NEW AVENUES ON INTRAGROUP LIABILITY

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I
Introduction

The phenomenon of corporate groups dominate modern business activity worldwide. Their typical enigmatic core – the polarity and tension between "unity and diversity" – has fascinated generations of scholars throughout the 20th century. With *Marcus Lutter* these creatures have become much more friendly and understandable to lawyers. His pioneering scientific work did not only reach unparalleled achievements within the German academic and jurisprudential boundaries, a situation which is clearly illustrated in the development of a train of legal though labelled with its own name (the "Lutter School"). For years and years, his work has also provided an inexhaustible source of inspiration all over the world, with far-reaching consequences in the doctrinal and jurisprudential evolution of many Common Law as well as in Civil Law countries. There can thus be no doubts that, with his work, both the national and international debate on the regulation of corporate groups has truly entered a new era, the "Lutter Era".

The phenomenon of corporate groups raises multiple and difficult regulatory questions. In the words of the honoured author himself, "a group of companies gives rise to the same questions as any single company, without being a company itself: a group of companies is founded, it must be financed, it must be managed and supervised, it has to resolve internal conflicts of interests between its members, it has to render account and it finally has to be dissolved"[1]. This paper is addressed precisely to one of those crucial problems

[1] *Lutter*, The Law of Groups of Companies in Europe: a Challenge for Jurisprudence, 9, "Forum Internationale", vol. I, nº 1, Kluwer, Deventer, 1983.

of a law on corporate groups: the treatment of liability issues in parent-subsidiary relationships.[2]

II
Intragroup Liability Today

On a foggy morning of March of 1978, while performing a regular procedure, the tanker "Amoco Cadiz" was crossing the Channel, within the French territorial waters. Suddenly, due to a breakdown of its steering-wheel, the vessel went out of control and drifted towards land. As the attempts at repairing the steering mechanism and the efforts of a tugboat to divert the ship from its tragic course were unsuccessful, the vessel went aground on the rocky French coast and broke in two. Millions of tons of oil were then spilt in the Channel, causing an environmental disaster which affected dozens of kilometres of the French sea coast.

The owner of the unfortunate tanker was the "Amoco Transport Company", a company incorporated in Liberia. This corporation, however, was a wholly-owned subsidiary of another corporation, the "Amoco International Oil Company", incorporated in Delaware, whose capital was in turn totally owned by a third corporation, the "Standard Oil Corporation", incorporated in Indiana (USA), which is the senior corporation of a major multinational group operating in the oil transport industry.

The total amount of claims of the victims of this oil spill – which included the French State, about 90 Britannia counties and hundreds of private individuals (namely, fisherman and inn owners) – was estimated at something around 2 billion of US dollars. Since the assets of the subsidiary "Amoco Transport Co." consisted almost entirely of the vessel now destroyed, being therefore obviously insufficient to recover the damages, the plaintiffs decided to sue the parent "Standard Oil Co.", in the Illinois jurisdiction in the USA. The

[2] Quoting again *Marcus Lutter*, "far the most difficult questions in the field of groups of companies are raised by the problem of liability of parent corporations for their subsidiaries, that is, dependent companies which are under the direction of the parent (The Law of Groups of

defendant contested such a claim, by arguing on the ground of the separate legal personality of the corporations involved and the insulation of liability: in the view of the parent company, these two cornerstones of corporation law would prevent any possibility of victims' claims being recovered out of its patrimony.[3]

This case constitutes perhaps a persuasive illustration of both the practical and theoretical importance of the treatment of liability issues in parent-subsidiary relationships.

1. The Practical Impact

As a practical problem, there is probably no doubt about the impact of intragroup liability problems in modern business litigation. The best proof of this impact lies in the gargantuan number of judicial cases where the central question at stake is invariably the plaintiff's complaint about the inequitable outcome of the formal liability insulation between parent and subsidiary corporations in spite of the existence of a substantial linkage of control.

Far from being restricted to one single legal branch, such cases arise across *the entire range of the law*, covering areas as diverse as classical tort liability, contract liability, environmental liability, product liability, labour liability, competition liability, bankruptcy liability, or tax liability: it has been disclosed that plaintiff law firms in metropolitan areas in USA will often have two or three cases a year in which their client's recovery is thwarted by the corporate fiction[4]. And far from being restricted to cases holding a sole private dimension

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Companies in Europe: a Challenge for Jurisprudence, cit., 23). Similarly, see also *Lutter*, 100 Bände BGHZ: Konzernrecht, in: ZGR 1987, 444 (458).

[3] In Re Oil Spill by "Amoco Cadiz" off the Coast of France on March 16th 1978, MDL no. 376 (N.D. Illinois Apr. April 18, 1984, American Maritime Cases, 2123-2199).

[4] In a handful of decisions, the US courts dealt with mini-corporate groups operating in the taxicab industry whose business was conducted as a single and highly integrated business unity (common management, common personnel, common trade names and logos, common supervisions and dispatching system, holding out to the public as a common operation, etc.), but which was typically fragmented into a number of separate subsidiary corporations. The entire assets of each of these group affiliates were composed of the ownership of a few cabs (sometimes only one) and a derisive liability insurance (the statutory minimum was $10000), usually insufficient to compensate tort victims injured by its operations (such as passengers and pedestrians). On these so-called *"taxi cases"*, see *Walkovszky v. Carlton* (18 N.Y. 2d 414, 223 N.E. 2d 6 [1966]), *Robinson v. Chase Maintenance Co.* (20 Misc. 2d 90, 190 N.Y. 2d 773

involving individual voluntary creditors, such cases are frequently reaching *public dimensions* and involving a *mass of involuntary creditors*: catastrophes regularly involving large multinational corporate groups, such as "Hoffmann-La Roche" in Italy (1976), "Bhopal" in India (1984), "Sandoz" in Switzerland, “Exxon Valdez” in USA (19), or “Erika" in France (1999) constitute just some of the most vivid and dramatic illustrations of this[5]. Besides, the problem is likely to increase as it has been asserted by several studies that enterprises operating in many industrial sectors, such as the hazardous-waste, chemical, nuclear, aeronautical, biotechnology sectors, usually expand through insulating in subsidiaries their most risky ventures in order to avoid tort liability exposure.

2. The Unsolved Theoretical Problem

But the problem also theoretically proves to be a major challenge. To deal with intragroup liability problems means to scrutinise the legitimacy of the extension of the “sacred cows” of classical corporation law, in particular the deep-seated institutions of the *legal personality* of corporations and of the *limited liability* of their shareholders, to new forms of enterprise organisation.

In fact, the typical hybrid nature of polycorporate enterprises soon raised the crucial problem of the unsuitability of the traditional liability standards, designed by the founding fathers of corporation law for the case of singlecorporate enterprises. By extending those traditional, highly formal concepts (fashioned to rule the relationships between independent corporations and its individual investors) uncritically to parent corporations, legal orders and courts have thus proceeded without any apparent recognition of the vitally different considerations involved in the regulation of the liabilities of sole independent corporations and of mere parts of a multi-corporate groups whose

[Sup.CT.1959]), *Teller v. Clear Service Co.* (9 Misc. d 495, 173 N.Y.S.2d 183 [Sup. Ct. 1958]) and *Mull v. Colt Co.* (31 F.R.D. 154 [S.D.N.Y. 1962]).

[5] On the Bhopal case, see in *re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified* 809 F.2d 195 (2d Cir. 1987); also *Note*, An Economic Approach to Forum non Conveniens Dismissals Requested by US Multinational Corporations – The Bhopal Case, in: George Washington Journal of Int. Law and Ecs. 1988, 215 ff.

activity falls entirely under the control of the parent corporation[6]. It soon became apparent that the automatic extension of these old archetypes to the new reality of corporate groups led inevitably to untenable distortions and could not be applied indiscriminately without leading to grossly unfair results[7].

Moreover, when surveying the state of affairs in comparative law, the first impression received is probably one of some dissatisfaction: not only do the main existing regulatory strategies provide quite disparate liability regimes for parent corporations, but even in themselves they often seem to provide no safe guidance as to the results, it being not rare to find cases, virtually identical as to their facts, where courts have decided in totally opposite senses. No wonder that a leading English scholar could refer recently to the question of intragroup liability as "one of the great unsolved problems of modern company law" (Schmitthoff).[8]

III
Regulatory Strategies in Intragroup Liability

Before turning to the conclusions reached by the Illinois court in the "Amoco Cadiz" case, it might be instructive to set a *hypothetical scenario* and to ask the following question: what would be the fate of this judicial dispute had the court adopted one of the prevailing regulatory strategies in the world-wide arena in the case at hand?

[6] For a critical revisiting of the historical, legal and economic rationale of the principle of the autonomy of corporations and of the limited liability of shareholders, as well as of their inconsistency regarding the phenomena of intercorporate control, see *Antunes*, Liability of Corporate Groups, 1974, 122 ff.; *Blumberg*, The Law of Corporate Groups, vol. III, 1987, 17 ff.

[7] This has been clearly portrayed in the argumentation of Government of India in the above mentioned *Bhopal* case: "The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damages caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology world-wide, acting through a forged network of interlocking directors, common operating systems, financial and other controls. (...) Persons harmed by the acts of a multinational corporation are not in position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise is liable for such harm" (Complaint, *Union of India v. Union Carbide Corp.*, ¶ 21, at 8 (no. 85 Civ. 2969 S.D.N.Y., 1985).

[8] *Schmitthoff*, Banco Ambrosiano and Modern Company Law, in: Journal of Business Law 1982, 361 (363).

Notwithstanding the different degrees of legislative, judicial and doctrinal development among the various national legal orders, one may distinguish currently three major types of *regulatory strategies* in comparative law. These strategies are: the traditional strategy of the *"entity law approach",* the revolutionary strategy of the "*enterprise approach"* and the mitigate strategy of the *"dualistic approach"*.

1. The Entity Law Approach

The so-called *"entity law approach"* – which has its clearest consecration in the USA legal system – represents the traditional and still-prevailing regulatory strategy concerning intragroup liability for the great majority of both Common and Civil Law countries.

This approach consists of the position of those legal orders that decide intragroup liability questions on the basis of the fundamental principle according to which *one member of a corporate group, namely the parent corporation, cannot be made liable for the debts or the acts of other group members for the reason that they are distinct legal entities*[9]. Under this view, the imposition of liability on the parent corporation for debts of group affiliates is considered as a rule to be impossible: only for the most extraordinary cases and in exceptional circumstances will this rule be set aside by *disregarding the corporate entity* of the corporations involved ("piercing the corporate veil" in USA, "lifting the corporate veil" in the United Kingdom, "superamento dello schermo della personalità giuridica" in Italy, "abuso de la personalidad juridica" in Latin Countries).[10]

If the court had adopted this classical approach of "entity law", it is likely that the fate of the victims of the oil spill would have been particularly

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[9] On this universal overarching archetype of American law on corporations, see *Blumberg*, The Law of Corporate Groups, 1983 and ff.; *Conard*, Corporations in Perspective, 1976, 416 ff.; *Fletcher*, Cyclopedia of the Law of Private Corporations, 3rd ed., § 25; *Henn/ Alexander*, Laws of Corporations and others Business Enterprises, 3rd ed., 15 f., 145, 344 ff.

[10] For curious legal-comparative undertakings on the topic, see *Cohn/ Simitis*, Lifting the Veil in the Company Laws of the European Continent, in: International and Comparative Law Quarterly 1963, 189 ff.; *Dobson*, Lifting the Veil in Four Countries: the Law of Argentina, England, France

unfortunate. Following this approach, the court would proceed from the assumption that the parent corporation “Standard Oil” should not be made liable for the debts of its wholly-owned subsidiary “Amoco Transport” for the reason that they were distinct legal entities. At most, one could expect from the court to enquire whether the subsidiary was treated as an "instrumentality", "alter ego" or another creature of the parent, as to permit a most exceptional disregard of its corporate entity. To that end, the court would then address the question of knowing whether the parent corporation did or did not respect the formal corporate separateness of its subsidiary, in a sort of grab bag analysis: did “Amoco Transport” observed the formalities of its incorporation and functioning? Did it kept separated directors, officers and employees? Had it separate bank account, financial records or auditing? And so on. Where it was found that the parent “Standard Oil” did not control its subsidiary “Amoco Transport” as a matter of form, then it is most likely that the former would be exonerated from any liability even when it had controlled the latter as a matter of fact.

2. The Enterprise Approach

The so-called *"enterprise approach"* calls for a new and revolutionary regulatory strategy on intragroup liability matters, and has found its most expressive recognition in several proposals initiated by EU law during the 1970’s in the context of its attempts at the harmonisation and co-ordination of company laws of European member states (namely, the proposals of a directive on groups of companies[11] and a regulation on the statutes of the European Company[12]).

This strategy argues that intragroup liability problems should be decided according to the fundamental principle that *the parent corporation shall be liable for all the unpaid debts and acts of its subsidiaries for the reason that the former controls the latter, forming thereby a unitary economic enterprise*. While

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and United States, in: International and Comparative Law Quarterly 1986, 839 ff.

[11] *Proposal for a Ninth Directive Based on article 54, 3 (g) of the EEC Treaty on Links between Undertakings and, in particular, on Groups of Companies* (EEC Doc. III – 1639/84-E).

[12] *Proposal for a Council Regulation on the Statute for European Companies*, in: O.J.E.C. 16/ 10/ 1989, nº C 263, 41ff. and O.J.C.E. 8/7/1991, nº C 176.

not yet having become positive law[13], this is a most interesting approach since it symbolises in a world-wide context the most far-reaching statutory undertaking against the prevailing traditional "entity law approach".[14]

If courts followed the so-called "enterprise approach", things would be likely to be quite different. Following this approach, it would be probably enough for the creditors to prove the existence of the sole instrument from which the existence of a mere relationship of domination between parent and subsidiary was derived – that is, the intercorporate stock ownership – in order to set in motion a regime of full, unlimited liability for the parent. What is more, once the group relationship had been established, the parent would have no possibility of exonerating itself from liability by proving that the accident could not be imputed directly or indirectly to its actual control, namely by bringing conclusive evidence that it did not participate at any rate in the design or supervision of the subsidiary vessel, or that the accident was caused by circumstances unpredictable and beyond its control (for instance, a case of "force majeur"). Therefore, if it were found that the parent “Standard Oil” controlled its subsidiary “Amoco Transport” as a pure matter of law, then the former would be held automatically liable for the debts of the latter even when such control had no possible causal linkage with the subsidiary default.

3. The Dualist Approach

Last but not least, somewhere in between these two radical and opposite strategies, a third intermediate and differentiated regulatory strategy may be referred to: the so-called *"dualist approach"*.

This approach has been adopted by the German system on affiliated companies (“verbundenen Unternehmen”), enacted in the Corporation Act

[13] See *Lutter*, Stand und Entwicklung des Konzernrechts in Europa, ZGR 1987, 324 (362).

[14] See *Dabin*, Systèmes Rigides du Type Konzernrecht – L'Exemple de la Proposition de Société Européenne, in: “Groupes de Sociétés – Une Politique Législative”, 1975, 143ff.; *Goerdeler*, Überlegungen zum europäischen Konzernrecht, in: ZGR 1972, 389ff; *Graffenried*, Über die Notwendigkeit einer Konzerngesetzgebung - Die Regelung der Europäische Aktiengesellschaft als Beispiele?, 1976; *Langen,* Der Vorschläge des Europäischen Konzernrechts zur Haftung eines herrschenden Unternehmens, in: ZRP 1978, 10ff.

("Aktiengesetz") of 1965[15], which regulates the group reality on the basis of a fundamental and clear-cut borderline between two legal-organisational models: the so-called "contractual" and "factual" groups"[16]. The regulation of the former aims legally to legitimise the control of parent corporation in breach of traditional canons of corporation law and organisationally to provide the only admissible model for centralised groups.[17] The regulation of the latter aims legally to preserve the autonomy of the subsidiary corporation according to the canons of the classical corporation law and organisationally to provide a model, at most, for very decentralised groups[18].

The treatment of liability issues in parent-subsidiary relationships follows then from the accommodation of the concrete group at stake within one of these two pre-established models: either a system of global compensation in

[15] Followed closely by some other national legal orders recently, such as Brazil (1976) and Portugal (1986): see *Comparato*, Les Groupes de Sociétés dans la Nouvelle Loi Brésilienne des Sociétés par Actions, in: Revue des Sociétés 1978, 845 ff.; *Antunes*, The Law of Affiliated Companies in Portugal, in: "I Gruppi di Società", 1996, 355 ff..

[16] In "contractual groups" ("Vertragskonzerne"), where the parent's control has been embodied "de iure" in a special contract of domination ("Beherrschungsvertrag"), the law has expressly recognised to parent corporations a broad legal power of control over its subsidiaries in open deviation from some of the classical canons of corporation law, and consequently imposed on the former a duty to cover all the annual losses or even a joint liability for the settlement of debts of the latter (§§ 291 ff. of "Aktiengesetz"). In "factual groups" ("faktische Konzerne"), where the parent's control exists as a mere "de facto" dominating influence which can be only exercised in the best interests of the subsidiary, the former is obliged to a duty of compensation for single established detriments that have emerged from the use of such influence (§§ 311 ff. of "Aktiengesetz"). For a general introduction on the German regulation of groups of companies, see *Emmerich/ Sonnenschein*, Konzernrecht, 6. Aufl. 1997.

[17] This results, not only from the fact that the domination contract has been deemed originally to grant to parent corporations the sole legitimate basis for their unrestricted legal right of intrusion on subsidiary affairs, but also indirectly from the centralisation pressures deriving from the heavier financial burdens to which the parent is subjected in consequence of such a contract or integration (namely, thanks to its duty to assume all net annual losses of the former). See *Strohn*: "The contractual groups is the most desirable group form particularly in cases of strong organisational intertwining" (original in German) (Die Verfassung der AG im faktischen Konzern, 177, p. 20).

[18] This comes about, not only from the circumstance that the parent does not enjoy any legal power of direction over the subsidiary so as to permit the former to stabilise a legitimate broad and permanent intrusion into subsidiary affairs (no duty of subsidiary managers to follow eventual instructions), but especially because its factual power can be only be exercised within the limits set by the preservation of the integrity of the subsidiary's own interests and patrimonial autonomy (or, if one prefers, because such factual power can only reach as far as the operability of the compensatory system of §§ 311ff. of "Aktiengesetz" permits). See *Hommelhoff*: "Only the factual group with very decentralised management structures is compatible with the global regulation of corporation law, particularly with the compensatory regime of §§ 311-318" (original in German) (Die Konzernleitungspflicht, 139); *Schmidt*: "§§ 311ff. legalise the exercise of factual domination over a corporation only in case of very weak and non-centralised unified management" (original in German) (Gesellschaftsrecht, 3. Aufl. 1997, 964).

contractual groups (where the parent is bound to assume all the annual losses of its subsidiary), or a system of mere punctual compensation in factual groups (where the parent has only to compensate concretely established patrimonial prejudice caused to the subsidiary).[19]

Once more, if the court had ruled from the background of such a two-level regulatory system provided by those legal orders where a specific group law has been enacted, it is likely that it would have proceeded as follows. Firstly, it would try to accommodate the multi-corporate group “Standard Oil” in one of the two existing legal models: given the absence of any domination contract and by the simple operation of the procedural game of §§ 17 and 18 of the Corporation Act, the corporate group at stake could then only be deemed as a so-called "factual group". Then, the court would probably go on to determine the general degree of centralisation of the group, in order to establish whether the parent exercised its controlling influence at arm´s length (“simple factual group”) or instead exercised a permanent intrusion into the entire business affairs of group subsidiaries (“qualified factual group”)[20]: only where it had been found that the parent “Standard Oil” had exercised a tight control over both strategic and day-to-day management of the subsidiary “Amoco Transport” and

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[19] While these rules represent the very core of the German intragroup liability system, one should be aware of the existence of other residual and functional equivalents, such as the jurisprudential *"piercing the corporate veil"* (cf. the *Herrstadt* and the *Sonnenring* cases: see also *Lutter*, Die zivilrechtliche Haftung in der Unternehmensgruppe, in: ZGR 1982, 244 (247 ff.); *Schmidt*, Zum Haftungsdurchgriff wegen Sphärensvermischung und zur Haftungsverfassung im GmbH-Konzern, in: BB 1985, 2074 ff.), the existence of *privately-made arrangements on parent liability* (e.g., "Patronatserklärungen”), and, above all, an important body of non-codified *judge-made liability rules* applicable to private companies (cf. the *ITT*, *Autokran, Tiefbau* and *Video* cases) and partnerships (cf. the *Gervais-Danone* case).

[20] On the so-*called "factual centralised groups"* ("qualifizierte faktische Konzerne”) – which is a hybrid form of corporate group which destroyed the theoretical elegance of the rigid two-stage regulatory framework – see the fundamental decision of BGH in the landmark of case *Autokran* of 1985 (BGHZ 95, 330, in: ZIP 1985, 1263), as well as further decisions in the *Tiefbau* case (BGHZ 107, 7, in: ZIP 1989, 440) and the *Video* case (BGHZ 115, 187, in: ZIP 1989, 1354). On literature, see *Deilmann*, Die Entstehung des qualifizierten faktischen Konzerns, 1990; *Druey*, Zentralisierte und Dezentralisierte Konzern - ist die Differenzierung rechtlich wünschbar oder realiziebar?, in: “Das St. Galler Konzernrechtsgespräch”, 1988, 9 ff.; *Hirte*, Der qualifizierte faktische Konzern, 1992; *Hoffmann-Becking*, Der qualifizierte faktische AG-Konzern, in: “Probleme des Konzernrechts”, 1989, 68 ff.; *Hommelhoff/ Stimpel/ Ulmer*, Heidelberger Konzernrechtstage – Der qualifizierte faktische GmbH-Konzern, 1992; *Lutter*, Der qualifizierte faktische Konzern, in: AG 1990, 179 ff.; *Scheffler*, Der qualifizierte faktische Konzern, in: AG 1990, 173 ff.; *Timm*, Grundfragen des "qualifizierten" faktischen Konzerns im Aktienrecht, in: NJW 1987, 977 ff.

persistently impaired its own entrepreneurial self-interest, would the former be obliged to cover the losses of the latter.

Notwithstanding the higher flexibility of this approach, its results might well prove again to be misleading. In fact, in spite of the assessment of highly-centralised group structure, it could well happen that the shipping accident at stake arose from external causes which were completely alien to the parental control, as it would be the case with an abnormal sea storm or a similar act of God – a case where the parent would be then penalised with liabilities outwith its actual control. This is decisive for the topic of intragroup liability. Since different intragroup liability regimes have been rigidly and automatically attached to these two pre-established group legal models, an inevitable gap between law and reality is likely to emerge whenever *the living governance structures of groups in the concrete case at hand diverge from that juridical model*. Thus, by automatically linking a heavier liability regime (a duty of compensation for losses and a joint direct liability) to the performance of a particular formal act (celebration of a contract of domination) or the existence of a parent's tight control over subsidiary affairs ("qualified factual control"), this approach may penalise parent corporations and often go too far in respect of subsidiary creditors' protection whenever the concrete liabilities complained of emerged from a decision-making process which was exceptionally conducted under the autonomous authority of subsidiary managers or from purely fortuitous and unpredictable circumstances, such as, for instance, natural catastrophes, insolvency of important subsidiary debtors, abrupt modification of the market or legal environment.[21] Inversely, by automatically excluding parent's liability just on the ground of a general assessment of a decentralised structure of the group, it is likely to unjustifiably benefit parent corporations and to underprotect their subsidiaries whenever the liabilities in dispute have

[21] This situation is likely to occur in the case of *decentralised contractual groups*, where the parent entrusted local subsidiary managers with a high level of decision-making authority regarding the conduct of their own business affairs or where subsidiary debts have originated from circumstances in spite of or beyond the group unified management (e.g. the subsidiary incurs annual net losses because of the political instability of the host country, such as lower productivity caused by political strikes). But it may well happen in *centralised factual groups* whenever the concrete liabilities in dispute are to be imputed to a decision-making process entirely unrelated to the parent's exercise of control.

emerged from a managerial decision-making process which the parent actually controlled in the case at hand.[22]

IV
New Avenues in Intragroup Liability?

Let us turn again to our case, confronting those hypothetical judicial solutions with the real decision reached by the court.

1. The Court Decision

In a most polemical decision dated 18 April of 1984, the State Court of Illinois declared the parent corporation "Standard Oil" liable for the liabilities of its subsidiary "Amoco Transport".

Looking now at the reasons underlying the judicial sentence, it is curious to notice that the court did not adhere strictly to any of the above mentioned regulatory approaches. It is true that, initially, the court developed reasoning echoing the traditional "entity law" approach: in fact, more than once, the court held the subsidiary Amoco to be an "instrumentality" of its parent Standard, relying on the disregard of norms concerning the formal separateness of the subsidiary corporate entity and the conduct of the subsidiary's business under a common group trademark[23]. It is also true that, subsequently, the court addressed the question of the general degree of centralisation of the group as a whole, in a fashion somewhat similar to the German jurisprudence on qualified

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[22] Considering that the great majority of existing corporate groups are still constituted as "de facto" groups, it is clear today that the dissuasive effect attempted by the original draftsman and the channelling of the factual power of control of parent corporations into "de iure" contractual schemes has failed (see *Bälz*, Einheit und Vielheit im Konzern, in FS Ludwig Raiser, 1974, 287 (306 ff.)). Moreover, it seems that a general and workable distinction between centralised and decentralised groups does not and cannot exist: as *Lutter* graphically put it, "the grey zone is here as large as the halo of a full moon on a foggy November night"! (*Der qualifizierte faktische Konzern*, in: AG 1990, 179, (184)). Cf. extensively *Antunes*, Liability of Corporate Groups, 1994, 180 ff., 206ff., 371 ff.

[23] "As an integrated multinational enterprise, which through a system of subsidiaries ensures the exploration, production, transportation and sale of oil products all over the world, is Standard responsible for the activity of their 100% subsidiaries, namely their «instrumentalities» Amoco International Oil Company and Amoco Transport Company. Standard exercised such a

factual groups, asserting then the existence of a highly-centralised group management and suggesting that the parent managed the subsidiary as a single branch or division.[24]

But the court did not stop there. Apparently considering such enquiries as to the compliance with the formal corporate entity of subsidiaries and as to the assessment of the general degree of centralisation of the group as being insufficient to ground the liability for the parent corporation, the court has focused its enquire on *whether the concrete situation of subsidiary default in the case at hand proceeded or not from a managerial process which was actually controlled by the parent corporation*. A set of circumstances was then found permitting the establishment of a narrow causality linkage between the control exercised by the group headquarters and the accident of the subsidiary vessel: namely, the construction of the vessel had been decided expressly by the board of directors of the parent, had been co-ordinated and financed by two other affiliates of the group, and had been insured by a third group affiliate; most important, the breakdown of the vessel was due to negligence incurred by the group headquarters central services, which were not only involved in the design and construction of the vessel, but were also responsible for the co-ordination of the world-wide operations of the group transportation system, for the safety and repairing procedures of the entire shipping fleet, as well as for the training of its crews.[25]

2. A Hybrid and Flexible Intragroup Liability System?

This judicial decision provides a singular case where past and future approaches on intragroup liability seem to appear curiously mixed. And future means that, in my opinion, in deciding whether the parent corporation should be made liable or not for debts of one group affiliate, the decisive question to ask

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control over these subsidiaries that they must be held as their mere «instruments»". In Re Oil Spill by "Amoco Cadiz" off the Coast of France, *cit.*, "American Maritime Cases", 2123 (2194).

[24] Thus, the court found a number of indicia, such as the existence of consolidated annual accounts, of interlocking directors and officers, of common internal audits, of common stock ownership and others, suggesting a highly-centralised group structure. In Re Oil Spill by "Amoco Cadiz" off the Coast of France, *cit.*, "American Maritime Cases", 2133 (2181 ff.).

should be *whether the particular business decision(s) from which the concrete liabilities in dispute arose were taken under the autonomous decision-making authority of the subsidiary corporation or instead under the control exercised by the parent*. Moreover, due to the typically unequal probative position of plaintiffs (subsidiary creditors) and defendants (parent corporation) in intragroup liability litigation, this substantive rule should be supported by an appropriate procedural system of *reversal of the burden of proof*[26], according to which it should be up to the parent corporation to bring evidence about whether such business decisions have originated from its own control or have been taken autonomously by the subsidiary.[27]

In conclusion, the treatment of liability issues in parent-subsidiary relationships should be based neither on a strict adherence to the dogma of corporate autonomy (as it is the case of the classical “entity law”), nor on a also dogmatic adherence to its opposed reality of corporate control (as proposed “de lege ferenda” by the “enterprise approach”), nor even maybe in a sharp separation between both (as in German and Portuguese Law), but instead in a regulatory strategy which takes seriously the very nature of the regulated phenomena itself: a *flexible and hybrid system of liability imputation* able to follow as flexibly and opportunistically as possible the typical hybrid blend of autonomy and control which characterises the governance structures of these new creatures of modern business activity, the polycorporate groups.

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[25] In Re Oil Spill by “Amoco Cadiz” off the Coast of France, *cit.*, “American Maritime Cases”, 2133 (2186 ff.).

[26] See also *Druey*, op.cit., 102; *Hofstetter*, Parent Responsibility for Subsidiary Corporations: Evaluating European Trends, in: International and Comparative Law Quarterly 1990, 576 (595); *Hoffstetter*, Sachgerechte Haftungsregeln für Multinationale Konzerne, 1997, 231 ff.; *Lehmann*, Das Privileg der beschränkten Haftung und der Durchgriff im Gesellschafts- und Konzernrecht, in: ZGR 1986 345 (366 ff.); *Posner*, The Rights of Creditors of Affiliate Corporations, in: Univ. California Law Review 1976, 499 (523); *Sauvain*, Droit des Sociétés et Groupes de Sociétés, 1972, 147. A somewhat similar procedural system has been adopted by some jurisprudence: cf. the cases *Gervais-Danone* (1980), *Autokran* (1986),*Tiefbau* (1989) and *Video* (1991) (for a detailed and critical review of these cases, see *Antunes*, Liability of Corporate Groups, 440 ff.).

[27] This seems justified twofold. From the plaintiff's viewpoint, the traditional system of "onus probandi", by forcing subsidiary creditors to bring evidence about a corporate decision-making process, the complex structures of which they are in no position at all to know, would expose them to a sort of *probatio diabolica* that would most probably call in question the operability of the liability system itself. But also from the defendant's viewpoint. As a matter of fact, by enjoying a most privileged insider position regarding the decision-making allocation system of their affiliates, parent corporations are in a better position to, and incur in the lowest information cost to, enlighten the court about the circumstances in which its own control over subsidiary management has actually been exercised in the case at hand.