is not illustrated by any provision in the Swedish Companies Act but has emerged through other sources of law. The absence of a

¹ See ch. 1:5 Swedish Companies Act (*Aktiebolagslagen (2005:551)*).
codified exception naturally creates a lot of space for argumentation; mainly what factors that trigger the applicability of the exception and how these are fulfilled. In a recent Swedish Supreme Court case (Högsta domstolen) from 2014, there are some slightly obscure indications that the court rather sees the exception being based on general principles of civil law, rather than an established exception in the field of association law.

The purpose with this study is for the above-mentioned reasons:
- To examine the Swedish legal position of the exception of piercing the corporate veil, to define what factors and conditions that constitute this exception, and to evaluate if Sweden should introduce a codified provision regarding the exception.

The study will therefore have the function as a helpful tool, on the one hand meant for people who are about to found a corporation, and for attorneys on the other hand, advising these people in their business process. As will be shown, the study will at an early stage take comparative approaches by looking at the United States. For this reason and also to increase the availability of the paper for as many people as possible, English has been chosen as the language for the study. However, since the main subject for the research is about Swedish legislation, significant legal terms have been explained in brackets with its Swedish corresponding term in direct connection with the English term as can be noticed throughout the study.

1.2. Previous research

This kind of fundamental exception naturally becomes a huge issue for professors and other scholars that are specialized in corporate law, both nationally in Sweden but also internationally, and it has therefore been subject for numerous discussions among these. In Sweden, these discussions have resulted in the same amount of produced works, but since there have been no Swedish Supreme Court cases ruling on veil-piercing for a long time until the year of 2014, the availability when it comes to modern literature is not very sufficient. The most modern veil-piercing researches are two books from the 1990’s and a single section

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in a book of corporate law from 2010. With respect to the time following the last Supreme Court case of 2014 there are two articles analyzing the exception of veil-piercing.

Switching to the comparative perspective with focus on the United States, it can immediately be noticed the availability of the relatively large amount of useful material. The doctrine concerning the exception in America is much more developed which maybe comes naturally because of the nature of the exception as a common law principle with its roots in this country. Sources from the United States indicate that there are more articles than books on the literature field, however, the most valuable source for this study is Stephen B. Presser’s book about piercing the corporate veil. Since 1991, he has released a new updated edition every second or third year with the last edition from 2016 which indicates the high relevance of the subject in the United States. With almost 1500 pages, it also says something about the deep research and the comprehensiveness in this work which is positive for my research because of the lack of recent Swedish material.

1.3. Subject and research questions

The main subject for the research is the Swedish legal principle of piercing the corporate veil. As was said before, much of the literature in the field might be a bit old, which is a possible effect of the many precedents of the same age. Speaking about cases and precedents, there have only been a handful of these in the Swedish Supreme Court, and the ones existing might seem a bit unclear in its grounds for the judgments. For example, the old cases before the year of 2014, do not say anything obiter dicta about the veil-piercing principle, but only how the exception related to the specific circumstances in each of the single cases which leaves questions open about the general factors that constitute veil-piercing. After many years of uncertainty, the Supreme Court in the year 2014 granted a writ of certiorari to a case in which the Justices maybe seem to reject the idea of piercing the corporate veil as a legal principle within the field of association law, but with quite obscure language instead bases stockholder

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6 Stephen B. Presser, Piercing the Corporate Veil, 2016 [Cit: Presser].
liability on general principles of civil law. The court therefore failed to clarify the many questions of the subject. For this reason, it is the goal of this study to make some clarifying attempts by answering the following three research questions:

- Is there an unwritten legal principle of veil-piercing in the field of Swedish association law?
- What are the factors and conditions that are required for a Swedish court to make an affirmative veil-piercing decision?
- Would Sweden as a civil law country benefit from introducing a veil-piercing provision in their national Companies Act?

1.4. Delimitations

Veil-piercing as a subject involves several different aspects and gives rise to many complications. Therefore it has frequently been referred to as one of the most fundamental issues in the field of corporate law. The questions mentioned above can hardly be said to reflect all of the different issues within the subject, but only those which have been chosen for this research as the most relevant with respect to the purpose of the work. Hence, there are fields within the subject that will not take part of the research.

Firstly, the study does not address any other areas than corporate law where veil-piercing is established, such as environmental torts law. The corporate law area is where the Swedish principle of veil-piercing seems to be most unclear and therefore needs to be studied. Having delimited the work to involve the area of corporate law, there are areas also within this field that are not taken into consideration, such as the situation where the stock capital turns out to be lower than half the registered amount of money. This situation refers to a stockholder who participates in the decision of continuing the business of the corporation despite the board’s negligence with setting up a balance sheet for liquidation purposes (Kontrollbalansräkning). After that kind of decision, the stockholder will be held personally liable for the possible upcoming debts of the corporation, which can be seen as one kind of veil-piercing situation where the main rule is set aside. The delimitation here is made because this type of situation

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8 Cf. Ch. 10:2, 32:6-8 Swedish Environmental Code, where parent corporations can be held liable for injuries caused by its subsidiary.
9 Ch. 25:19 Swedish Companies Act.
is more connected to consequences for not respecting the provisions of protecting corporate funds, while the area for the study in the following is focused on the general exception to the main rule of no personal liability.\textsuperscript{10} For the same reason, the stockholders’ liability for tortious acts is also something that is excluded from the research.\textsuperscript{11}

1.5. Methods and materials

The method that is used for seeking the most suitable answer on these questions is a legal dogmatic method, combined with comparative and empirical ingredients. What characterizes the legal dogmatic method is the usage of the generally accepted sources of law where the primary one is the codified provisions, followed by preparatory works, case law and doctrine. Together they aim to describe the established law in a certain matter and therefore this method will be suitable for the answers to the first two Lex lata questions described in section 1.3.\textsuperscript{12} It should be said that different scholars have different ways of how to formulate the legal dogmatic method, however, the description above seems to be the most generally accepted one.\textsuperscript{13} The method can also be used to criticize and propose changes on the investigated field of law.\textsuperscript{14} For example, the criticism is going to include the unwillingness of the Swedish Supreme Court to take a clear position regarding veil-piercing. Because of this uncertainty surrounding the subject, changes in the field of the law regarding a possible codified veil-piercing provision will be discussed, which makes the method suitable for the last research question concerning the Lex ferenda aspect.

Sweden is a civil law country where the codified provisions would have been regarded as the main source of law in this study, but in the absence of a veil-piercing provision, the precedents from case law will take the position as the most valuable legal source. Other central sources of law that will be used are Swedish preparatory legislative works concerning the principle and also the doctrinal opinions. A few comments must be made regarding the doctrine since the majority of the researches were produced relatively long time ago. I have therefore chosen to use two of the most recent ones from the 1990’s as mentioned in section

\textsuperscript{10} Ibid, Ch. 1:3.
\textsuperscript{11} Ibid, Ch. 29:3.
\textsuperscript{12} See Korling & Zamboni, Juridisk Metodlära [EN]: Legal Theory, 1:2 Ed., Studentlitteratur, Sverige 2013, p.21 [Cit: Korling & Zamboni].
\textsuperscript{14} Korling & Zamboni, p.24.
1.2. The opinions from earlier doctrine however will not be excluded since these opinions are referred to in the researches from the 1990’s.

Since the legal dogmatic method has the main function to describe the law, there is a deficiency in that nothing is said about how the law is being practiced, which could help deciding the well-functionality of the established law.\textsuperscript{15} This is the reason for also making the empirical method part of this research, which is a way to evaluate facts from reality.\textsuperscript{16} By using this method, I have chosen to examine three recent cases from the Swedish district court instance (\textit{Tingsrätt}), all ruled after the last Supreme Court precedent of 2014. When using the legal dogmatic method as described above, precedents from the Swedish Supreme Court are examined since that court has the function to create law and clarify diffuse areas of law. Now with the empirical method, these three cases from the district court instance will be looked at since the function of this instance is to apply the established law on a certain situation. When deciding which cases that would be part of the study, I have used the database of Karnov Juridik where judgments from all Swedish district courts are uploaded soon after they are published by the judge. I have then searched the database using the Swedish corresponding term of “veil-piercing” and, to make sure that no case is being excluded, I have made a search using the Swedish term of “stockholder liability”. The result was that 49 district court cases regarding veil-piercing and 87 cases regarding stockholder liability were found respectively.

Having two lists of results with district court cases from all around Sweden, I used the settings in the database to sort these cases with respect to the relevance of the subject of veil-piercing and stockholder liability respectively. I have then studied the top ten cases from each result list from which can be concluded that the cases from the list of “stockholder liability” are all about liability as a result of a tortious act or stockholders participating in decisions of continuing the business of the corporation despite the board’s negligence with setting up a balance sheet for liquidation purposes. This means, according to the choice of the subject, that only the result list of “veil-piercing” is relevant for the study. From the cases in that list, I have gleaned those three judgments in which the subject has been discussed the most. The reason why only three cases have been chosen is that already in the third case, the subject can be observed not to be discussed more than in just a few sentences in the judgment Therefore I have excluded the following cases since the parties in these cases have either settled before

\textsuperscript{15} See ibid, p.24.
the trial or since the question of veil-piercing for other reasons never was dealt with. The assessments from these three courts are subject for examination within this empirical method and accordingly these judicial cases constitute the relevant materials when using this method.

In addition to the legal dogmatic- and the empirical methods, the study also brings up comparative elements with foreign law. The usage of this comparative method includes comparisons with the legislation, case law and doctrine from the United States. The comparisons with this country come natural since that jurisdiction is the place where the principle of piercing the corporate veil was originally initiated and has been developed the most.17 The goal of this study, using this comparative approach, is to provide both the legislator and courts of Sweden more material and solutions about the topic and thus try to contribute to clarify as many aspects as possible regarding the exception, which might be needed because of the absence of a codified provision and the lack of clear case law in Sweden.18

Since the United States is known to belong to the legal system of common law, judicial cases from the state courts constitutes the main source of law when addressing the American position of the principle. A codified provision about the principle can however be found in some of the states’ Companies Acts which are described below. In addition to these sources, literature including Stephen B. Presser’s book constitutes the useful material along with articles from other scholars. However, when using literature and doctrinal opinions, no matter from which country, these are looked at with some caution because of the higher risk of the author’s own subjective opinions to appear in the texts rather than the reflection of objective facts. This may be even more important when studying Swedish literature because of the absence of a provision in the Companies Act and the lack of case law in the field which might create a lot of space for discussions where subjective opinions are easier to occur.

It should be noticed though that two ways of using this comparative method exist according to literature.19 Firstly the method can be used to take a dominant role by making a pure and close comparative study between two legal systems. The second alternative is to let the study take a subservient role by observing and receive impressions from the foreign legal system rather than making any deep analyze. The present study will use the latter way by first observing the

17 V.inf. section 3.1.1.
18 Korling & Zamboni, p.143.
American legislation and later the Swedish. With this subservient approach it should be clear which blanks in the Swedish legislation that could use some guidance from the United States. The reader should have in mind that since the goal is to provide foreign legislative material to an unclear area of Swedish law, high caution is required because the legislation in the United States might be suitable in their legal system while the same solution in Sweden may not achieve the same positive effect. Which parts of the American sources of law that would or would not be appropriate in the Swedish legal system is discussed later in the analysis section.

1.6. Outline

At first, the thesis gives the reader a brief summary of the concept of the business organizations of limited liability. Here is described what signifies these organizations, including the main rule of separate legal entity. This should be an appropriate way to start the research since the main subject is about an exception from the main rule. Therefore, the reader should first get a good understanding of the main rule before he or she can start dealing with the different aspects of the exception as the main subject of this study.

The disposition in the following consists of three sections where the first one forms the main part of the whole study. Here is presented everything needed for fulfilling the purpose of the study including the material for answering the research questions. Since the United States is where the veil-piercing principle once was introduced and has been developed the most, it is in my opinion a useful way to start the study by first using the comparative method to examine the American veil-piercing principle. By doing this, it will make it easier for the reader to understand the position of the same principle in Sweden which is described right after the sections of the American field of law. It should also be easier to see which aspects of the Swedish principle that are missing clear guidance. Another advantage in having Swedish sections located after the American section is that these Swedish sections are then described right before the analysis in chapter four. Since the analysis is where the answers to the research questions will be discussed it makes it easier for the reader to follow the discussions when the Swedish field of law has been described just before the analysis, since these questions are focused on Swedish aspects of veil-piercing. The last part of the first main section is where the empirical method is used for examining the recent Swedish district court cases.

20 Ibid, p.258.
The second main section analyzes what has been addressed in the first section. At this stage it is time to take into account everything in the first section and use this data to discuss and balance different aspects which is necessary to reach a legitimate answer to the research questions. In other words the analysis is made about what is the position of the veil-piercing principle with respect to the legal sources. Further is highlighted what factors that were taken into consideration by the Supreme Court when ruling on the veil-piercing issue. Analyzed is also if the Courts’ assessments, especially from the last precedent in 2014, have changed what has been the traditional opinion of the legislator where no provision regarding veil-piercing has been introduced. Throughout the discussion is held in mind what we have learnt from the investigation of the American field of law. For example there are states having a veil-piercing provision in their Companies Acts, which are to be considered when discussing a possible Swedish veil-piercing provision.

In the final section is presented the results of the discussions in the previous section which accordingly are to be seen as the result of the whole study. This section is held quite short since its purpose is only to conclude the discussion in the previous section including the research questions of the study.
2. Business organizations of limited liability

The Swedish corporate business organization is one of the types of businesses in which someone can choose to run their businesses. Other alternative forms such as partnerships, joint ventures, cooperatives and sole proprietorships are also possible ways to go, but each and every type has its own hallmarks that identify them as one business organization or another. In many cases, the choice made by people to found either one of the business organizations depends on which criteria that suits their specific concept and also what the ambitions are of the founders. The veil-piercing principle which has initially been mentioned in the previous chapter is an exception to the hallmark of limited liability and has therefore been applied in Swedish cases involving business organizations signified by this hallmark. Thus follows now a description of the fundamental conceptions of the two Swedish business organizations that are characterized by limited liability.

2.1. Corporations and cooperatives

Significant for the corporation as a business organization are the stocks that are allocated among the stockholders of the corporation. The stockholders in possession of the stocks are hereby entitled to two privileges. Firstly, stocks carry a right to vote at the annual general meeting of the corporation (Bolagsstämma), and thus give the stockholders a great impact on important concerns of the corporation like the composition of board members and important affairs and so on.\(^{21}\) Secondly, they provide the stockholders a right to an economic part of the corporation.\(^{22}\) The purpose of the corporate business is therefore in the majority of all corporations to generate profit for the stockholders.\(^{23}\) Furthermore, for the corporation to become a legal entity with the power to undertake legal capacity by entering contracts, the corporation needs to be registered at the Companies Registration Office (Bolagsverket).\(^{24}\) There is also a requirement for a successful incorporation that the stockholders provide the corporation at least 50 000 SEK as initial stock capital which is meant to have the function as a kind of guarantee for the creditors of the corporation.\(^{25}\)


\(^{22}\) Ch. 7:11 Swedish Companies Act.

\(^{23}\) Sandström, p.20.

\(^{24}\) Ibid, p.73; Ch. 2:25 Swedish Companies Act.

\(^{25}\) See ch. 1:5 Swedish Companies Act.
The other business organization that is relevant with respect to the Swedish case law in the field of veil-piercing is the cooperative (Ekonomisk förening). In many aspects, cooperatives are similar to the business organization of corporations. The cooperative is however obliged, according to the Swedish Cooperatives Act, to operate its business in the economic interest of the members of the cooperative. Moreover, at least three members are required which is another difference from corporations which can be founded on the initiative of a single person on his own. Furthermore there is no codified requirement for a cooperative to have a certain amount of money for its establishment. Apart from the differences just mentioned, there are many similarities with the corporate business organization as for example the possession of a part of the cooperative which is provided each member who deposits money to the association. The right to vote at the general meeting and the right to payoffs are entitlements of the members, and registration at the Companies Registration Office is a mandatory requirement in the same way as with corporations.

2.2. Separate legal personality

Both stockholders and members in the position of the owners of the two business organizations do also enjoy the privilege of being legally separated from their associations, which is the most relevant hallmark with respect to the subject of this study and therefore it deserves a separate section in this initial chapter. The separate legal entity of the corporation and the cooperative respectively is the result of a successful registration at the Companies Registration Office and places the stockholders in a position where they are protected against any obligations of the association with no personal duties because of payment claims from the creditors. By looking at the relevant provisions in the Swedish Companies- and Cooperatives Acts addressing this limited liability for the stockholders, the protection might at first seem to be absolute according to how the provisions are expressed. It literally says that the owners do not have any personal obligations because of the obligations of the associations. However, as is disclosed already by the headlines on the front page of this study, the provisions are not to be understood as a complete protection, but certain factors in each and every case might justify a piercing of the protecting veil of the associations.

26 See Ch. 1:1, Swedish Cooperatives Act (Lag (1987:667) om ekonomiska föreningar).
28 Ch. 1:3 Swedish Companies Act; Ch. 1:3 Swedish Cooperatives Act.
3. **Piercing the Corporate Veil**

Already in the subsection to the paragraph of limited liability for stockholders in the Swedish Companies Act can be noticed the reference to the twenty-fifth chapter which describes the situation where stockholders have participated in a decision to continue the business when the stock capital has come below a certain level, despite the negligence from the board members to set up a balance sheet. Together with the provision of stockholders’ liability for tortious acts in the twenty-ninth chapter, these are the only codified corporate veil-piercing exceptions to the main rule of limited liability that can be gleaned only by studying the Companies Act. Nowhere else in the Companies Act can be noticed the more general veil-piercing exception which is the subject of this study, and the provisions in the two chapters just mentioned must therefore not be seen as the only exceptions to the main rule. Stockholders can thus be held liable for obligations of the corporation also in other cases that do not necessarily have to do with protection of corporation funds or tortious acts.

3.1. United States

3.1.1. Historic review

The main rule of limited liability was originally introduced in the United States as a principle that was meant to have positive impact on economy and democracy.\(^{29}\) The attractiveness of no personal liability made these goals easy to achieve while in the late nineteenth century it was praised as one of the best discoveries thus far in history. However, with these great possibilities and with the positive effect on welfare that was a result of introducing the principle, it was soon blamed for becoming too much of a tool serving high finance rather than normal sized entrepreneurship. Therefore, different theories started to arise that would make it possible to set aside the principle of limited liability.

3.1.2. Alter ego

The most common and accepted theory has been claimed in doctrine to be the one by Fredrick J. Powell who addressed what can be said to be a two- or three-part test which could make the veil-piercing exception applicable if the test was fulfilled. Since the criteria in this theory appear to be dominant in following case law where the principle has been applied, the theory

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\(^{29}\) Presser, § 1:1 p.1.
is highlighted in the following.\textsuperscript{30} During the rest of the twentieth century, other scholars have addressed other versions of this theory which are also given attention below, but in general they are all more or less based on the following two-/three-part test.

Powell started with addressing the first test of his theory which aimed to determine whether or not a subsidiary was functioned to work as a façade for the parent. In other words it was a way to decide if the subsidiary was the \textit{alter ego} of the parent, meaning that the business in the subsidiary in fact is to be seen as the “other self” of the parent. He discusses a variety of factors and circumstances which could indicate that the business of the subsidiary indeed was the alter ego of the parent.\textsuperscript{31} Many of these factors include the economic relationship between the parent and its subsidiary. Among these can initially be noticed the proportion of stocks in the subsidiary which is in possession of the parent. The higher percentage of stocks owned by the parent, the more should point in the direction of alter ego. When studying the stocks, Powell also suggest that one should investigate if the incorporation of the subsidiary was preceded by the parent subscribing to the total amount of stocks, or if the parent in any other way had a dominant role in the incorporation. Other factors connected to the economic relationship between the parties are mentioned by Powell as to what extent the parent is financing the business of the subsidiary. A subsidiary financed completely or to an almost complete extent is more likely to be the alter ego of the parent than what would be the case if it was independent and self-financed. Also the possible fact of the subsidiary not being able to pay the running costs is a sign that the parent might use it as its other self rather than the subsidiary operating independently.

More circumstances are mentioned by Powell that do not directly reflect economic and financial aspects between the parties, but which might as well work as helpful guidelines when determining the potential alter ego of the parent. Factors in this matter are whether the constructions of the governances, the boards and the officers of the two corporations turn out to be similar. It is also said by Powell, when focusing on aspects about the directors in the subsidiary, that if these seem to work more in the interest of their parent rather than in its own interest, after receiving orders from the parent, this is something that would indicate the subsidiary to be functioned as alter ego. Not just shared directors and staff members but also fixed assets that appear in both corporations can be a contributing factor as well as the possible fact that the only existing assets in the subsidiary are the ones provided by the parent.

\textsuperscript{30} See ibid, § 1:6 p.1.
\textsuperscript{31} Ibid, § 1:6 p.2.
Lastly is mentioned some circumstances referring to the business of the subsidiary. A sign of alter ego in how the business operated is said by Powell to be the possible situation where the parent describes the subsidiary and its business as the parent’s own. The same applies to the situation where the subsidiary is not doing any other business but with its parent. Finally is said that if the subsidiary has been neglecting legal requirements for a corporation, this might also point in the direction of alter ego.\(^{32}\)

Powell’s above-mentioned factors were never said to require cumulative fulfillment for the subsidiary to be characterized as its parent’s alter ego.\(^{33}\) However, it seems like the fulfillment of just one factor would not be enough.\(^{34}\) Instead, each court needs to look from a comprehensive perspective when ruling on the issue and determine if enough circumstances are fulfilled in each specific case, resulting in the subsidiary having the character of alter ego. Moreover, the list of alter ego factors is not meant to be seen as complete since the courts are free to take into account more factors that are not mentioned by Powell.

The years following Powell’s theory, factors like failure of paying dividends have been referred to as another factor of value, not merely as a factor of alter ego, but as an independent veil-piercing factor.\(^{35}\) In fact, the uncertainty of the veil-piercing subject seem to have made scholars and judges interpret many of Powell’s sub-factors as independent veil-piercing factors and not necessarily factors to determine a corporation to be an alter ego or not.\(^{36}\) The same applies to undercapitalization which also has been pointed out specifically as one reason for the court to pierce the veil.\(^{37}\) In fact, the United States Appellate Court for the Ninth Circuit once applied the veil-piercing principle solely on the basis of undercapitalization of the subsidiary.\(^{38}\) However, the idea that undercapitalization within the subsidiary on its own would cause piercing of the corporate veil later appears to have been rejected by courts ruling on the veil-piercing exception.\(^{39}\)

According to Powell, the alter ego criterion is one of three tests to be fulfilled. However, some of the corporate law scholars today, by referring generally to the courts’ assessments

\(^{32}\) E.g. situations where the corporation enters contracts without being registered at the Companies Registration Office.

\(^{33}\) Presser § 1:6, p.2.

\(^{34}\) Ibid § 1:6, p.3.

\(^{35}\) Macey & Mitts, p.107.

\(^{36}\) Ibid, p.107-108.


\(^{38}\) Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, (9th Cir. 1988).

\(^{39}\) See Macey & Mitts, p.103 passim.
concerning the veil-piercing issue, seem to emphasize the idea that alter ego by itself might be sufficient enough for applying the veil-piercing exception. At the same time some scholars are of the opinion that the courts require the element of alter ego combined with a fraudulent element to be able to pierce. The opinions are quite divided in this matter and it is the court’s investigation in each case that determines what factors that are required. To conclude the alter ego discussion above however, it can be said that the separate legal entity between a parent and its subsidiary must be considered as nonexistent.

3.1.3. Fraud

Powell continues his theory with saying that successfully proving the business of a subsidiary being the alter ego of its parent is on its own not enough for piercing the corporate veil and hold the stockholders liable for obligations of the corporation. In addition to the alter ego criterion, he introduces two other criteria where the first one is explained as the requirement of some kind of fraudulent element in the parent’s use of the subsidiary towards a third part. The third and last criterion is a requirement of the plaintiff having suffered harm which has been a result of how the parent uses its subsidiary. Having the factors from the alter ego theory fresh in mind, some of these sub-factors can already be noticed to include both fraudulent and harming aspects which tend to make all three conditions merge into each other.

When explaining his fraud or injustice test, Powell sets out some sub-factors similar to what could be seen in his first alter ego test. In the same way, these sub-factors of fraud are meant to be helpful guidelines for deciding a parent’s use of its subsidiary as fraudulent or not. Firstly, he addresses the more general situation with asking if the parent’s use of its subsidiary amounts to concrete fraud, where an affirmative answer would indicate the fulfillment of the condition of fraud. The same generality appears in what can be said to be a catch-all clause, which involves other actions of wrongdoing and injustice that are seen as fraudulent.

Moving on to the other factors set out under this fraud test, these are a bit more focused on specific situations in the relationship between the parent and the subsidiary. Among these can be noticed the fact that the parent might use the subsidiary for violation of a provision which then would be seen as an act of fraud. Similarily to this situation of violating a provision, it is

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41 Presser, § 1:6 p.3.
43 Ibid, p.2.
also an act of fraud to use the subsidiary to commit a tortious act. Hereafter is said that if the parent has been siphoning the funds or other assets of the subsidiary, this can also be seen as such a serious wrongdoing to be fraudulent. Further, if the subsidiary is used by the parent as a sham with an underlying purpose to use it for misrepresentation, this kind of relationship is also likely to involve a fraudulent element. The same applies to the situation where the doctrine of estoppel is considered to be invoked following the parent’s way of using its subsidiary. With this legal doctrine being applicable in a situation involving the parent and its subsidiary, a presumption is created about an existing fraudulent aspect in the parent’s use of the subsidiary.

Unlike the requirement of fulfilling several factors which was the case when deciding about alter ego, Powell submits that when deciding whether there is an aspect of fraud in the way the parent uses its subsidiary, it is enough having answered at least one of the above mentioned factors affirmatively for the achievement of this second criterion of fraud. But similar to the alter ego test, other fraudulent sub-factors than the ones listed can be taken into consideration by the courts when ruling on this fraud test.

Similarly with alter ego, some of the legal writers have interpreted case law in the way that fraud itself can constitute the applicability of the veil-piercing exception, while others are more attached to Powell’s theory where fraud is one of three piercing factors which have to be fulfilled cumulatively. However, when determining fraud, none of the more specific sub-factors from Powell’s test appear in the theories of other scholars, but apparently they take a more general perspective when determining if any acts are to be seen as fraudulent.

3.1.4. Caused harm

Having fulfilled the first and second test, the third test which requires the plaintiff being harmed as a result of the relationship between the parent and the subsidiary might be fulfilled in the majority of the cases already at this stage, partly since all the three tests may merge with each other as was mentioned before. Of the three tests addressed by Powell, the criterion of a plaintiff being harmed is at the same time the least explained one. It can be noticed though that he makes a distinction between contract- and tort cases where a tortious conduct

44 The doctrine of estoppel is a common law doctrine which in short can be explained as a procedural tool that prevents one part from arguing in the opposite direction of what that he or she did in earlier stages in a legal process. See Carlson, p.139.
45 Presser, § 1:6, p.3.
46 V.sup. footnote 40-41.
of the subsidiary at any time would lead to satisfaction of this third test. In contract cases however, it is necessary to look at the plaintiff’s knowledge about the relationship between the parent and the subsidiary. It is Powell’s opinion that if the relationship includes elements of alter ego and fraud, the plaintiff will never be able to fulfill this last criterion in case of he or she having accepted the relationship and still contracted with the subsidiary. The threshold regarding the size of the injury suffered by the plaintiff when dealing with contract cases also seem to be higher than in tort cases. This is a result of the expression used by Powell that “actual injury” is required in contract cases for fulfilling this condition.

As explained, there are no definite requirements when ruling on the veil-piercing issue. The last criterion of harm being caused was for example a condition for Powell, but has not been emphasized as any requirement among judges or other scholars. Therefore the courts in more or less all of the states have only emphasized the first two piercing factors of alter ego and fraud. For example there is the state of New York which is said to be the state which has been subject to most veil-piercing cases and therefore has been producing the most legal material concerning the issue. There are indications that New York also can be said to belong to one of the stricter states when it comes to veil-piercing since there are examples of courts having required that a clear abuse of the corporate business organization must have occurred for the fraud test to be fulfilled properly. The same applies to the fulfillment of alter ego where complete domination of the subsidiary by the parent has been required. The widespread impact these two criteria have had all over the states can well be illustrated when looking first at New York as the state which has been subject for most veil-piercing cases and then confirm that even a state like Hawaii, which is said to belong to the states with the least developed case law on the issue, is applying the same two piercing factors from Powell’s model.

### 3.1.5. Legislation

According to what has been addressed in the foregoing, the general view of the states is that the corporate veil can be pierced in cases of alter ego or fraud. Whether both have to be fulfilled or if they constitute the exception separately is however quite a disputed question.

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47 Presser, § 1:6, p.3.  
48 Ibid, § 1:6, p.3.  
49 Thompson, p.1052.  
which have to be decided in each situation. Having an exception which has been developed through legal sources as case law and doctrine and where the scope of application is quite disputed, the reader might already suspect the absence of codified provisions regarding the American veil-piercing principle. In fact, almost every state across the nation has been ignoring the idea of a veil-piercing provision in their Companies Acts.\textsuperscript{53}

There are however two kinds of legislative solutions addressing exceptions to limited personal liability which can be found in the Companies Acts of Texas and Delaware respectively. Firstly by examining how the legislator has expressed the Texas provision, the conditions in the provision partly refer to the discussions about alter ego and fraud from case law and doctrine.\textsuperscript{54} A simplified way of explaining the content of the provision is that a stockholder shall have no contractual obligations because of the contractual relationships of the corporation no matter if the corporation is in fact the alter ego of the stockholder or if the corporation has committed an act of fraud, unless the third party proves that the fraudulent conduct was committed with the main purpose that the stockholder was going to benefit from it. In addition to this first part of the provision, there is a subsection addressing that the same applies if the third party proves that any corporate obligation, contractual or non-contractual, is a result of the corporation’s failure to comply with corporate formalities set up by the Companies Act, incorporation articles or corporate bylaws.\textsuperscript{55}

The Texas provision seems to be a result of a case ruled in the late 1980’s where the threshold for fraud was set very low with the result that the veil was pierced on way too broad terms.\textsuperscript{56} The way the provision is expressed can immediately be noticed to narrow down the scope of the veil-piercing exception to only be applicable on situations of actual fraud and informalities, leaving no possibilities to pierce on grounds of for example alter ego. However, legal scholars seem to express themselves carefully in this matter by saying that the effect of the provision is not clear and that the court is still the leading law-maker concerning the issue, regardless the provision.\textsuperscript{57}

The second veil-piercing provision is found in the state of Delaware, which is known for being the leading state in the field of corporate law. Unlike how the Texas legislator chose to shape their provision, the Delaware provision does not literally refer to elements of fraud or

\textsuperscript{53} Thompson, p.1041.

\textsuperscript{54} Texas Business Companies Act 2.21A(2).

\textsuperscript{55} Ibid, 2.21A(3).

\textsuperscript{56} See Castleberry v. Branscum, 721 S.W.2d 270, 271 (Tex. 1986).

\textsuperscript{57} See Thompson, p.1042; Presser, § 2:48, p.3.
corporate informalities as grounds for veil-piercing. Instead, the provision gives the founders of the corporation an option to include a provision in the certificate of incorporation that stockholders can be held personally liable for corporate debts if certain conditions are fulfilled that are cited in that optional provision. In addition to this first part of the Delaware provision, there is a second part stating that in any other cases than what the provisions address, or in cases of absence of such provisions, stockholders shall not be held liable for corporate debts, unless if their own conduct give rise to liability. The provision is an implementation from the Model Business Corporation Act where the same provision can be found. The last part of the provision about the stockholders’ own conducts as a reason for liability seem however to give rise to some question marks since no further explanation of this phrase seems to exist.

3.2. Sweden

3.2.1. Introduction

As have been explained when examining the position of the veil-piercing principle in the United States, there are differences in the opinions when determining what piercing factors that are required for its applicability. Alter ego and fraud are however considered as the two dominant grounds for piercing, but if they both need to be fulfilled or if they separately can constitute enough basis for applying the exception is a mission for the court in every single case to decide. Much of the same reasoning can be noticed when we now are entering the Swedish way of applying the exception. As will be shown in the following, ever since the exception started to be subject for application in the Swedish Supreme Court early in the twentieth century, the court seems to have avoided taking a clear position when applying the exception. At the same time there is no codified provision about the Swedish veil-piercing exception which has resulted in that these somewhat unclear court decisions today form the case law in the field and has the position as the main source of law when referring to it. It is therefore necessary to briefly describe the circumstances in each case to understand what makes it a question of veil-piercing for the court.

As was said in the second chapter, not all cases from the Swedish courts have been involving corporations as the business organization being subject for veil-piercing. Scholars have therefore had their doubts about the precedent in the matter of future cases concerning

58 Delaware General Corporation Law § 102(b)(6).
59 Model Business Corp. Act § 6.22(b).
corporations.\textsuperscript{60} For this research however, these cases can well be mentioned to show how the Court reasons about the factors that affect the decision whether to pierce the veil or not. These factors have been said in Swedish literature to follow the American pattern where there is no complete list of veil-piercing factors.\textsuperscript{61} Accordingly, all different aspects of each specific case must be taken into account in order to make a decision whether the exception is applicable or not.

3.2.2. Contractual veil-piercing precedents

The earliest veil-piercing decision from the Swedish Supreme Court appears in a case from 1935.\textsuperscript{62} The business organization subject for piercing is a cooperative in which the members enjoy the same kind of limited liability as stockholders in a corporation.\textsuperscript{63} The circumstances here were a man who ran a tailoring business as a sole proprietor (Enskild firma). After been running this business for some years, the business began to show bad economic results and he therefore decided to form a cooperative together with four employees from the tailoring business, aiming to provide material for the members of the cooperative for their tailoring business. In other words, this new cooperative carried out the same kind of business as the sole proprietorship. Each member of this new cooperative was also obliged to pay a 50 SEK deposit for the membership, a deposit which however never was payed.

The new cooperative entered into a contract with a supplier which according to their deal was going to deliver material in exchange for payment. However, the cooperative became insolvent and soon it is declared bankrupt without any possibilities to pay the supplier. On the one hand side, according to the Cooperatives Act of 1911, the members of such cooperatives enjoy the position of having no personal duties for the obligations of their association.\textsuperscript{64} The supplier on the other hand claimed that the cooperative was created solely with the function to work as a front for the main owner so that he could continue to keep up the same business as before without standing the risk of being personally liable. For this reason and since the material was delivered to him personally just like in his former business, there was no separate legal entity in the plaintiff’s view.

\textsuperscript{60} See e.g. Andersson, p.277; Brocker, p.38 (Rohde’s opinion).
\textsuperscript{61} Andersson, p.275.
\textsuperscript{62} NJA 1935 p.81.
\textsuperscript{63} V. sup. section 2.1.1.
\textsuperscript{64} See 5 § Swedish Cooperatives Act (\textit{Lag (1911:55) om ekonomiska föreningar}).
The case was first dismissed in the District Court, and later also in the appellate court, for the reason that the plaintiff’s claims were not adequately supported by his arguments. The Supreme Court was of the opposite opinion and accepted the claim. The majority of the Justices firstly found the investigation of the cooperative not being conform to the first paragraph of the Cooperatives Act and therefore never should have been registered due to the paragraph. They further mention the fact that it is clear that the owner created the cooperative with the purpose to continue his former business in the name of this new business organization and that its business was carried out solely for his own winning. For these reasons the court decides to pierce the veil of the cooperative and hold the owner personally liable for the debts of the association.

The next precedent where the question of veil-piercing applicability in a contractual matter is being dealt with is from the year of 1975. The circumstances were a man positioned as the chairman of the boards of two car dealing corporations. His children were the stockholders of one of these two (A-corporation), while he was the stockholder himself to the second one (B-corporation) together with his wife. Since the position of the chairman allowed him to represent both corporations, he made the two corporations contract with each other, agreeing that the A-corporation owned by the children was going to operate the business for the other B-corporation as a commissioner. Soon he cancelled the same contract and instead formed three new contracts where various transactions were going to take place between the two corporations. The transactions however left the A-corporation indebted with bankruptcy soon following. A lawsuit was then filed by the bankrupt estate against the B-corporation owned by the man and his wife, where the estate claims that the B-corporation should be liable for all debts in the bankrupt estate which arose as a result of the new contracts. Also some other creditors of the bankruptcy estate which did not get payed for deliveries filed suits against the B-corporation for the same reason as the estate, namely that the business in the A-corporation was completely controlled by the B-corporation with the A-corporation functioned merely as a platform for the business of the B-corporation. The B-corporation answered to the claim by filing a motion to dismiss, arguing that the two corporations are two separate entities without liability for each other’s obligations.

The courts in the first and second instances dismiss the case on the grounds that there was nothing stated in the contracts or in any other documents between the two corporations that

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65 NJA 1975 p.45.
said anything about one of the corporations being liable for the other’s obligations or vice versa. However, the Supreme Court made an even more detailed investigation by observing additional circumstances in the relationship between the two corporations. It was easy clarified that the chairman had legal capacity to enter contracts on behalf of both corporations and that he or his closest relatives were the stockholders to the same corporations. Further it was confirmed that the assets of the A-corporation were not sufficient enough for their business to be considered as independent and the assets of value they had in possession were moreover the property of the B-corporation. Assets in their possession were confirmed not to be a result of their business but had been provided the A-corporation from outside, and these assets also turned out to have been transferred to the B-corporation just before the end of every financial year. Therefore it was the opinion of the Supreme Court that the B-corporation was the actual, or at least to a great extent, the business operator of the A-corporation and should thus be liable for the debts of the bankrupt estate.

3.2.3. Non-contractual veil-piercing case law

The first case dealing with veil-piercing on a non-contractual basis was ruled quite soon after the first case from 1935.66 Once again a cooperative is in focus as the business organization which piercing claims are filed against. The circumstances here were that the cooperative in question had the function to provide buildings for its members and was the owner of a building between two other properties. One of these two was owned by an individual and the other by a corporation. A short time before the cooperative initiated a construction project on their territory, they transferred all stocks and other valuable assets to the corporation located next to them. As the project proceeds, the property of the individual gets damaged as a result of the construction which made the individual file a lawsuit where he claimed damages consistent to the reparation costs. The suit is filed against the corporation which was in control of all the assets, but the corporation denied liability on the ground that the cooperative was responsible for the construction that took place on their own territory. The question for the court is then whether the corporation can be held liable on the grounds of veil-piercing.

The first instance rules affirmatively on the claim from the individual by declaring the corporation responsible for the caused damages. They explain this with the fact that the corporation, since it was in possession of more or less all assets, fixed as well as tangible, was

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66 NJA 1942 p. 473.
to be seen as the owner of the territory of the cooperative, regardless the fact of the cooperative as the registered owner. The appellate court on the other hand affirms the appeal from the corporation by upholding the main rule of no personal liability, while the Supreme Court makes the final decision with affirming the appeal from the individual. This decision is backed up with the same grounds as the first instance based their decision on, namely that the corporation, after having received all the assets from the cooperative, was as good as in possession of the building on the cooperative’s territory despite the cooperative being the formal registered owner. Because the cooperative did not have any assets to finance the construction project, this was made through the corporation which also had the true purpose of providing the corporation with more space for their business with this construction. Overall, these circumstances were sufficient enough for the Supreme Court to pierce the cooperative veil.

Together with the case from 1975, this next case has until recently constituted the Swedish legal basis when referring to the principle of veil-piercing in various contexts. Similar to the 1975 case, the business organization was a corporation, here with the ownership structure of five stockholders including four corporations and one city municipality running the business with the purpose to acquire real estate for water supplies adjustments. The corporation entered a contract that made them the owner of a water reservoir, however, as a result of their negligence of taking care of the property, a flood occurred soon after their acquired ownership, which damaged another neighboring individual’s property. The corporation was accordingly held liable towards the individual for compensatory damages. It turned out though, during the investigation of the circumstances in the case, that the establishment of the corporation was an initiative by the city municipality which had the purpose to let the corporation acquire the reservoir to enjoy the benefits this would mean for some power stations owned by the city and the other four corporations. It was also clarified that the corporation did not have any money assets except for 30 000 SEK as their stock capital and that the stockholders were financing any costs that were connected to the work on the reservoir when the stock capital could not be used in this matter. Before the corporation received the claim from the individual concerning the payment of damages, they had also used significant parts of its stock capital resulting in bankruptcy. The individual then filed a

67 Brocker & Grapatin, p.40.
68 NJA 1947 p.647.
69 See e.g. Moberg, p.63.
lawsuit against the stockholders, claiming them to be held liable for the obligation of the corporation to pay damages.

Unlike the previous cases, all of the instances now agreed with each other’s decisions of piercing the veil of the corporation when this issue reached the courts. Once again the absence of corporate governance and independency within the corporation was something that the courts saw as contributing factors for their decision. This was explained with the money that was provided by the stockholders for all the running costs that came up because of the reservoir. Besides, it was clarified that the only purpose for creating the corporation was to acquire the reservoir for the profit of the stockholders. The lower instances also found that the disposable stock capital was right on the minimum amount with respect to what the bylaws of the corporation allowed. The amount of 30 000 SEK was also mentioned by the judges in the Appellate Court to be relatively low with respect to the business of the firm. Although, this was not explicitly mentioned by the Supreme Court as a piercing factor, it might have been an affecting aspect since this court uses the expression that other circumstances in addition to the absence of corporate governance resulted in their decision of piercing the corporate veil.

3.3. Proposals for new legislation

With respect to the importance of the subject, it is repeatedly mentioned in literature that the amount of precedents addressed in the foregoing sections are insufficient with the Supreme Court taking no clear position regarding the exception.70 At this stage, the reader might still be able to see some sort of pattern regarding what kind of circumstances that constitutes the veil-piercing exception. The outcomes of the court decisions together with the importance of the subject have resulted in two government bills where the introduction of a codified veil-piercing provision has been inquired. The discussions have both times ended up with negative answers to the question, but still there is a point with bringing up the inquiries in this study since they highlight the issue in larger perspectives by analyzing a variety of pros and cons that would follow a potential provision. The two inquiries were made during the years of 1989 and 2001 respectively which mean they were preceded by the case law addressed in the foregoing sections. The reader should bear in mind that there is still one more case to be briefed which was ruled in 2014 and has not yet been succeeded by any legislative inquiry. However, it will be helpful to analyze the field of law after the case from 2014 by studying

70 See e.g. Andersson, p.286.
what pros and cons that are used to back up the decision not to introduce a provision in these earlier legislative inquiries.

3.3.1. Criteria for veil-piercing

In the first inquiry from 1989, the Committee of Payment Liability (Betalningsansvarighetskommittén) had got the mission from the government to examine the issue of piercing the corporate veil.71 In the same way as the previous sections that we have just seen above, the Committee started with briefing these relevant cases and highlighted the circumstances that played a role for the question of veil-piercing. It was then observed that they all contain an element of misconduct in the way the business of the corporation was operated. At the same time, the Committee emphasized the restrictiveness that must always be considered when applying the exception. It was therefore the opinion of the Committee that some sort of qualified misconduct that was connected to the composition of the corporate business, and not only wrongdoing that for example causes the injury of a single creditor, was the required factor when applying the exception.72

How to evaluate whether certain circumstances are of such an extent to fulfill the requirement of misconduct is something that has to be decided on the basis of the circumstances in every single case. As was shown from case law, all of the cases in the field included for example an undercapitalizing element which is mentioned by the Committee as a factor that can help determining if a corporation is functioned for disloyal purposes. It must however be examined how the element of undercapitalization relate to the corporate business. Only the fact of shortage of money in a corporation that is a result of for example some early investments in the initial stage of the founding process, or sudden upcoming expenses that could not be foreseen are situations where undercapitalization are not to be seen as something disloyal towards the creditors. Instead the disloyalty is meant to be situations where the undercapitalization is caused by the stockholders as a part of how the business is composed. In other words the inadequate finance of the corporation should be more of a persistent kind where no plans exist of how to take care of future economic obligations.

Another factor of how to confirm the potential misconduct of a corporation is mentioned as the creditors’ possibilities to evaluate the corporation’s economic situation before

71 SOU 1987:59 - Ansvarsgenombrott m.m. [EN]: Piercing the Corporate Veil etc.
contracting.\textsuperscript{73} The easier the possibilities to evaluate, the less space should exist for accusing the corporation for misconduct and vice versa. However, one must observe the situation where the corporation might give the appearance to be open to its creditors about the economic position, but then acting fraudulent by providing them false figures. In this case, the corporation can certainly not rely on their openness as something that would prevent the corporation from being accused for misconduct.

3.3.2. Provision proposal

Having established the criterion that in the Committee’s view is required for the application of veil-piercing, they turned to discuss the need for legislation regarding the exception. Here was firstly examined what kind of creditors that would find a codified veil-piercing provision most useful. A difference was made between larger creditors like banks and the government on the one hand, and smaller ones like customers and contractors on the other. The Committee firstly reached the conclusion that the first category of creditors not being in need of a codified veil-piercing provision. These creditors’ need for protection was said to be fulfilled through the opportunities these have of doing more detailed examinations of the corporation which they are about to contract with. When it comes to the latter group of smaller creditors however, these do not always have the same opportunities to undertake the same detailed examinations as the larger ones and might therefore be in need of a codified provision to a larger extent than the previous group of creditors.

The conclusion of the Committee’s was that the need for a codified provision was quite limited with respect to the creditor perspective. However, the Committee considers also the aspect if legal certainty is affected negatively by the non-existence of a veil-piercing provision. Since the Committee was given the mission to clarify the issue of veil-piercing, they emphasize that there seems to be a need for clearer guidelines. Introducing a provision to fulfill this need would on the one hand most certainly lead to the result that more veil-piercing cases would be brought to court with more affirmative rulings as a possible result. In the Committee’s opinion, this was not seen as any problem at all since the awareness of the exception should make the corporations proceed with caution when they are about to commit a certain act that might harm creditors. A provision would therefore have some preventative effect. The protection of the creditors was further said to be in need of expansion since the

\footnote{\textsuperscript{73} Ibid, p.111.}
Committee’s investigation indicated that the respect of creditors’ interest was neglected to a quite large extent, sometimes as part of financial crimes. This disloyal way to neglect the interest of the creditors was not always caught by the already existing provisions regarding creditors’ protection. During the investigation made by the Committee, opinions from the business community were gathered where the dominating opinion was that there was no general need for a veil-piercing provision but that some certain situations still could occur where it would be suitable with having a provision concerning the exception.

The conclusion of the Committee was therefore that there was a need for provisions concerning veil-piercing that would clarify the issue, but that these should be expressed in a way that only those specific situations that were subject for veil-piercing were caught by the wording of the provision. By having a provision with such a limited scope, the negative effects on for example commerce would be insignificant while the principle of limited personal liability would still retain its position as the main rule. The Committee therefore suggested the following amendment to be added to the paragraph in the Swedish Companies Act where the main rule of limited liability is addressed:

In case of the corporation not being able to fulfill its obligations towards the creditors which is a result of a stockholder’s misconduct, the stockholder is together with the corporation jointly and severally liable for the insolvency of the corporation. However, the stockholder will not be held liable unless the economic position of the corporation has been clearly insufficient with respect to its business and foreseeable risks. A stockholder shall also not be held liable for corporate obligations in cases where he has informed the creditor about the economic position of the corporation to an extent that can be reasonably expected of him.

3.3.3. Rejection

The investigation of the principle of veil-piercing which lead to the proposed provision above was thereafter sent to the Council on Legislation (Lagrådet) where it was scrutinized more in detail. The Council’s proposal in which they gave their opinion on the provision, they start by saying that the appropriateness of the provision will be decided on the basis of how to interpret its wording. In particular the interpretation of the conditions [stockholder’s]

74 Ibid, p.95.
75 Ibid, p.97.
76 See ibid, p.128 for original Swedish version of the amendment.
77 Prop. 1990/91:198 - Öm Ändringar i Aktiebolagslagen m.m. [EN]: Swedish Companies Act Amendments etc.
misconduct and clearly [insufficient] are said to be crucial in this matter.\textsuperscript{78} Starting off with the condition of misconduct, the Council said that this is not a very suitable formulation with respect to the veil-piercing issue, mainly because it is an emotive word that might give rise to more personal considerations of what circumstances that should be seen as misconduct. The definition of misconduct also very much depends on the branch where the corporation operates since the commercial custom in one branch might be more tolerating than others. Using a word like “misconduct” as a crucial condition, when ruling on veil-piercing was therefore seen as inappropriate.

The same applies to the condition “clearly”, when talking about the corporation’s finances. Being clearly insufficient means in the majority of cases that bankruptcy is imminent and since the mission of the court is to determine whether the corporation was clearly undercapitalized, this would be hard to decide on an objective basis knowingly about the bankruptcy. Moreover, one could easy imagine that the amount of corporate funds might vary quite quickly over a short period of time, for example in periods of business expansions.

The goal with introducing a statute was to increase legal certainty and the awareness regarding the exception, and also achieve some kind of preventative effect. However, to achieve this, the individual businessman or attorney must be able to make a prior assessment on the basis of the provision. Therefore, the wording of the provision did not contribute to the goals mentioned above, but rather risked increasing the uncertainty concerning veil-piercing. The conclusion of the Council was accordingly not to let the provision be introduced in the Swedish Companies Act. The parliament later voted in accordance with the Council’s opinion.

3.3.4. Legislative inquiry of 2001

The question of codification of the exception was some years later once again up for discussion as one discussion point in an inquiry from 2001 where a revised Swedish Companies Act was prepared.\textsuperscript{79} The question was however not discussed to the same extent as was the case in the previous inquiry from the 1980’s. The Committee in this inquiry simply says that the need for a codified provision regarding veil-piercing has not grown larger now

\textsuperscript{78} Ibid, p.43.

compared with the last time the question was discussed.\textsuperscript{80} It can rather be said that the need has decreased because of the variety of stringent reforms and amendments that have taken place in many areas of law since the 1980’s. New provisions in the Companies Act regarding compulsory liquidation and provisions about the duty of an accountant to report suspected illegalities within a corporation are just a few of the mentioned reforms.\textsuperscript{81} Besides, in case of introducing a provision, there would be no other alternative than to use the very general legal terms like “misconduct” or “clearly” for the provision to include all corporations, regardless of size. That language would once again be criticized with respect to legal certainty, and therefore it is the conclusion of the Committee that a codification would be inappropriate.\textsuperscript{82}

3.4. NJA 2014 p.877

So far it can be noticed from case law that none of the courts say anything \textit{obiter dicta} about the scope of the veil-piercing exception outside the circumstances of their own cases. Because of the courts’ unwillingness to take a clear position regarding the issue, the subject has been surrounded by uncertainty since it was introduced by Swedish case law in the first half of the twentieth century. Finally in the year of 2014 the Swedish Supreme Court granted a writ of certiorari (\textit{prövningstillstånd}) where the Justices for the first time made an official comment on the subject.

The circumstances in the case were two corporate groups (\textit{koncern(er)}), each owned by an individual. Similarly to the previous cases, these corporate groups suffered economic failure resulting in bankruptcy. The reason turned out to be a decision from the Swedish Tax Agency (\textit{Skatteverket}) which denied the requests of tax deduction from the corporate groups. Some years later, the two bankruptcy estates sued a consultancy firm for malpractice, on the ground that the advices from the consultancy firm caused the corporate groups their economic failure. During this legal process, the two estates founded a new corporation with the capital stock of 100 000 SEK which was the minimum amount during that time according to the Swedish Companies Act.\textsuperscript{83} The estates then passed to this new corporation the judicial process of the lawsuit which ended up being unsuccessful as the case was dismissed. As a result of the judgment, the new corporation was liable for the costs that the consultancy firm had because of the judicial process, but since they were not sufficiently capitalized, it was declared

\textsuperscript{80} Ibid, p.286.
\textsuperscript{81} Ibid, p.287.
\textsuperscript{82} Ibid, p.288.
\textsuperscript{83} Chapter 1:3 Swedish Companies Act (1975:1385).
insolvent following its bankruptcy just a week after the judgment in court. On the basis of veil-piercing, the consultancy firm then filed a motion against the two individuals to be held personally liable for the costs of the judicial process.

The three instances all agree that the stockholders of the estates were liable for the costs of the consultancy firm. The judgment of the District Court, which is confirmed by the Appellate Court, follows the traditional grounds of judgment that we have seen from previous case law, although with giving a more detailed explanation around the topic. The District Court firstly addressed that there is a balance between the purpose of the corporate business organization in which the stockholders can run their businesses without risking being held personally liable for potential corporate debts, and the creditors’ interests of minimizing the risk of not being payed. Therefore there are codified provisions in the Swedish Companies Act that are supposed to have the function as a kind of protection of the corporate funds for the creditors. The principle of veil-piercing is said, despite its position as a non-codified principle, to have the same function as the provisions of protection of corporate funds. Great restrictiveness is however required when applying it and only cases of clear misuse of the corporate business organization should be subject for its applicability. This could be manifested with inadequate capitalization and the business of the corporation not being independent. Since the corporation that undertook the judicial process from the estates had the purpose only to do just that, and was capitalized with no more than the minimum amount of money as required by the Companies Act, this was to put the consultancy firm at big risk in the event of losing the trial. Therefore, using the corporation with respect to these circumstances was an unacceptable conduct enough to pierce the corporate veil.

In contrast to the lower instances and the previous precedents from the twentieth century, the Supreme Court chose what can be said to be a revolutionary way of reasoning regarding the veil-piercing exception. Instead of referring to an unwritten legal principle of veil-piercing within the field of association law, the Justices referred to the traditional principle of veil-piercing that has been developed by courts, preparatory works and doctrine, as liability of stockholders on the grounds of general principles of civil law. As examples of situations that could be included under these principles is mentioned the two cases from 1935 and 1975 respectively where the business of a corporation was in fact the business of the owners which therefore are liable on the basis of principles of contract law. Also principles of tort law which is meant by the Supreme Court to reflect the circumstances in the water reservoir case from 1947 are possible ways to constitute liability of the stockholders. In addition to these
examples from case law, the Supreme Court addressed the possibility of being liable in “certain other extraordinary cases”. A further explanation what is meant with this last phrase is however not given by the Court.

Lastly, the Court also made a distinction between creditors in contractual cases versus those in non-contractual cases. Usually the creditors entering contracts with a corporation have opportunities to examine the corporation in question beforehand by undertaking due diligences etc. For this reason, the Court seems to reject the idea that the civil law principles in contractual cases can constitute personal liability of the stockholders. The existing provisions of protecting corporate funds in the Companies Act must in other words be seen as enough satisfying for the creditors’ need of protection. On the contrary, the Court stated that creditors in non-contractual cases might be in need of extended protection since these do not have any chances to avoid receiving a lawsuit and therefore are forced to participate in a judicial process. However, the range of this protection is something that depends on the kind of claim, and the purpose of the provision on which the claim is based.

What has been said in the foregoing can be illustrated with the Supreme Court’s decision in the present case. The consultancy firm sued for payment of the costs of the judicial process, basing their claim on the provisions of liability for costs of judicial processes in The Swedish Code of Judicial Procedure (Rättegångsbalken). The firm was accordingly seen as a creditor in a non-contractual case and their need for protection was to be decided on the basis of these provisions. The circumstances in the case were moreover clarified that the two stockholders founded the corporation just a few months before they passed the judicial process and that no other kind of business was operated therein. Transactions within the corporation also turned out to be solely related to the judicial process with money deposits from the stockholders that were just enough to cover the expenses from the process. Therefore there were no plans of how the judicial costs would be payed in case of losing the case. The conclusion of the Supreme Court was for the abovementioned reasons that the two stockholders had the purpose of avoiding the risk of being liable for the judicial costs by operating through the undercapitalized corporation, which was an inappropriate way to use the corporate business organization. As a result, the stockholders were held personally liable for the corporate obligations.
3.5. Reactions to the 2014 Supreme Court case

The assessment by the Supreme Court is something different from what we could see in the two earlier instances which followed the traditional veil-piercing reasoning from the earlier legal material. The reactions of the legal scholars were therefore presented very soon after the decision of 2014 was published. One of them believes that the judgment is a clear statement from the Supreme Court that the veil-piercing exception does not have the position as a legal principle within the law of associations.\textsuperscript{84} Another addresses a more critical approach to the judgment and discusses if this really is the purpose of the Justices.\textsuperscript{85}

Doctor Adestam is of the opinion that the Supreme Court rejects the idea of a corporate veil-piercing exception since the Court expresses itself with the phrase that liability can affect stockholders on the grounds of general principles of civil law. He emphasizes the wording that creditors in non-contractual cases are in greater need of protection than creditors in a contractual case whose protection must be seen as satisfied by the existing provisions in the Companies Act. In other words, for a stockholder to be held liable for corporate obligations, it is a requirement that the creditor is in a non-contractual relationship with the corporation. However, solely the existence of a non-contractual creditor claiming personal liability must not be seen as enough for the court to rule affirmatively on the question. The scope of this creditor protection is decided on the basis of the purpose of the provision(s) on which the creditors base their claims. The need of protection together with the purpose of the provisions which are mentioned by the Court as crucial when ruling on the question of stockholders’ personal liability result in Adestam’s theory that if the creditors are not in need of extended protection or if the purpose assessment does not justify liability of a stockholder, the main rule of no personal liability will be upheld.

Professor Sandström is more careful with drawing concrete conclusions of the case and addresses a rather critical approach to the judgment. Among his criticism can firstly be noticed the lack of references to legal sources in the grounds of the judgment, almost like the Supreme Court is of the opinion that only the opinion from the highest instance matters when creating a precedent. The function of such a precedent is to give guidance in diffuse areas of law, and the more material that have been considered when ruling on such a diffuse area, the more trust should be put in the Court’s decision. By ignoring much of the legal material

\textsuperscript{84} Adestam, p.1, p.8.  
\textsuperscript{85} Sandström, Ansvarsgenombrott och ABL.
concerning veil-piercing, a lot of questions regarding other veil-piercing circumstances are left unanswered which almost makes it look like that the purpose of the Supreme Court was to create a precedent concerning the specific situation with corporations undertaking judicial processes. If this was the true purpose of the judgment, Sandström think it is strange since the Justices had the chance to create a precedent on the veil-piercing issue in general.

The argumentation about creditors’ different need of protection in contractual versus non-contractual cases is however easy agreed with. The same applies to the general principles of civil law as the basis on which the veil is pierced. In addition hereto, the court also opens up the possibility that liability can hit stockholders in “certain other extraordinary cases”, which in Sandström’s opinion is another thing to criticize since no example or explanation was given of what cases that could be included under this phrase. It is therefore unsure if the Court still has left some possibilities open that stockholder liability as liability on the basis of a veil-piercing principle of association law.

3.6. Empirical research; How are the precedent(s) interpreted?

In the following has been chosen those three cases from the Swedish District Court instance in which the veil-piercing issue has been discussed the most these few years after the last Supreme Court case from 2014. Since it has only been a short time after this last precedent, it might be hard based only on a few cases to get a clear picture of how the veil-piercing exception is being applied. Nevertheless, some indications can hopefully be observed.

In the first case, there is a contract between two corporations, a buyer and a seller, where the buyer acquired real estate from the seller. The real estate was however burdened with mortgages which were not amortized before the ownership of the property was transferred. The claim from the buyer (plaintiff) was then that the representative of the selling corporation had to pay them the equal amount of money that the plaintiff now spent to relieve the property from its mortgages, even though they had agreed in the negotiations that the representative personally was going to carry out that duty. One of the grounds on which they claimed payment was on the grounds of veil-piercing.

The court chose here a different way to explain their decision than the Supreme Court did in the case from 2014. Expressing itself relatively confident, the court says that the conditions of

86 V. sup. method section 1.5.
87 District Court of the city of Växjö, Case no. T 1597-16.
(1) the corporation having no independent purpose of doing business, (2) no independent business administration and (3) undercapitalized with respect to the kind of business the corporation was about to operate, were all established in the case of NJA 1947 p.647 and together constitute the veil-piercing exception. The District Court seems to ignore the position that was taken by the Supreme Court in 2014 where it might have been the Court’s intention to reject piercing of the corporate veil as legal principle of association law. With this simple reference to the conditions in the case of 1947, the District Court here bases its decision on the plaintiff’s failure to prove these three piercing factors, and accordingly ruled negatively on the veil-piercing question. It is also not clear from the judgment if all three conditions had to be fulfilled in order to hold the representative personally liable or if the circumstances in the case required the fulfillment of one or two as enough. The decision not to pierce the veil is however of less value since the interesting for this empirical research is to see how the court reasons when ruling on the issue.

The same terse reasons for the judgment can be noticed in the next District Court case. The circumstances in regard to the question of veil-piercing were that a lawsuit was filed towards a corporation that took possession of real estate that did not belong to them, which resulted in injury of the plaintiff. The plaintiff then sued the bankruptcy estate that owned the corporation and claimed damages equal to the loss suffered when the corporation was in possession of their property. Once again, veil-piercing was one of the grounds on which the plaintiff sought payment, this time arguing that the bankruptcy estate had a very influential position as the owner and that this estate in fact was to be seen as the actual owner of the business and assets of the corporation. There was also claimed to exist an element of misconduct since the bankruptcy estate had known for several years that their corporation was in possession of property that did not belong to them.

The court dismissed the veil-piercing claim based on provisions of limitation in the Swedish Code of Land Laws (Jordabalken). However, the court also explained the potential scenario where the claim would not be dismissed because of these limitation provisions. In this case, there would still not be anything in the circumstances that would constitute veil-piercing. It was not proved that the corporation was undercapitalized with respect to its business or that the bankruptcy estate committed an act of misconduct. Furthermore, solely the fact of the bankruptcy estate being an influential stockholder was said not to be enough for the

88 District Court of the city of Göteborg, Case no. T 16247-12.
applicability of veil-piercing. In contrast to the previous case where the reference was made to the 1947 case, the court in the present case did not refer to any sources of law at all when talking about the different elements that were required for veil-piercing.

The last of these District Court cases in this section can without doubt be observed as the most comprehensive of the three.\textsuperscript{89} The circumstances were distinctly similar to the last Supreme Court case from 2014 which is also referred to by this District Court in their judgment. In this case a number of stockholders took the decision to liquidate their corporation. One of the stockholders then alleged that he was harmed as a result of how the liquidation process was being handled and accordingly files a suit towards the other stockholders where he claims damages for his losses. The legal process of this suit is then passed by this individual plaintiff to a wholly-owned corporation of his. The claim for damages was however unsuccessful and the corporation was thus held liable for the costs of the judicial process of the other stockholders. Shortly after the District Court’s dismissal, the corporation is declared bankrupt with no possibilities to fulfill the charges against it. The stockholders then sued the individual on the grounds of veil-piercing to be held liable for the obligations of the corporation. It can be noticed that much of the circumstances so far are quite similar to the case of 2014. However, the corporation that acquired the legal process in the present case was not initiated only for the reason to undertake the judicial process, but had for many years operated within the branch of production and selling. Other circumstances in regard to this corporation were that during the few months between the District Court’s dismissal and the bankruptcy of the corporation, the stockholder withdrew 240,000 SEK in total, which in his opinion was reasonable salary with respect to the time he spent on the judicial process. The corporation was thus nearly totally tapped on assets.

The court in its judgment started by mentioning that the Supreme Court in its precedent from 2014 has ruled on the veil-piercing issue concerning corporations undertaking judicial processes. It is therefore firstly clarified that the stockholders that filed the lawsuit were to be seen as creditors in a non-contractual case, and thus in need of extended protection since they have not been able to avoid the claim from the plaintiff. Next is discussed if it was in conformity with the business of the corporation to undertake the judicial process from the stockholder. The answer is quite clear to the court that it was not within the scope of the corporation’s business to do so, partly due to the branch in which the corporation was

\textsuperscript{89} District Court of the city of Nacka, Case no. T 4520-15 et al.
operating and also because the corporation had no separate interest in the process but was rather serving the interest of the individual stockholder. Also the financial aspects of the corporation were discussed, where the economy was noticed not to be sufficient enough to cover other expenses than the corporation’s own attorney’s fees. In other words there was no plan of how to pay the defendants’ attorneys’ fees in case of losing the case. Besides, when finding out that the case was dismissed, he still withdrew from the corporation a significant sum of money in a short time, leaving the corporation without any notable assets. In sum, it was the opinion of the District Court that these circumstances indicated that the stockholder was operating the judicial process through the corporation to limit the negative consequences for him personally in case of an unsuccessful outcome, but at the same time being able to benefit from the compensatory damages the corporation would receive if the claim turned out to be successful. Therefore it would be inappropriate to let the corporate veil protect the stockholder from personal liability and he was accordingly held liable for the creditors’ judicial costs of the proceeding.
4. Analysis

4.1. Is there a principle of veil-piercing in the field of Swedish association law?

The answer to this first question has its basis in the judgment from the last Supreme Court case from 2014. This case was as we have seen, followed by the three District Court cases along with the doctrinal reactions. Cases and articles both show that the Justices in the Supreme Court case cannot be said to have been very successful with presenting a clear precedent regarding the veil-piercing exception. The District Court cases are not very conforming in its judgments and the two scholars have presented quite different opinions of how to interpret the decision.

4.1.1. Doctrinal opinions

First of all I am quite surprised that Doctor Adestam in his article about the precedent seems to be quite sure about his opinion that the Supreme Court rejects the idea of a veil-piercing principle in the field of association law. When reading the grounds of the judgment, I agree with him that the Court indeed tries to avoid talking about veil-piercing as a phenomenon within association law. But if it really was the purpose of the Court to present that break through idea, then I rather agree with professor Sandström that more legal sources should have been mentioned for the precedent to have the desired impact on future cases. By presenting these sources in a more detailed judgment, it would also have clarified the legal position that those legal sources of the traditional veil-piercing discussions no longer should be seen as part of established law, if that was the purpose of the Court. Instead, we now have a precedent which easily can be interpreted to apply only on situations where stockholders use corporations for judicial processes.

Since it is such an obscure judgment in what was already a diffuse area of law before the judgment, I am of the opinion that one should be very careful with making any concrete conclusions of this 2014 precedent and in particular not try to create a legal standard for stockholder liability. The risk is that the suitability of these conclusions or legal standards might be limited to circumstances of corporations used for judicial processes, while in other circumstances, the standard might be inappropriate. As we saw under section 3.5, Adestam created this kind of standard where the creditors’ need for protection together with the purpose of the relevant provisions should be the crucial elements when ruling on the question of stockholder liability. Sandström seems to agree with the first part of this standard about the
creditor protection. I am willing to agree that creditors in a non-contractual relationship are in need of protection to a greater extent than creditors which voluntarily contract with a corporation. However, I think the authors have missed mentioning an important aspect in this matter which was mentioned by the Committee in the legislative inquiry from 1989. Here was observed the possible situation of creditors that voluntarily contract after doing what can be asked of them when it comes to due diligences and other investigations regarding the corporation, but when it turns out that the data is showing a false picture of the corporation. In these cases, it can hardly be the intention of the Court or the authors that the already existing provisions in the Companies Act should be a satisfying protection for the creditors while stockholders avoid personal liability. It is worth emphasizing what have just been said since the authors’ and the Court’s disregard of this situation might tend to discourage creditors to contract with corporations which can lead to negative effects on commerce.

4.1.2. Legal practitioners’ opinions

So how is it then possible to establish the legal position of stockholder liability? The precedent from 2014 is too unclear for making that assessment, and the two articles analyzing the case do not give any answers as was explained above. According to the legal dogmatic method, the answer to the question of the legal position would be that the position is unclear. Without establishing any law however, we might use the empirical method to at least get some sort of indication of its position. To clarify, the following analysis of the District Court cases is not meant to reflect any definite legal position of veil-piercing, which would be to apply the legal dogmatic method incorrectly.  

As we saw in the case briefs under section 3.6, the assessments of the District Courts can hardly be said to follow a clear standard. In the first case from the district court of Växjö, the judge was reasoning in traditional terms of veil-piercing as was done by the Supreme Court cases from the twentieth century. The Supreme Court case from 2014 seems to have had no impact at all on this first District Court case, and we can only speculate if this has to do with the judge’s lack of knowledge about this last precedent, or if the difficulties with interpreting the precedent made him unsure if the issue in the 2014 precedent was applicable on his District Court case. Since it is up to every judge to know the law and its applicability, I find it

90 See Korling & Zamboni, p.38.
hard to believe that the judge was unaware about this precedent. Instead it is rather imaginable to believe the judge to be unsure about the interpretation, which is in line with the opinion of Sandström. It is then possible that the judge has chosen the more traditional way of ruling on the issue, either because this is the only way to solve the question in his case, or because he sees the 2014 judgment as only applicable in situations where corporations undertakes judicial processes. Being unsure about the interpretation of the 2014 precedent is nothing to blame the judge for. However, the way he chooses to formulate his judgment can be criticized. The legal sources has shown us that there are no definite conditions for the exception to be applicable, as the judge claims, and the Supreme Court case from 1947 is accordingly not the only source to refer to. It gives the reader a way too simplified picture of the veil-piercing exception.

Another example of the same kind of uncertainty can be noticed in the second district court case from Göteborg. Of the three cases involved in this study, this one is subject for the least detailed veil-piercing assessment by the District Court. Still it is interesting how the assessment is made. The District Court seems to emphasize the traditional factors of undercapitalization of the corporation and misconducts towards the creditors, and confirms hereby that nothing in the circumstances of the case can constitute veil-piercing. Also not the fact of the stockholder having an influential position in the corporation would lead to that decision. Interesting for our research question however, is that the District Court does not refer to any legal sources when addressing these different factors. One possible reason might be that this Court does not know whether the Supreme Court in the 2014 precedent wants legal practitioners to reason in terms of these traditional factors and therefore avoids referring to this last precedent. Another reason might be that the District Court interprets the 2014 precedent being applicable only in cases of corporations undertaking judicial processes and therefore chooses to base their veil-piercing decision on the traditional factors. Regardless what the Court had in mind when ruling on the issue, some reference would have been desired to be able to know what they consider the legal basis for its decision. Given the fact of the District Court reasoning in terms of traditional piercing factors, the latter alternative above might be the more likely opinion of the Court.

The case with the most sufficient veil-piercing assessment must however be said to be the case from the District Court of Nacka. As we saw, the circumstances were very similar to the

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91 Cf. General legal principle of *Jura novit curia*, e.g. Korling & Zamboni, p.43.
2014 precedent with the only difference that the corporation undertaking the judicial process was not created for the purpose to do so, but had for several years been operating in a different branch. For the first time, we can now observe a District Court referring to the 2014 precedent. What is interesting is the way this Court expresses itself when referring to it. It literally says that the Supreme Court in its precedent from 2014 has “ruled on the issue of veil-piercing where corporations undertake judicial processes.” This phrase could indicate that the District Court interprets the 2014 precedent as if it is only applicable on cases with similar circumstances and not on veil-piercing cases in general. It is of course possible that the previous District Court interpreted the 2014 precedent in the same way and that this is the reason why no references to this latest precedent are to be found in the judgments. Therefore can be said that if it was the intention from the Supreme Court to establish a legal position on veil-piercing situations in general, this must be said to have failed with respect to what we have seen in these three cases.

4.1.3. Conclusion

To conclude, I would say that the ordinary sources of law do not give any answer at all regarding the question of the veil-piercing exception. The approach made by the Supreme Court in 2014 to see the traditional veil-piercing principle within the law of associations as stockholder liability on the basis of general principles of civil law, is backed up by an insufficient amount of arguments and uncertainty in the ground of the judgment to get the precedential impact. Besides, the terseness of the judgment does also leave the opportunity open for interpreting the precedent as only applicable on situations where corporations undertake judicial processes. Without having any impact on the question of the position of the exception of veil-piercing, the first two District Court cases can be said to confirm the uncertainty of this question by reasoning in traditional terms of veil-piercing. Because of this obscure judgment, no definite conclusions or standards should be created which means that the principle of veil-piercing retains the traditional position as a principle within the field of association law.
4.2. What are the conditions for an affirmative veil-piercing decision?

As the reader maybe noticed when reading the grounds of the judgments from the Swedish precedents from the twentieth century, the reasons for piercing the veil remind to a great extent of what we could see from the United States earlier in the study. Important to have in mind is that neither in the States nor in Sweden is there an established absolute standard for what circumstances that constitutes veil-piercing. For example, the American alter ego criterion was emphasized by one scholar to be combined with an act of fraud as well as the creditor having suffered harm, while others saw the factor as independent from each other. The same pattern can be noticed in the Swedish Supreme Court cases where it has not been very clear which combination of factors that constitute the exception. However, in the following is presented my attempt to try clarifying what these Swedish piercing factors might be and which combination that is required.

4.2.1. Alter ego

Focusing on Swedish case law, the reader should initially notice that the lack of independence or alter ego is a dominant factor in all of the cases. The reasons why a business association is dependent on its stockholder or other owner, is however not explained to the same extent by the courts. Especially in the earliest cases there is just a sentence or two about what circumstances that contributed to the associations being in a dependent position. Later in the precedents from 1947 and 1975 the grounds of judgment are a little more detailed, with for example undercapitalization as a reason for the non-existence of independency along with money depositions to cover different costs as they arose. Alter ego must also be said to be the case in the last Supreme Court precedent from 2014, even if it is not mentioned directly by the Court. Since nothing is said obiter dicta about other possible factors to determine alter ego, I would say that the subservient way of using the comparative approach in this study could work as helpful guidelines when determining alter ego by studying those factors mentioned under section 3.1.2. It might be a good idea to first remind about what was said in the initial chapter when taking impressions from other legal system; namely that one should be aware of the risk that impressions from foreign legal systems might not be well functioned in another legal system. When it comes to the alter ego factors however, I do not see these as typical for the common law system and they should therefore work as helpful guidelines for the Swedish piercing factor of alter ego.
4.2.2. Undercapitalization

Quite close connected to alter ego is the factor of undercapitalization as we saw in the cases from 1947 and 1975 where the independency was confirmed by the fact of the corporations being undercapitalized. This factor was also, together with misconduct, what the Committee from 1989 considered the conditions of veil-piercing. Besides, the Supreme Court’s decision from 2014 had its basis in the financial aspects of the corporation. My own personal opinion about this criterion is that it is so much more specialized than the other piercing factors of alter ego and misconduct. Therefore I would rather see this factor of undercapitalization as a tool to determine either of these two, as we saw the Swedish Supreme Court did in the case from 1947 where alter ego and undercapitalization together constituted an act of misconduct. I imagine myself this as a good solution for Sweden since the required stock capital is already on a relatively low level. In other words, having undercapitalization as a pure independent piercing factor of the same value as alter ego and misconduct might have a way too discouraging effect on Swedish stockholders with respect to today’s level of required stock capital. One can easily imagine stockholders to avoid entering contracts or maybe even avoid founding corporations, which would have a negative effect on commerce.

By reading the Supreme Court judgments from the twentieth century, one can sometimes get the impression that undercapitalization is seen as a piercing factor independent from alter ego and misconduct. Clearly the Committee from 1989 got this impression, given the proposal of the amendment that was the conclusion of their inquiry. It is quite a risky business talking about undercapitalization as an independent veil-piercing factor, since it might give someone the picture that undercapitalization on its own can constitute the exception. In this regard I would like to address two things. Firstly we saw from our study of the American sources of veil-piercing that undercapitalization was said by some scholars not to be able to constitute veil-piercing on its own.\footnote{V. sup. footnote 34.} With respect to the low amount of required stock capital in Sweden, this could work as a useful impression from the United States. Secondly, the term of undercapitalization needs to be further explained. Just the fact of a corporation being undercapitalized cannot be seen said to fulfill the criterion, just as the Committee says under section 3.3.1. If that would be the case, then we are facing the situation of almost each and every corporation to be undercapitalized in the initial process of their new corporations as was described already in the introduction section, which cannot be the
purpose of having undercapitalization as a piercing factor. Therefore there must be some sort of qualified element when determining undercapitalization, for example that the finance is undercapitalized persistently with no plans of how to account for future expenses.

4.2.3. Misconduct

From our study on the American field of law, this Swedish piercing factor of misconduct corresponds to the factor of “fraud” as was explained under section 3.1.3. This factor might not be very clearly expressed by the Swedish courts. Nevertheless, I would say that it is an underlying factor in all of the Supreme Court cases we have seen, which the Committee from 1989 seems to have observed as well. These cases all have in common that the associations that were subject for veil-piercing in some way had been used for purposes that the corporate business organization is not meant for. Accordingly, there must be an element of qualified inappropriateness in the way of using the association which is not in line with the actual purpose of the business organization; that one should be able operate and take risks in a business without getting personally liable. The condition of the inappropriateness being of a more qualified kind is meant to exclude situations where creditors have been harmed as a result of the negligence of the corporation. An act of malice is therefore required. Of course it is a hard balance to determine when an act is to be seen as outside the scope of the purpose of the corporate business organization. In fact it is best explained by the examples from case law that we have seen.

We saw the owner in the case from 1935 who created a cooperative with the purpose only to enter contracts on his behalf, and therefore violated the provision that required cooperatives to work in the interest of all members. Being aware of this violation can thus be seen as an act of misconduct. So could also the stockholder’s strip of the corporate assets in the case from 1975. Transferring of assets was also the case in the precedent from 1942 in which the cooperative once again did not have the purpose to work in the interest of all members, but only for the corporation. In the precedent from 1947, the element of misconduct may not be that clear, but similarly as we addressed in our American study, the piercing factors tend to merge into each other which means that the combination of alter ego along with undercapitalization together can constitute an element of misconduct. Lastly in the most recent precedent from 2014, the corporation was just a tool for the stockholders to avoid the
provisions in the Swedish Code of Judicial Procedure which must be seen as an inappropriate way of using the corporate business organization.

There are in other words some different circumstances that can amount to the piercing factor of misconduct. Some of these, like violating or evade codified provisions or stripping the corporate assets, are sub-factors that we recognize from our American study on the piercing factor of “fraud”. For the same reason as with the sub-factors of alter ego, these factors of fraud should work as helpful guidelines also for legal practitioners in Sweden while determining the element of misconduct.

4.2.4. Conclusion

In sum, it is the two factors of alter ego and misconduct that together have an impact on the decision of piercing the corporate veil. Together with undercapitalization, they tend to merge into each other, and we have seen cases where the fulfillment of two factors like for example alter ego and undercapitalization together forms an element of misconduct. This is one reason why I emphasize undercapitalization as a sub-factor to determine either or both of alter ego and misconduct. Another reason has been explained with the low amount of required stock capital in Sweden. Alter ego and misconduct should therefore be seen as the two main conditions for the exception’s applicability.

4.3. Does Sweden need a provision regarding veil-piercing?

It has been quite a while since the last legislative inquiry examined the question of introducing a provision regarding veil-piercing in the Swedish Companies Act. In this section is presented a brief examination of the same question where certain respect is taken to the legal position of stockholder liability after the last precedent from 2014. The answer to the question thus depends partly on the answers to the first two research questions, but also on aspects of legal certainty and creditor protection as we saw were considered by the committees in the inquiries from the previous chapter.

The first question about the characterization of stockholder liability as a veil-piercing principle in the field of association law, or constituted by general civil law principles, is of great importance for the question. In my opinion, stockholder liability characterized as liability on the basis of civil law principles would reject the idea of a codified provision
permanently, since civil law principles exist over a wide spread area of law, such as contract law and tort law which were mentioned as examples by the Supreme Court in 2014. It would therefore be impossible of having one single provision somewhere among all the civil rights acts, referring to general principles of civil law as the basis for stockholder liability. The alternative of having one provision in each act of civil law in the Swedish code, referring to stockholder liability would also not be legislatively practical.

Since the precedent of the Supreme Court case from 2014 has proved to be quite hard to interpret with the Justices establishing no clear legal position of stockholder liability, the traditional way of seeing this kind of liability as a veil-piercing principle of association law still seems to be the current position of stockholder liability. Therefore it is possible to discuss a potential introduction of a provision. Initially the reader should be reminded of the legislative inquiries from 1989 and 2001 respectively. The purpose of the proposed provision in 1989 was to increase legal certainty, and the Council on Legislation that later rejected this proposal did not deny this need. However the way the proposed provision was expressed did not contribute to that goal, which was why it was rejected. Years later when the Committee in the year of 2001 once again discussed the need for a provision, it was said that the many amendments that had taken place on several areas of law since the year of 1989 had decreased the need of a codified provision.

I agree with the Council on Legislation about the expression of the proposal which would lead to many complications and maybe even jeopardize the main rule of limited liability if it was introduced in its existing shape. The provision is way too extensive for being an exception to the main hallmark of a corporation, and it contains the condition of undercapitalization which I would say tend to have a negative or discouraging effect due to the Swedish legal requirement of stock capital. Other possible legislative solutions have been observed in the United States but I would also make a very careful approach to these since the Texas provision for example was introduced as a reaction on a case that was ruled on too broad terms in the legislator’s view. Also the provisions from the state of Delaware and the Model Business Act are in my opinion too vague in its phrase that a stockholder’s “own conduct” can constitute veil-piercing. With respect to the foregoing and to the answers to the previous research questions, I would rather propose a provision with the following formulation:

[SV:] I händelse av att aktieägare agerar genom bolaget så som för egen räkning, eller då ägarförhållandena i övrigt visar att bolaget förlorat sin karaktär av självsständighet, svarar
In case of stockholders acting through the corporation on their own behalf, or when the ownership construction shows the corporation having lost their independency, the stockholders are held joint and severally liable with the corporation for the obligations in the main section, if there are extraordinary circumstances that justify such liability.

It can be observed that conditions like misconduct and clearly are not part of this proposal, as was the case in 1989. Instead, the first part of the provision signifies the piercing factor of alter ego while the second part addressing extraordinary reasons which are meant to include undercapitalization of persistent kind or a qualified element of inappropriateness in the way the corporation is used which would constitute the element of misconduct. By letting undercapitalization be a component of the narrower condition of extraordinary reasons, I think much of the possible discouraging side effects would be avoided with respect to the stock capital requirement as was discussed above.

An assessment must however be made if this provision is suitable for being introduced with respect to the legal situation now after the 2014 precedent. On the one hand side, one can argue that the current legal situation in the field does not justify an introduction due to the uncertainty of the legal position of the veil-piercing exception. However, Sweden is a civil law country after all, with the code as the main source of law. The Supreme Court had the chance in 2014 to clarify the field of veil-piercing, after many years of uncertainty surrounding the subject, but did clearly not succeed. Therefore, I would say that it is now up to the Swedish parliament to introduce a provision regarding veil-piercing in the Swedish code, preferably in the Companies Act in direct connection to the main rule of limited personal liability. As a civil law country, it cannot be any desired situation to just wait for another precedent by the Supreme Court, especially not with respect to the importance of the subject and the bygone years of uncertainty. Accordingly, the answer to this last research question is positive.
5. Final conclusions

To shortly sum up the research and the research questions in its entirety, we have seen that the traditional Swedish legal principle of veil-piercing very recently in 2014 has been subject for a Supreme Court case where the Court made a different approach than in the other precedents by seeing stockholder liability as liability on the basis of general principles of civil law. It seems to be unclear whether this statement applies on veil-piercing situations in general or if this was the approach made specifically when the circumstances is about a corporation that undertakes a judicial process. There are indications from some recent Swedish district court cases that this latter alternative seems to be the “generally” accepted one. Since no clear answer was given in the precedent from 2014, the Swedish principle of piercing the corporate veil retains its position as a principle within the field of association law.

Next up was the question about what piercing factors that constitutes the Swedish veil-piercing principle. The dominant factor through history could be observed as alter ego. In addition hereto, every affirmative veil-piercing decision has also included an element of undercapitalization and/or misconduct, which both have to be of a more qualified kind for its fulfillment. As guidelines for the determination of these factors, we used the subservient perspective on the United States to get ideas of how to do this determination. I am of the opinion that alter ego combined with misconduct constitute the veil-piercing exception. An alternative could be alter ego combined with undercapitalization which together can constitute misconduct and accordingly make the exception applicable.

Lastly, the question whether to introduce a provision regarding veil-piercing was briefly examined with respect to the previous research questions and earlier legislative inquiries. Because of the importance of the issue and the long time of uncertainty surrounding the subject, one could ask of the Supreme Court in 2014 to establish some sort of clear standard. Since this was not the case, it is my opinion that it is now time for the Swedish parliament to act as the main legislator. Waiting for a new precedent in the field would be acceptable in a legal system of common law, but in a civil law country like Sweden, it is not a suitable situation to rely on the Supreme Court to rule on a new precedent sometime in the future. The answer is therefore that a provision is highly desirable and a proposal has been given which is intended to be an improvement of the earlier proposal from 1989 and could work as a possible suggestion for the legislator of how to formulate a provision.
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