A more complicated variant on this situation arises when the contract is made on behalf of a Corporation not yet formed, and no explicit responsibility of the incorporator or promoter is provided. Under these circumstances, too, the latter's liability is usually inferred. Some Systems reach the result through consideration of agency principles, others through more or less specific Corporation law oriented doctrine: Only in the DUTCH law is this personal liability questionable; there the ability of the later Corporation to avoid the obligations of such a contract seems to dictate a reciprocal ability on the part of the contracting promoter-party not to be bound in the absence of a specific declaration of will to the contrary.

In the search for appropriately differentiated Aalter ego doctrine, the AMERICAN decisions, and especially the numerous ones of CALIFORNIA, are the most useful. While the readiness of the various AMERICAN jurisdiction to accept an "alterr ego" or "disregard" result differs greatly among them, it seems reasonably clean that the combination of clearly inadequate capitalization of the venture, and formal commingling of corporate and personal affairs by the owner sought to be charged, often suffices to justify a finding that, the corporate entity should be disregarded.

See the authorities cited supra n. 198. A related and less clearly resolved issue is the possible joint liability of the incorporators for the actions of one of them. See Wiedemann (supra n. 186) 454-457: cf. the separate treatment thereof in AMERICAN law, for the event of defective formation, supra s. 48. Another related issue is whether the actors' liability (especially if passive co-incorporators are liable) is unlimited or limited to the amount of the agreed subscription; See Wiedemann (supra n. 186) 454-455

See, typically, the generalization in Restatement of Agency 2d (1957) s. 326: "Unless otherwise agreed, a person who, in dealing with another, purports to act as agent for a principal whom both know to be nonexistent or wholly incompetent, becomes a party to such a contract".

See the GERMAN AktG § 41 par. I sent. 2; and the comparative study of René Weith, Les contrats conclus au nom d'une société anonyme en formation (Thesis, Lausanne 1935).

At least the incorporators were normally not responsible if the Corporation did not adopt or otherwise become liable on the contract; See van der Heiden and van der Grin te no. 119 p. 140; although, of course, they could specifically agree otherwise. The matter is controversial in DUTCH law, and other authors have expressed a preference for a Position more in consonance with the general view. See van Schilfgaarde 137; idem, Doorbraak van aansprakelijkheid in het N.V.-recht (Deventer 1970) 14-16; more generally, See Stein, Rechtsbevoegdheid. The newly-enacted version of art. 40 of the DUTCH Comm.C (Law of 29 April 1974 Stb. no. 285) does provide for promoters' liability - not, however, in consequence of their original participation in the transaction, but for damages resulting from the failure of the Corporation to accept it, which may make a difference if the company is never formed, as well as to the nature and measure of any recovery. It is therefore criticized by van Schilfgaarde, Doorbraak (supra) 15.

See the use of these materials in the major comparative literature on this subject: Serick, Rechtsform und Realität juristischer Personen (Berlin 1955), esp. 54-55 Müller-Freienfels, supra n. 232; Drobnig Haftungsdurchgriff bei Kapitalgesellschaften (Frankfurt 1959), esp. 7-9; Caflisch, Die Bedeutung und die Grenzen der rechtlichen Selbständigkeit der abhängigen Gesellschaft im Recht der Aktiengesellschaft (Thesis, Winterthur, Switz, 1961); Wiethölter, Book Review: ZHR 125 (1963) 324-326; Verrucoli, Il superamento della personalità giuridica delle società di capitali nella Common law e nella Civil Law (Milan 1964) esp. 34; Peter Kalbe, Herrschaft und Haftung bei Juristischen
Personen (Thesis, Heidelberg 1965); Wiedemann, Bär and Dabin, esp. 5; Rehbinder; Gower, too, leans hereon to some extent; see supra n. 238; and see Feltham, Lifting the Corporate Veil: Special Lectures of the Law Society of Upper Canada 1968. Developments in Company Law (Toronto 1968) 305-332, 332. See also La personnalité morale et ses limites (Travaux et Recherches de l'Institut de Droit Comparé de l'Université de Paris XVIII) (Paris 1960) ; Cohn and Simitis, "Lifting the Veil" in the Company Laws of the European Continent: 13 I.C.L.Q. 189-225 (1963) 241 See the overview in Lattin, Jennings and Buxbaum 141-155.

Referring Principles:

- X.2 - Piercing the corporate veil
- X.3 - Liability of corporate founders