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THESIS SUMMARY

AN EXPLORATION INTO LIABILITY OF CORPORATE GROUPS:

A COMPARATIVE PERSPECTIVE

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Table of Content

PART I. SHORT SUMMARY OF THE RESEARCH TASK

One of the key factors that contributed to the expansion and development of economic and business relationships alongside modern industrial, technological and scientific development is the establishment of a business corporation as a channel to participate business relationship locally and globally. Nowadays, corporate groups (most of them are multinational/transnational corporations) are much more powerful than some countries; their employees outnumbering the labour force and revenue surpassing Gross Domestic Product of an entire country. Those large corporations are designated by their subsidiaries. Thus, the question is that while multinational and national large corporations have been dominating business world, conglomerates have been replacing simple, single corporations what is ruling and regulating them. Are the present corporate law and its basic principles able to fulfil their role in today's business world? These are motivation of this study.

This study concerns the most common form of modern business that is called corporate groups. Corporate law is one of the most converged fields of law throughout the world. The fundamental legal principles and issues around corporation are generally similar in most countries, so it is common for corporate law to be studied within the scope of comparative law. Generally, its fundamental

issues still have not been resolved at the legislative, judicial and doctrinal level in world jurisprudence. In today's globalised corporate world, the same issues, the same aspirations, the same global corporate bodies, and connected businesses etc. all encourage a comparative study of corporate law and a search for common solutions to the common ground. It seems that there is still not a systematic change and reform in this field. In recent years, some countries have made gradual improvements in this field, although there is still no consistent and comprehensive approach to the regulation on corporate groups. The research has been attempting to reveal that the effects of applying traditional corporate law and doctrine on modern corporate groups' liability are causing the gap between the laws and the reality. The existing doctrines and paradigms need to be reevaluated in light of the new global economic era.

Rationale for the Research

There is a need to review and introduce main approaches and principles developed up to today. Without reaching out the fundamental limited liability paradigm there will always be fruitless and ineffective efforts continuously among academics and legislatures. The original legal theories, doctrines, principals of corporate law have been outdated over the realities of this modern business development, so it is necessary to scrutinise them and seek new theories and principles. In response to the issues, at

first, determining what the core cause of this legal backwardness is crucial.

It is need to be simply noted that the exigencies of commercial activity and practical problems corporations presenting are that roughly similar in global market economies throughout the world. Thus, the study reflects on the general international legal approaches to the liability of corporate groups and the key theoretical principles recommended by commentators in some legally and economically powerful jurisdictions, from a comparative law perspective. We will review current doctrinal trends with examples from prominent jurisdictions including German, the EU, France, the U.S., etc. Corporate groups law is interrelated with other areas of law such as labour, insolvency, tort, environment and so on but the range of this research falls within the only limited liability of corporate groups law through exploring doctrinal references and legal approaches in some of these areas.

The Innovative Side of the Research

The most important standpoint of this study is to find an optimal recommendation through the analyses in corporate groups' law environment that will contribute the development of corporate groups law. Liability is the foundation of many of the legal issues relating corporate groups such as minority shareholders' protection, governance, transaction and so on. The study's direction

and proposal are based on the intersection of classical enterprise theory within certain branches of law and newly introduced, modern due diligence/duty of vigilance principle's attributions. The main difference from the previous principles is that it is not attributed by the structure, types of control, or form of the group, but on the fact that it is defined by law as a corporate group generally. The novelty of this study is that it proposes a new partial enterprise principle which is particularly, inspired by international human rights law's due diligence principle.

While offering the partial enterprise principle the study also investigates other principles and doctrines which provide the general background information regarding corporate groups accountability including historical and international approaches to the issue whereas some more detailed analyses on particular matters such as newly enacted acts, regulations on liability.

The Scope of the Research

This study argues for alternative approach of the corporate group liability rather than rejecting current principles altogether by reviewing and analysing them. Because it pursues in accordance with literatures which have proposed enterprise liability only in certain circumstances. This is not mean separating the notion of limited liability in all circumstances. On the other words,

the principle of limited liability is not intended to be denied in all areas.

It is not intended to examine all different types of corporate groups' structure, different regulatory strategies and types of controls in detail, but mainly tried to focus on enterprise liability for a parent corporation considering more interdisciplinary context. The study not only examines current situation but also provide some possible options regarding the issue in question from the legal and socio-economic point of view. Briefly, the focus of the research will be liability corporate groups controversies while considering the experience of some jurisdictions.

Having reviewed the leading literatures which proposal various options from a revolutionary to flexible reform, and analysing from international law to national judicial decision, this research argues in favour of enterprise approach for corporate groups with revised and modified partial enterprise liability. It is worthy to note that the recommendations are intended to update the liabilities of the parent for the corporate group and are not for piercing the responsibility of the natural person- shareholders since within the law of the corporate group. While considering the difference of exemplified jurisdictions, I argue for the common core and ultimate cause of global regulatory shortcomings lies in the liability issues.

The Structure of the Research

The dissertation consists of introduction, 4 other chapters, conclusion, bibliography and appendices. These chapters are divided into sub parts and conclusions of each chapters, the first chapters deal with the legal, social, economic and political situations shaping the development of corporate world in most jurisdictions and furthermore explores the evolution of corporate groups' legal environment. The final chapters are more about theoretical inference and propositions.

Aim and Objects of the Research

The aim of the research is to explore the current situation, facing problems, controversies on corporate groups' responsibility through analysing legislations, jurisprudences and academic literatures in order to recommend suitable theoretical background and legal framework. This research attempts to propose the most potential principle for the legislation and will contribute to global corporate law field new knowledge and understanding of current perspectives and expectations on corporate group law through its comparative study.

Research Question

The study focuses on the opportunities, challenges and significance in regard to corporate groups liability through selected jurisdictions' experiences. It sets out to address the following research questions:

- What is currently regulating and governing corporate groups, while those large multinational and local corporations are ruling the world economy?
- Why have corporate groups been still so far free from responsibility? Where is the root of this situation? Is there any possibility to fix it?
- Which kind of judicial and statutory response must be there to the emergence of corporate groups?
- Where and how limited liability can be extended to a parent corporation?
- Is it possible to adopt enterprise liability and ‘due diligence’ tool, if so what can be its framework?

PART II. METHODOLOGY AND EXAMINATION OF THE RESEARCH

Research Methodology and Hypothesis

The research methodology is based on literature, case study and empirical study in the context of comparative legal perspective. With comparative approach considering positive and negative foreign jurisdiction's experience, the research's scientific findings will contribute knowledge to global corporate law field beyond the constraints of national frontiers.

Research findings are analysed in accordance with four main sources of information: firstly, the current literature, secondly, laws and regulations, thirdly, court cases, fourthly, statistic and data. The methods employed to develop this study involving comparison in historical and foreign jurisdiction's context, analyzing case and legislation, normative, perspective, explicative and descriptive legal characters on academic literatures, legislative documents, judicial decisions and empirical data.

To accomplish as objective a testing of the corporate group's liability related theory as possible, case studies examine the performance the effectiveness of the theory and principle and comparative analysis that explores the concepts developed in a comparative legal scholarship. During the research 95988 district civil courts' decisions

of Mongolia between the year of 2015 and 2020 studied and analysed. The purpose of conducting a case study survey using quantitative methodology is to analyse the current situation of corporate group law awareness with the findings and to propose the most efficient and effective theoretical and regulatory framework further. Some cases from different jurisdictions are chosen as an example and compared to other jurisdictions.

The research assumptions are that the issue of group corporate liability remains unresolved under the laws of most countries; there is no controversy in literature review in the implementation of enterprise theory, but only in the practical and judicial context; due to the diversity of groups' structures, internal relationships and communications, the principle of holding the parent company accountable cannot be applied over limited liability; and the principle of entreprise liability might be implemented only in certain preconceived legal areas but not as a common, fundamental legal characteristic of a corporation.

The Shortcomings of Limited Liability Principle and Legal Theories

The fundamental legal features of a corporation, such as limited liability and separateness, have greatly contributed to the development of corporate business, but it is not such a suitable legal principle for the group structured-collective corporations. Therefore, in the case

of a group corporation, the question arises as to whether there are grounds and opportunities to establish a different liability principle from a single corporation. There are a number of reasons for holding the group's parent corporation accountable: the shareholder of the corporation becomes its parent corporation, which is protected by its own limited liability and is again protected by the limited liability of its affiliated corporations; using this legitimate opportunity to get rid of responsbility, the affiliate or subsidiary is used for fraudulent activity; as a final result, the rights of the subsidiary's involuntary and outside creditors are left out of the law, justice is in doubt.

That compartmentalization of the corporation has led to a shift to risk, excessive risk, and failure to take action to remedy tort victims. Limited liability principle is originally intended to limit the risk of individuals being held liable for the company they invested in, it now offers protection to corporations that operate through subsidiaries and contractors. Briefly, although such businesses are economically interconnected, legally disconnected; these contradictions are challenges facing legalisative injustice. It is complicated to regulate the groups, as the subsidiary corporation has the contradictory features: on the one hand, independent and separate entity but on the other hand, controlled and depended unit.

In regard to the corporate group, limited liability provides ‘double protection’ to parent corporate, this double limitation could continue till a hundred protection for a corporate that consists of a hundred subsidiaries. In the context of justice, it is neither legally nor socially valuable one. Today's multinational and group-based relationships of corporates have been becoming increasingly difficult to adjust by traditional corporate law rules. There is hesitation like neglecting of the traditional legal protection of the corporate as its main feature will negatively affect the economy and the business sector. This is the reason behind this backwardness.

Enterprise liability law is a conceptual approach which intends to respond to the disadvantages and legal gaps caused by entity liability law. The theory of enterprise liability focuses on economic integration rather legal status through breaking legal separation principle of an entity. The second major theoretical approach of the study is due diligence/duty of vigilance which referred in the French Corporate Duty of Vigilance Law, placing the responsibility on domestic and multinational corporations in France to identify and prevent risks to human rights and the environment that could occur as a result of their business activities. The duty of vigilance approach for parent companies seeks to response the political, legal, social and economic importance of multinational corporations, and strengthen the accountability of parent

companies. It is a legislative innovation, building on both the existing soft and hard legal frameworks, thus challenging its observers on their conceptions of law and legal theory. In particular, the Law introduces into substantive law some apparently unidentified legal objects[1].

Fieldwork to study cases

In this study, we also selected Mongolia as a representative of the developing economy and law, and the study also consider and compare selected countries' corporate law situations. There are also a few jurisdictions which are relatively successful in the field of regulating corporate groups. For example, German would be a great example since it has the most developed set of provisions on corporate groups. Mongolian civil law originates from Roman-Germany law, corporate and business law is based on Anglo-American law elements. These multinational and national corporations have significant contribution for the overall macroeconomic performance of countries, Mongolia is not an exception in terms of that multinational corporations dominated business world. Nearly all the foreign invested corporations in Mongolia are actually controlled units of any multinational

[1] Stéphane Brabant et al, *French Law on the Corporate Duty of Vigilance*, (Revue Internationale De La Compliance Et De L'éthique Des Affaires – Supplément À La Semaine Juridique Entreprise Et Affaires N° 50 Du Jeudi 14 Décembre 2017, p.1

corporation running business throughout the world, mostly in mining resource sector.

These corporations in mining industry are mostly giant corporate groups, and usually involved in potential harms in environment, human rights violation and torts. When the social responsibility or corporate liability issues arise, those affiliated, controlled corporations just transfer nearly all of its assets into the parent corporation existing overseas just before declaring bankruptcy to escape liability. Creating subsidiaries and controlled units has been clearly as a way to avoid and ignore liability. Parent corporations externalise the risk of tort liability on intention through legally formed, separate, controlled subsidiaries. Thus, more extensive approach and holistic reform of corporate group law ought to be taken nowadays.

In this study, we surveyed a total of 95988 decisions of the courts of districts level during last five years. An analysis of these decisions reveals that very few cases have been resolved in accordance with company law, especially in the case of a corporate group related provisions.

Table 5. Survey of Court Decisions

Total corporations	144025
Civil court decisions (2015-2020)	95988
Corporate law related case	67
Corporate group law related case	1

In practice, there are many disputes which corporate groups involved in over loans, bankruptcies, mining licenses, fraud, and environmental rehabilitation, but there are two reasons why the courts have not resolved the issue as a group corporation's law: the legal environment of the corporate group, in particular the regulation of liability, is insufficient, almost absent; the court does not recognize that the group had used the corporation's organisational structure to take advantage of the lack of a legal framework for liability. In other words, the absence of a court decision does not mean that there is no such dispute. It assumes that principles of corporate group's extended liability have been used very little in other jurisdictions as well, due to the strong dominance of traditional limited liability and independent legal personality principles.

The case we have chosen also applies to this type of conflict. For example, 'AD' group operated a gold mine in Mongolia with Russian state investment, and a tax

dispute arose with the government. The corporation, which refused to pay the 50 bn tax debt, transferred all its assets to one of its subsidiaries and began preparing to declare bankruptcy. The government has also demanded compensation for environmental damage. The company appealed to international arbitration in Germany, Frankfurt. After several years of unresolved disputes, another Mongolian company bought the company with its debts. Our conclusion is that the problem would have been easier to resolve if there had been a group liability and asset pooling principle at the time and existing a legal framework to hold the parent company accountable.

Another case from the survey is back to 10 years ago filed, because the dispute of the corporation is still controversial in the society. However, it has still unresolved. It was concluded that the reason for the bankruptcy of Anod Bank, which went bankrupt in 2009, was the large amount of non-performing and overdue loans. According to a survey,[2] the bank suffered damages in the amount of principal, interest and receivables due to violation of the provision "the total amount of loans, other asset-equivalent assets, guarantees and sureties to be issued by the bank to one borrower and related persons shall not exceed 20% of the bank's equity", but one of the bank's borrowers was a large corporation called "G", which

[2] ХЗҮХ, *Хязгаарлагдмал хариуцлагыг нэвтлэх нь: Толгой ба охин компанийн хариуцлагын асуудал,* 2010, p.14

established an average of about 20 subsidiaries and borrowed from each of them. In this way, the company looks like manipulating group structure by establishing subsidiaries to obtain loans. At the time, no one mentioned this legal shortcoming, and even if it did, it would probably be considered all done within the law. It is called a 'façade' in veil lifting doctrine.

According to our research of legal environment under Mongolian laws, these provisions would become legal incentives for the establishment of a subsidiary. These include avoiding corporate liability, owning mineral licenses, evading corporate income tax, obtaining bank loans.

Survey of Regulations

	Company Law
	6.5. A controlled or daughter corporation shall not be liable for the debts of its parent corporation and the parent corporation shall not be liable for the debts of its controlled or daughter corporation, unless otherwise provided by law or the agreement concluded between them[3].
	Corporate Tax Income Law
	20. 10% applies to the first 6 billion Mongolian tugrik (MNT) of annual taxable income. If

[3] Company Law of Mongolia, 2011, Art.6.5

	annual chargeable income exceeds MNT 6 billion, the tax shall be MNT 600 million plus 25% of income exceeding MNT 6 billion[4].
	Banking Law
	7.1. The total value of loans, loan equivalent assets, guarantees, warranties and other contracts provided to one person and/or his/her related or connected persons shall not exceed 20 percent of the capital of the bank[5].
	Minerals Law
	7.4 One license may be granted to one legal person only[6].

PART III. FINDINGS, RESULTS AND UTILIZATION

To sum up proposals and doctrines from the main literature review sources of this study: the classic enterprise theory, proposed by Blumberg and others, based on more functional control while some commentators' true enterprise is relied on economic control, and these approaches have not been accepted broadly at present. It has not accepted into a positive law because just as it is difficult to define direct control in a veil lifting approach, moreover, it is difficult to define a real economic integration. Skinner's approach is in line with international and national law concept. However, the scope is limited by the test based on a country's

[4] Corporate Tax Income Law of Mongolia, 2019, Art.20
[5] Banking Law of Mongolia, 2010, Art.17.1
[6] Minerals Law of Mongolia, 2006, Art.7.4

development level and the issue of group liability is thereby viewed in terms of international human rights and environmental law but not as a problematic issue of corporate law. The approach of duty of vigilance / due diligence adopted in international law is currently applied only to human rights violations and environmental damage; and the most conspicuous and innovative solution is that it does not take into account the specifics, test and means of corporate structures, which have so far been unresolved. This would become more straight-forward solution.

Although there are some academic proposals to change the legal approach, the reason why it has not been successful so far is that, in addition to the political and economic reasons, from a legal point of view, the group is not an organisation with unified legal rights and obligations, nor is it a single entity due to its complex nature. However, within certain limited circumstances, the law tries to look into a corporate group through lifting the corporate veil principle. The limitations and uncertainties of lifting the corporate veil cannot provide an effective regulation for the corporate groups which needs a selective and specific manner. The principle of veil lifting is ineffective and incomplete, and it does not have a proper legal response to the dynamics and the reality of corporate business activities, so it may be more efficient to adhere to enterprise law approach in further legislation. This enterprise liability mechanism has the

advantage of flexibility but lacks the certainty that suitable theory-based legislation would present. There is a tendency that countries are beginning to apply the enterprise principle somehow, at least due diligence approach nevertheless, the corporate group law's failure to formulate comprehensive and coherent group regulations and laws do make it difficult for the court to apply it.

The approach we propose is that maintaining control based character of the enterprise liability principle when taking parent corporation to extended liability, regardless of the group's type, structure, size. That is the same as the principle of duty of vigilance / due diligence, this means that the type and structure of the group are not taken into account and not a fundamental criterion. In terms of coverage, it would cover areas such as human rights, environmental protection, mass tort, insolvency, and corporate law, in other words, it can be a partial enterprise liability approach. Although it governs different areas of law, the basic principles should be adopted into corporate law. In this way, it can be considered to be one of the underlying principles of corporate law, limiting the dogma of limited liability principle of corporate law.

The enterprise liability approach is criticised as the main disadvantage of is the uncertainty and rigidity of the solutions developed for group liability cases. Some have proposed a variety of standardised tests for entreprise

liability rule, which may lead to the same criticism as the veil lifting doctrine challenges which:

- it is difficult that court distinguish whether the parent corporation has violated a standard of care. Although it remains an option, a test is typically very difficult to satisfy, and impossible to satisfy without showing that the parent controlled the subsidiary.
- it is too vague and inconsistent, relying on high standards of control, the application is too narrow. Requiring very strict, centralised control, such as lifting the corporate veil, can avert parents from scrutinising the activities of subsidiaries, and they want to stay as far away as possible. Like due diligence and duty of vigilance approach, a rule should create incentives for the parent corporation to assess the risks and should aim to increase their accountability through doing everything that can to prevent harms.

There must be equal opportunities provided for the principle of entreprise liability like limited liability principle that is applied without any restrictions or criteria for any type of corporation, but primarily in *certain sectors*. Subsidiaries of a group are also difficult to legally regulate because of their complex nature of being *independent and dependent, separated and controlled*. So

that, it may also require dual-mode regulating strategy because of its dual legal nature.

This research's proposal suggests two strategies to introduce enterprise liability law: 1. legal control in addition to economic integration 2. applying for limted areas. Legal control means that it refers directly on the control definition provisions set out in the relevant law of the country, including both direct and indirect control and either vertical or horizontal structures. This model is adopted in international human rights law and in French due diligence/duty of vigilance law which disregards whether the group has centralised or decentralised structures which would be considerably strict and undoubtable strategy. To mention again, this study only addresses the issue of joint and extended liability of the parent corporation.

Adopting the principle of enterprise liability only partially to certain areas- mass tort, human rights, environment, insolvency, corporate law - may make this principle more flexible and less radical attribution. It also renders that limited liability, which is a fundamental principle of corporate law, does not need to be modified in its entirety. However, It should be noted that enterprise principle cannot be implemented effectively without making it an elemental principle of corporate law as well. This does not, however, preclude the application of the principle of enterprise as a fundamental principle in these mentioned

areas as limited liability does. Because the principle of limited liability is applied to the corporate group, regardless of its form, structure or size, if so, this rule should be equally served to the principle of enterprise liability. These characteristics form the basis of our proposed partial enterprise liability approach, which is based on the findings and results of this study. It is an approach that benefited from both the classic enterprise liability principle and the modern due diligence principle's features.

Conclusion

Rather than completely denying the limited liability of corporate groups, because of avoiding adverse economic consequences and radical changes, the tendency to legitimise this principle may be proper today in some areas of the law. It would be recommended to introduce the principle of extended liability in the areas of insolvency, mass tort, compensation for harm and damage to the environment at first. A broader perspective of regulation here is demanded. In doing so, consideration should be given further to when adopting enterprise liability principle, whether there must be criteria for the relationship and structure of the subsidiaries and parent or not. Understanding the distinct mechanisms of corporate groups may be a key to a fresh approach-enterprise liability.

The tendency to legislate this approach today may be justified in some parts of the law, rather than to completely rule out the limited liability of corporations in order to avoid adverse economic consequences and drastic changes. In the first instance, the principle of extended liability should be introduced in matters of insolvency, mass damage, environmental issues and compensation for harm and damage to the environment. The reason for highlighting these areas is that, as the cases show, most of the problems occur in these areas, therefore, there is an urgent need to address this issue in the first place. Corporate group liability law covers interdisciplinary issues of human rights, tort and business law.

Although some commentators come to a conclusion that 'legal separation will not fade any time soon as it approaches 200 years of existence'[7] the measurements and initiatives taken by international organisations and some countries in recent years are relatively encouraging. In particular, the growing willingness to regulate liability around multinational corporations indicates that there is a growing legal incentive to hold group corporations accountable for their actions abroad. These global

[7] Radu Mares, *Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses,* (Research Handbook on Human Rights and Business, Edward Elgar, 2020), p.25.

measurements will undoubtedly have an impact on national legislation in the future. Despite lawmakers and drafters claim that the legalising human rights due diligence does not affect the principle of limited liability this is one form contradicting the separate personality of the corporation from the theoretical view. It seems that the international community and the BHR movement will lead and encourage to hold corporations accountable in the context of a broader critique of global economic justice, with growing legal obligations of parent corporations. Although some see that policymakers are unsure of the complexities of markets and organisations and not ready for unintended consequences in abolition of limited liability, the gradual tightening of the international soft and national hard laws show that legislators are somehow willful to transfer responsibility for the harmful activities of a subsidiary to a parent corporation, as the law ignores of the principle of legal separation. Ideally, this partially enterprise liability framework would restructure the decisional processes within corporate groups to prevent catastrophic harms, while it enhances the reputation of the business and in compliance with justice through stopping corporate impunity. It is preferable for imposing liability to be constrained for both directly and indirectly control, in accordance with established principles, rather than on a case-by-case basis, which in turn prevents corporations through encouraging to avoid a harm cause. Enterprise liability law does not

treat natural and artificial legal persons without distinction, and has a pragmatic legal and policy response to modern globalisation and changes in corporate development. Just as other legal fields change their principles and doctrines in the course of development, the corporate liability law should keep pace with the times, it should not be stuck in the two centuries ago. It should be recognised by society and the judiciary for various jurisdictions around the world with considering that this corporate law initiative is a kind of ad hoc reform while promoting sustainable development further.

PART IV. LIST OF PUBLICATIONS

№	Journal name	Title	Language
1	Rule of law MLR No.74-4, 2019	Legal Theories of Company Groups	Mongolian
2	Rule of law MLR No.76-1, 2020	The Regulation of Corporate groups-a Comparative analysis	Mongolian
3	Law Review of Mongolia Special issue 5, 2020	The Unfolding of Limited Liability Principle-Corporate Groups Law	English
4	EWC (Law and Economy) London (3 co-authors) 3-4. issues, 2019	Limiting 'Limited Liability'	English
5	EWC (Law and Economy) London 3-4. issues, 2020	Corporate Law Principles versus Corporate Groups	English
6	Rule of law MLR No.76-3, 2020	The New Principle-Due Diligence	Mongolian