



January 2015

## Conflicts of Corporate Laws in Europe - "Utopia Limited; or: The Flowers of Progress"

Werner F. Ebke  
*University of Heidelberg, Germany*

---

### Recommended Citation

Werner F Ebke, *Conflicts of Corporate Laws in Europe - "Utopia Limited; or: The Flowers of Progress"*, 68 SMU L. REV. 1021 (2015)  
<https://scholar.smu.edu/smulr/vol68/iss4/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CONFLICTS OF CORPORATE LAWS IN EUROPE – “UTOPIA LIMITED; OR: THE FLOWERS OF PROGRESS”

Werner F. Ebke\*

## PROLOGUE

THIS article is dedicated to Alan R. Bromberg (1928–2014), colleague and friend, a distinguished university professor, a leading partnership, corporate, and securities law scholar, a thoughtful attorney, and a demanding teacher who has inspired many students, academics, judges, and lawyers throughout the world. He also touched my professional life in the most positive way.<sup>1</sup> Alan, like his wife Anne, loved the opera. Therefore, it seems to be appropriate to write an article in his honor that brings together opera and corporate law.

## I. ACT I

*“A Company Limited? What may that be?  
The term, I rather think, is new to me.”*

These are not the words of the owner of a small business or start-up company in Germany in response to her legal advisor’s suggestion that she (re-)incorporate her business as a “private company limited by shares” (Ltd. or Limited Company) under English law. Rather, these are the words of King Paramount I, ruler of the fictitious South Pacific island kingdom of Utopia, in the Savoy Opera<sup>2</sup> “Utopia Limited; or: The Flowers of Progress” with libretto by William S. Gilbert and music by Arthur Sullivan, premiering on October 7, 1893, in London.<sup>3</sup> Gilbert’s libretto

---

\* Erstes juristisches Staatsexamen (J.D.) (University of Münster, Germany, 1977), LL.M. (University of California at Berkeley School of Law [Boalt Hall], 1978), Dr. iur. (J.S.D.) (University of Münster School of Law, 1981), Habilitation (University of Münster School of Law, 1987), Dr. rer. pol. h.c. (European Business School, Oestrich-Winkel, Germany, 2005), Dr. iur. h.c. (EBS Law School, Wiesbaden, Germany, 2013); Professor of Civil Law, German and European Corporate Law and Managing Director, Institute of German and European Corporate and Business Law, University of Heidelberg, Germany.

1. Professor Alan R. Bromberg chaired my tenure committee at the Southern Methodist University School of Law in Dallas, Texas, where I taught from 1983 until 1988.

2. The Savoy Operas denote a style of comic opera that developed in Victorian England in the late 19th century, with William S. Gilbert and Arthur Sullivan as the original and most successful practitioners. See Ivan Hewett, *The Magic of Gilbert and Sullivan*, TELEGRAPH (Aug. 2, 2009), <http://www.telegraph.co.uk/culture/music/opera/5931987/The-magic-of-Gilbert-and-Sullivan.html> [<http://perma.cc/R5Y5R-FAYA>].

3. The present article was inspired by the reference of the former dean of the Harvard Law School, Professor Robert Charles Clark, to this opera in his treatise on cor-

satirises limited liability companies and particularly the idea that a bankrupt company could leave creditors unpaid without any liability on the part of its owners.<sup>4</sup> It also lampoons the English Companies Act of 1862<sup>5</sup> by imagining the absurd convergence of natural persons (or sovereign nations) with legal commercial entities under the limited liability company law.<sup>6</sup> In addition, the libretto mocks the conceits of the late 19th century British Empire and several of the nation's beloved institutions.<sup>7</sup> In mocking the adoption by a "barbaric" country of the cultural and legal values of an "advanced" nation, it takes a tilt at the cultural and legal aspects of imperialism.<sup>8</sup>

At the end of Act I of the Opera, King Paramount I ("*A King of autocratic power we . . . . A despot whose tyrannic will is law . . . . Whose rule is paramount o'er land and sea*") receives his eldest daughter, Princess Zara, who has returned<sup>9</sup> from the University of Cambridge's Girton College.<sup>10</sup> The King had sent his daughter to England in the hope that her training there would help him to transform Utopia into a more "civilized" country, using Victorian England as a role model ("*Oh, maiden rich in Girton lore*").<sup>11</sup> With a view to remodelling the political and social institutions of Utopia, Princess Zara has brought with her six British gentlemen ("*The Flowers of Progress*"), "*Representatives of the principal causes that have tended to make England the powerful, happy and blameless country which the consensus of European civilization has declared it to be.*"<sup>12</sup> Princess Zara introduces them one by one: Captain Fitzbattleaxe (of the British Army), Sir Bailey Barre (Q.C. and MP), Lord Dramaleigh (a British Lord Chamberlain), Mr. Blushington (of the County Council), Mr. Goldbury (a company promoter, subsequently Comptroller of the Utopian Household) and Captain Sir Edward Corcoran (KCB, Royal Navy).<sup>13</sup> Each gentleman is asked to give a piece of advice about how Utopia could be advanced.<sup>14</sup>

Their advice is as follows:

---

porate law. See ROBERT C. CLARK, CORPORATE LAW 708 (1986); see also Werner F. Ebke, *Gesellschaften aus nicht privilegierten Drittstaaten im Internationalen Privatrecht: "Utopia Limited; oder: Die Blüten des Fortschritts,"* in Festschrift für Hans-Jürgen Hellwig 117 (Michael Hoffmann-Becking, Peter Hommelhoff & Friedrich Graf von Westphalen eds., 2010).

4. W.S. GILBERT & ARTHUR SULLIVAN, UTOPIA LIMITED 32, 34, 44 (1893).

5. Companies Act, 1862, 25 & 26 Vict., c. 89 (Eng.).

6. See GILBERT & SULLIVAN, *supra* note 4, at 34–35.

7. See generally *id.*

8. See *id.* at 40.

9. See *id.* at 10.

10. Girton College was founded in 1869 as the first residential college for women at the University of Cambridge in England. See *Girton's Past*, GIRTON COLL., <http://www.girton.cam.ac.uk/girtons-past> [http://perma.cc/6KDA-EDA9].

11. GILBERT & SULLIVAN, *supra* note 4, at 20.

12. *Id.* at 28.

13. See *id.* at 29–31.

14. *Id.* at 32.

Captain Fitzbattleaxe: *"Increase your army!"*  
 Lord Dramaleigh: *"Purify your court!"*  
 Captain Corcoran: *"Get up your steam and cut your canvas short!"*  
 Sir Bailey Barre: *"To speak on both sides teach your sluggish brains!"*  
 Mr. Blushington: *"Widen your thoroughfares, and flush your drains!"*

Mr. Goldbury's advice is that of a typical company promoter:

*"Utopia's much too big for one small head –  
 I'll float it as a Company Limited!"*

Astonished, the King asks:

*"Company Limited? What may that be?  
 The term, I rather think, is new to me."*

Mr. Goldbury explains:

*"Some seven men form an Association  
 (If possible, all Peers and Baronets),  
 They start off with a public declaration  
 To what extent they mean to pay their debts.  
 That's called their Capital; if they are wary  
 They will not quote it at a sum immense.  
 The figure's immaterial — it may vary  
 From eighteen million down to eighteen pence.  
 I should put it rather low;  
 The good sense of doing so  
 Will be evident at once to any debtor.  
 When it's left to you to say  
 What amount you mean to pay,  
 Why, the lower you can put it at, the better."*

After the chorus's affirmation

*"When it's left to you to say  
 What amount you mean to pay,  
 Why, the lower you can put it at, the better."*

Mr. Goldbury continues:

*"They then proceed to trade with all who'll trust 'em  
 Quite irrespective of their capital  
 (It's shady, but it's sanctified by custom);  
 Bank, Railway, Loan, or Panama Canal.  
 You can't embark on trading too tremendous —  
 It's strictly fair, and based on common sense —  
 If you succeed, your profits are stupendous —  
 And if you fail, pop goes your eighteen pence.  
 Make the money-spinner spin!"*

*For you only stand to win,  
And you'll never with dishonesty be twitted.  
For nobody can know,  
To a million or so,  
To what extent your capital's committed!"*

And the chorus repeats:

*"For nobody can know,  
To a million or so,  
To what extent your capital's committed!"*

Mr. Goldbury goes on:

*"If you come to grief, and creditors are craving  
(For nothing that is planned by mortal head  
Is certain in this Vale of Sorrow — saving  
That one's Liability is Limited),  
Do you suppose that signifies perdition?  
If so you're but a monetary dunce —  
You merely file a Winding-Up Petition,  
And start another Company at once!  
Though a Rothschild you may be  
In your own capacity,  
As a Company you've come to utter sorrow —  
But the Liquidators say,  
'Never mind — you needn't pay,'  
So you start another company tomorrow!"*

The chorus reiterates:

*"But the Liquidators say,  
'Never mind — you needn't pay,'  
So you start another company tomorrow!"*

The King begins to take pleasure in Mr. Goldbury's advice:

*"Well, at first sight it strikes us as dishonest,  
But if it's good enough for virtuous England —  
The first commercial country in the world —  
It's good enough for us."*

Yet, the King's Wise Men Scaphio and Phantis, both Justices of the Supreme Court of Utopia, and Tarara, the "Public Exploder" who has the duty to detonate the King if Scaphio and Phantis order him to do so ("*If ever a trick he tries — he tries that savours of rascality, at our decree he dies — he dies without the least formality*"),<sup>15</sup> express a word of caution:

*"You'd best take care —  
Please recollect we have not been consulted."*

The King, however, disregards their objection:

---

15. See GILBERT & SULLIVAN, *supra* note 4, at 6.

*"And do I understand you that Great Britain  
Upon this Joint Stock principle is governed?"*

Mr. Goldbury rejoins truthfully:

*"We haven't come to that, exactly — but  
We're tending rapidly in that direction.  
The date's not distant."*

The King responds enthusiastically:

*"We will be before you!  
We'll go down in posterity renowned  
As the First Sovereign in Christendom  
Who registered his Crown and Country under  
The Joint Stock Company's Act of Sixty-Two."*

King Paramount I then decides to incorporate his Crown and country under the English Companies Act of 1862. He is convinced that, thereby, he will bequeath something important and valuable, for his own benefit and that of his people and his country:

*"Henceforward, of a verity,  
With Fame ourselves we link —  
We'll go down to Posterity  
Of sovereigns all the pink!"*

While the attendant Utopians are enthusiastic, Scaphio and Phantis quarrel:

*"If you've the mad temerity  
Our wishes thus to blink,  
You'll go down to Posterity,  
Much earlier than you think!"*

Tarara corrects them:

*"He'll go up to Posterity  
If I inflict the blow"*

Scaphio and Phantis respond apologetically:

*"He'll go up to Posterity,  
Of course he will, you're right!"*

Yet, Princess Zara, her friend Captain Fitzbattleaxe, and her younger sisters, Princesses Nekaya and Kalyba, are unconcerned:

*"And as for our posterity  
We don't care what they think!"<sup>16</sup>*

---

16. *Id.* at 32–35.

## II. ACT II

The Kingdom of Utopia has been transformed into a replica of Britain (“... *this happy country has been Anglicized completely!*”)<sup>17</sup> that is even better (“*more perfect*”) than its role model (“*She is England with improvements*”):<sup>18</sup> Utopia has built an army and a navy, established courts, purified its literature and drama, and followed Mr. Goldbury’s suggestion so that the country and the Crown are now limited liability companies.<sup>19</sup> Utopia has turned from a government known as “Despotism Tempered by Dynamite”<sup>20</sup> into Utopia Limited. The King and the Flowers of Progress exult in their success (“*Society has quite forsaken all her wicked courses*”).<sup>21</sup> And the people, pleased with English fashions and customs, sing about the country’s new glory (“*Eagle high in cloudland soaring*”).<sup>22</sup> Scaphio and Phantis, the King’s Wise Men, are furious, however, because the changes pose a threat to their power and influence (“*With fury deep we burn*”).<sup>23</sup> They demand that the monarch reverse the changes.<sup>24</sup> When he refuses, they remind him of their power over his life (“*If you think that when banded in unity*”).<sup>25</sup> Yet, the King points out that one can only wind up, but not blow up a limited liability company.<sup>26</sup> Scaphio and Phantis conclude that the King is right (“*He’s no longer a human being he’s a Corporation, and so long as he confines himself to his Articles of Association we can’t touch him*”).<sup>27</sup> Realizing that they have lost their powers of extortion over the King, Scaphio and Phantis plot with Tarara to reverse the course of events (“*With wily brain upon the spot*”).<sup>28</sup>

Meanwhile, Princesses Nekaya and Kalyba meet with Mr. Goldbury and Lord Dramaleigh (“*A wonderful joy our eyes to bless*”),<sup>29</sup> who tell the King’s daughters that English girls are not as “*demure*” as Utopian girls, but rather heartily and fun-loving.<sup>30</sup> The Princesses are pleased at the prospect of abandoning some of the “*musty and fusty rules*” according to which they were raised (“*Then I may sing and play?*”).<sup>31</sup>

Eventually, Scaphio and Phantis manage to raise popular wrath “*Upon our sea-girt land*” and to persuade the King of Utopia that the changes

---

17. See *id.* at 40.

18. See *id.*

19. *Id.*

20. See AC Meetup: Leftist Analysis of Gilbert & Sullivan’s “Utopia Limited” or the Flowers of Progress, <http://www.dailykos.com/story/2015/06/14/1392224/-AntiCapitalist-Meetup-Leftist-Analysis-of-Gilbert-Sullivan-Utopia-Ltd-or-the-Flowers-of-Progress> [http://perma.cc/39YB-695R].

21. GILBERT & SULLIVAN, *supra* note 4, at 39.

22. *Id.* at 42.

23. *Id.*

24. *Id.* at 42–43.

25. *Id.* at 44.

26. *Id.*

27. *Id.* at 44.

28. *Id.* at 44–45.

29. *Id.*

30. *Id.* at 48.

31. *Id.* at 49.

brought about by the *Flowers of Progress* are not to the country's advantage (*"So down with them! – Down with the Flowers of Progress"*).<sup>32</sup> Asked by the King what went wrong, Scaphio responds that the *"boons have brought Utopia to a standstill!"*<sup>33</sup> There has been an end to war, he points out, making the army and navy superfluous (*"Our pride and boast – the Army and the Navy – have both been reconstructed and remodeled upon so irresistible a basis that all the neighboring nations have disarmed – and War's impossible!"*);<sup>34</sup> sanitation is so good that the doctors are out of work (*"Your County Councillor – Has passed such drastic Sanitary laws – That all the doctors dwindle, starve, and die!"*); and, the laws are so perfect that crime and litigation no longer exist, emptying the courts and leaving lawyers jobless (*"The laws, re-modelled by Sir Bailey Barre, – Have quite extinguished crime and litigation: – The lawyers starve, and all the jails are let – As model lodgings for the working-classes!"*).<sup>35</sup> Scaphio summarizes: *"In short – Utopia, swamped by dull Prosperity[,]"* and demands that *"affairs [be] – Restored to their original complexion!"*<sup>36</sup>

King Paramount I asks his daughter Zara for a solution.<sup>37</sup> After a little prodding from Sir Bailey Barre, Princess Zarah realizes that she has forgotten the *"most essential element"* of British civilization: the parliamentary system of government (Government by Party). *"Introduce[,]"* Zara suggests, *"that great and glorious element at once the bulwark and foundation of England's greatness and all will be well!"*<sup>38</sup> Under the two-party system, each party, once elected, will so confound the efforts of the other that no real progress will be made (*"No political measures will endure, because one Party will assuredly undo all that the other Party has done"*),<sup>39</sup> leading to the happy result for which everybody strives (*"Then there will be sickness in plenty, endless lawsuits, crowded jails, interminable confusion in the Army and Navy, and, in short, general and unexampled prosperity"*).<sup>40</sup> Once the system of Government by Party is adopted, the "Monarchy Limited" will transform itself into a "Limited Monarchy" (*"From this moment Government by Party is adopted, with all its attendant blessings; and henceforward Utopia will no longer be a Monarchy (Limited), but, what is a great deal better, a Limited Monarchy!"*).<sup>41</sup>

King Paramount I relents, instituting the critical reform of government, which is sure to lead to plenty of work for lawyers, doctors, police, and other public employees, and the day is saved, as Scaphio and Phantis are imprisoned, and Utopia Limited is finally free.<sup>42</sup> The attendant Utopians

---

32. *Id.* at 52.

33. *Id.*

34. *Id.* at 52.

35. *Id.* at 52–53.

36. *Id.* at 53.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*



are overwhelmed with joy and cheer.<sup>43</sup> The curtain falls as the people sing their praises of “[the] little group of isles beyond the wave”—Britain!<sup>44</sup>

### III. ACT III

A little over one hundred years later, the vision of Gilbert and Sullivan is reality: English company law has become an important “export item,” not least within the European Union (EU).<sup>45</sup> Since the mid-1980s, company promoters *à la* Mr. Goldbury on both sides of the English Channel have been offering companies incorporated under English law for sale (“I’ll float it as a *Company Limited!*”).<sup>46</sup> Language barriers are relatively easy to overcome as English has become the predominant language of the business community within the EU, which provides the English legal system a comparative advantage over the legal system of other EU Member States whose national languages are less widely known.<sup>47</sup> In addition, a growing number of lawyers and consultants on the Continent are familiar with the English legal system, economics, and customs because, like Princess Zara, they studied law or economics at a renowned university in the United Kingdom (UK).<sup>48</sup> Last, not least, the continuing digitalization, too, facilitates the formation of a Ltd. by foreign persons under English law.<sup>49</sup> Not surprisingly, therefore, the English Ltd. has, for many years, been among the top choices in Germany when founders of a business were considering an alternative to incorporating their business as a closely-held corporation, or *Gesellschaft mit beschränkter Haftung* (*GmbH*),<sup>50</sup> under German law.<sup>51</sup>

43. *Id.*

44. *Id.* at 54.

45. For an early account of the notion that “law as a product” can be “imported” and “exported,” see, for example, Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969), and Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985).

46. See Werner F. Ebke, *The Limited Partnership and Transnational Combinations of Business Forms: “Delaware Syndrome” Versus European Community Law*, 22 INT’L LAW. 191, 195 (1988) (stating that “[p]rivate incorporation services continually attempt to attract even more business”).

47. See John Tagliabue, *In Europe, Going Global Means, Alas, English*, NEW YORK TIMES (May 19, 2002), <http://www.nytimes.com/2002/05/19/world/in-europe-going-global-means-alas-english.html> [<http://perma.cc/4JH8-X595>].

48. See Anna K. Bernzen, *Deutsche Juristen in London: Fish and Chips statt Wurststulle*, <http://www.lto.de/recht/studium-referendariat/s/deutsche-juristen-england-solicitor-legal-practice-course-london-llb-rechtsanwalt/> [<http://perma.cc/VNP7-DJUJ>].

49. See Gebhard Rehm, *Die Private Company Limited by Shares (Ltd.) nach englischem Recht*, in AUSLÄNDISCHE KAPITALGESELLSCHAFTEN IM DEUTSCHEN RECHT 328–29 (Horst Eidenmüller ed., 2004); see also *infra* note 55.

50. For an English-language introduction to the law of the *GmbH* and a bi-lingual synopsis of the relevant statutes, see, for example, CARSTEN JUNGSMANN & DAVID SANTORO, *GERMAN GMBH-LAW – DAS DEUTSCHE GMBH-RECHT* (2011).

51. 9,703 English Private Ltd. were registered in Germany as of January 1, 2015, amounting to 78.7% of all foreign companies registered in Germany. See Udo Kornblum, *Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1. 1. 2015)*, 106 GMBH-RUNDSCHAU [GMBHR] 687, 695 (2015). Over the past several years, the percentage of English limited companies *vis-à-vis* all foreign companies registered in Germany has declined, however, from 89.8% on January 1, 2010, to 85.7% on January 1, 2011, 83.5%

## A. BOON OR BANE

At first glance, the Ltd. appears to be an attractive form of business association (“*A wonderful joy our eyes to bless*”),<sup>52</sup> especially to many owners of small and medium-sized businesses as well as start-up companies in Germany.<sup>53</sup>

1. *The English Ltd.: An Appealing Form of Business Association*

For one, the process of forming and registering a Ltd. is swift and does not involve a great deal of red tape.<sup>54</sup> While in Germany the formation and registration of a *GmbH* may take several weeks, an English Ltd. can be formed and registered within 48 hours if the application is filed online and model articles of associations are used.<sup>55</sup> Also, unlike under Germany’s law of closely-held corporations,<sup>56</sup> documents concerning the formation and registration of a Ltd., like subsequent amendments of its Articles of Association and transfers of its shares (*Geschäftsanteile*), do not need to be notarized by a *Notar* (i.e., a “notary public”),<sup>57</sup> which not only makes the formation of a Ltd. less costly,<sup>58</sup> but also adds a certain degree of informality and flexibility (“*Then I may sing and play?*”).<sup>59</sup> In addition, unlike the German law of closely-held corporations (“*musty, fusty rules?*”),<sup>60</sup> English law does not require a private Ltd. to have a minimum amount of legal capital, i.e., the amount that the company receives from those who subscribe for its shares.<sup>61</sup> Rather, while it is re-

---

on January 1, 2012, 81.8% on January 1, 2013, 80.6% on January 1, 2014, and 78.7% on January 1, 2015. See *id.* at 695. The reasons for the decline are explained in more detail *infra* text accompanying notes 153–66.

52. See GILBERT & SULLIVAN, *supra* note 4, at 48.

53. For a thorough comparison of the *GmbH* and the Ltd., see, for example, JASPER NEULING, *DEUTSCHE GMBH UND ENGLISCHE PRIVATE COMPANY* (1997).

54. See Wolfgang Kessler & Eicke Kessler, *Die Limited – Fluch oder Segen für die Steuerberatung?*, 50 DEUTSCHES STEUERRECHT [DStR] 2101, 2102 (2005).

55. See Set up a Private Limited Company, Gov.UK, <https://www.gov.uk/limited-company-formation/register-your-company> [<http://perma.cc/C88E-FHKD>] (stating that a same day service is possible but “[y]ou must get your application to Companies House by 3 p.m.”).

56. See Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Act on companies with limited liability], Apr. 20, 1892, REICHSGESETZBLATT [RGL] 846, as amended §§ 2(1), 15(3), [http://www.gesetze-im-internet.de/englisch\\_gmbhg/index.html](http://www.gesetze-im-internet.de/englisch_gmbhg/index.html) [<http://perma.cc/W5VS-BSF2>].

57. Kessler & Kessler, *supra* note 54, at 2102. For details of the role, functions, and professional qualifications of a *Notar* in Germany, see generally PETER L. MURRAY & ROLF STÜRNER, *THE CIVIL LAW NOTARY – NEUTRAL LAWYER FOR THE SITUATION. A COMPARATIVE STUDY ON PREVENTIVE JUSTICE IN MODERN SOCIETIES* (2010).

58. See, e.g., Rehm, *supra* note 49, at 328. For details of corporate and tax law aspects of the Ltd. from the perspective of German lawyers, see, for example, VOLKER G. HEINZ & WILHELM HARTUNG, *DIE ENGLISCHE LIMITED*. (3d ed. 2012); CLEMENS JUST, *DIE ENGLISCHE LIMITED IN DER PRAXIS* (4th ed. 2012).

59. See GILBERT & SULLIVAN, *supra* note 4, at 49.

60. German law requires a *GmbH* to have a minimum legal capital (*Stammkapital*) of 25,000. See Reichsgesetzblatt [RGL] [Limited Liability Companies Act], Apr. 20, 1892, GmbHG at 846, § 5(1). Of this amount, at least 50% must have been paid in at the time of registration. See *id.* § 7(2). For recent legislative reforms, see *infra* notes 156–68.

61. Historically, apart from a short period in the early years of modern company law in the middle of the 19th century, British law has not attached importance to minimum

quired to state the value of the consideration to be received by the Ltd. upon the issuance of its shares, the company maintains full control over this amount<sup>62</sup> (“*They start off with a public declaration – To what extent they mean to pay their debts. That’s called their Capital; if they are wary – They will not quote it at a sum immense. The figure’s immaterial — it may vary – From eighteen million down to eighteen pence. I should put it rather low; The good sense of doing so – Will be evident at once to any debtor. When it’s left to you to say – What amount you mean to pay, Why, the lower you can put it at, the better.*”).<sup>63</sup> Thus, setting up a Ltd. in England requires less capital than forming a GmbH in Germany.

As no minimum capital is required by law, there are no complex rules on the commitment, contribution, and maintenance of capital (“*And you’ll never with dishonesty be twitted. For nobody can know, To a million or so, To what extent your capital’s committed!*”).<sup>64</sup> The historically important conceptual linkage between legal capital and limited liability for shareholders of a corporate entity sensed by William S. Gilbert does not exist in the case of the Ltd. (“*They then proceed to trade with all who’ll trust ‘em – Quite irrespective of their capital [It’s shady, but it’s sanctified by custom]; Bank, Railway, Loan, or Panama Canal. You can’t embark on trading too tremendous — It’s strictly fair, and based on common sense — If you succeed, your profits are stupendous — And if you fail, pop goes your eighteen pence.*”).<sup>65</sup> In spite of the absence of a statutorily required minimum amount of legal capital, English law, as a general rule, lets the shareholders of a Ltd. have limited liability, which may prove to be beneficial to them if the company fails (“*If you come to grief, and creditors are craving [For nothing that is planned by mortal head – Is certain in this Vale of Sorrow — saving That one’s Liability is Limited], Do you suppose that signifies perdition?*”).<sup>66</sup> Needless to say, it is as easy to form a Ltd. as it is to liquidate it and to wind it up (“*You merely file a Winding-Up Petition, And start another Company at once! Though a Rothschild you may be – In your own capacity, As a Company you’ve come to utter sorrow — But the Liquidators say, ‘Never mind — you needn’t pay,’ So you start another company tomorrow!*”).<sup>67</sup> Last, not least, unlike in Germany, a statutorily institutionalized participation of employees in the decision-making processes of the company or the supervision of management (*i.e.*,

---

capital requirements. See GOWER & DAVIES, PRINCIPLES OF MODERN COMPANY LAW 273 (Paul L. Davies & Sarah Worthington eds., 9th ed. 2012).

62. *Id.* at 274–75.

63. GILBERT & SULLIVAN, *supra* note 4, at 33.

64. *But see* GOWER & DAVIES, *supra* note 61, at 276–77, 286–91, 319–76; ALAN DIGNAM & JOHN LOWRY, COMPANY LAW 114–17 (2009).

65. Most English Ltd. are reported to have a share capital of no more than GBP 100.00. See HEINZ & HARTUNG, *supra* note 58, at 70.

66. See GOV.UK, *Choose a Legal Structure for Your Business*, <http://www.gov.uk/business-legal-structures/limited-company> [<http://perma.cc/43HJ-99VG>].

67. See GILBERT & SULLIVAN, *supra* note 4, at 34.

codetermination)<sup>68</sup> is not required under English company law.<sup>69</sup>

## 2. The Most Essential Elements

However, as is illustrated in Gilbert and Sullivan's opera *Utopia Limited*, persons considering the formation of a Ltd. as an alternative to a business association organized under the laws of their own country or the liquidation of an existing domestic limited liability company coupled with its reincorporation under English law must not overlook the "most essential elements" of the legal and economic environments within which the Ltd. exists and operates, both in its state of incorporation and in the country in which it conducts all or most of its business (*i.e.*, host country). Thus, for example, although shareholders of a Ltd., as a general rule, enjoy limited liability for the company's debt ("He's no longer a human being he's a Corporation, and so long as he confines himself to his Articles of Association we can't touch him"),<sup>70</sup> English courts have developed a body of case law dealing with the attempts of corporate creditors to satisfy their claims out of the personal assets of the corporation's shareholders, despite the general rule of limited liability.<sup>71</sup> Cases of this sort have been referred to by metaphors, such as "mere façade," "sham," or "pretence" cases and attempts to "lift the corporate veil."<sup>72</sup> Furthermore, di-

68. Germany introduced codetermination in 1951, establishing employee participation at two levels of corporate governance: the firm level, with work councils (*Betriebsrat*), and the board level, with employee representatives on the board of non-executive directors (*Aufsichtsrat* or supervisory board). See, e.g., Bernhard Grossfeld & Werner Ebke, *Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe*, 26 AM. J. COMP. L. 397, 398–409, 427–30 (1978) (explaining the German two-tier model of corporate governance, which differs from the U.S. American unitary board model, and the codetermination laws). The law of 1951 applies primarily to larger companies in the coal, iron, and steel industries. *Id.* at 428. In 1976, codetermination was extended to other industries, but without requiring full parity of shareholder and employee representatives, as the chairman of the board of non-executive directors has the tie-breaking vote, which, due to the rules relating to the election of the chairman, ultimately ensures that the shareholder representatives on the supervisory board have the final say. See GEORG BITTER, *GESELLSCHAFTSRECHT* 33–34 (2d ed. 2013). The Law of 1976 applies to corporations having, *inter alia*, more than 2,000 employees. *Id.* at 33. Corporations having between 500 and 2,000 employees are required, by a law enacted in 2004, to establish a separate board of non-executive directors two-thirds of the members of which are to be elected by the shareholders and one-third by the employees. *Id.* Currently, the Law of 1976 and the Law of 2004 apply to approximately 700 corporations each. See BARBARA GRUNEWALD, *GESELLSCHAFTSRECHT* 268 nn.1–2 (9th ed. 2014). For a comparative analysis of the role and effects of employee representation on corporate governance, see, for example, Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 52–56 (2011).

69. See Kessler & Kessler, *supra* note 54, at 2102; Werner F. Ebke, *Company Law and the European Union: Centralized versus Decentralized Lawmaking*, 31 INT'L LAW. 961, 968 (1997). For a critical assessment of the German law of employee representation on the board of non-executive directors, see, for example, Otto Sandrock, *The Colossus of German Supervisory Codetermination: An Institution in Crisis*, 16 EUR. BUS. L. REV. 83, 85–91 (2005).

70. See GILBERT & SULLIVAN, *supra* note 4, at 44.

71. See GOWER & DAVIES, *supra* note 61, at 214.

72. See *id.* at 214–23; DIGNAM & LOWRY, *supra* note 64, at 34–49. In practice, however, the corporate veil of a Ltd. is seldom lifted by courts. See, e.g., JUST, *supra* note 58, at 26; FELIX STEFFEK, GLÄUBIGERSCHUTZ IN DER KAPITALGESELLSCHAFT 783–809 (2011).

rectors of a Ltd. might incur personal liability for fraudulent<sup>73</sup> or wrongful trading.<sup>74</sup> In some cases, directors might also be subject to

Within groups of companies, the corporate veil of a Ltd. is, as a general rule, not pierced either. See Moritz Renner, *Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe*, 43 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 452, 466 (2014).

73. See Insolvency Act, 1986, c. 45, § 213. It reads as follows:

- (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
- (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

For details of this provision, see, for example, GOWER & DAVIES, *supra* note 61, at 227–30. From a comparative perspective, see STEFFEK, *supra* note 72, at 312–42; CLAUS MÖSSLE, GLÄUBIGERSCHUTZ BEIM ZUZUG AUSLÄNDISCHER GESELLSCHAFTEN AUS DER SICHT DES ENGLISCHEN RECHTS 74–76 (2006).

74. See Insolvency Act 1986, c. 45, section 214, which reads as follows:

- (1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.
- (2) This subsection applies in relation to a person if –
  - (a) the company has gone into insolvent liquidation
  - (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
  - (c) that person was a director of the company at that time.
- (3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into solvent liquidation) he ought to have taken.
- (4) For the purpose of subsections (2) and (3), the facts a director of a company ought to have known or ascertain, the conclusions he ought to reach, and the steps he ought to take are those that would be known or ascertained, or reached or taken, by a reasonably diligent person having both –
  - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
  - (b) the general knowledge, skill and experience that that director has.
- (5) The reference in subsection (4) to the functions carried out in relation to a company by a director of a company includes any functions he does not carry out but that have been entrusted to him.
- (6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.
- (7) In this section “director” includes a shadow director.
- (8) This section is without prejudice to section 213.

For details of this provision, see, for example, GOWER & DAVIES, *supra* note 61, at 230–32. For a comparative analysis, see, for example, STEFFEK, *supra* note 72, at 342–440; MÖSSLE, *supra* note 73, at 77–89. A “shadow director” within the meaning of section 214(7) is a person, other than a professional advisor, in accordance with whose directions or instructions the directors of a company are accustomed to act. See GOWER & DAVIES, *supra* note 61, at 232–33.

disqualification.<sup>75</sup>

In addition, as the internal affairs of a Ltd. having its principal place of business outside the UK are, as a matter of EU law, governed by English law,<sup>76</sup> there may be a need for costly legal advice to meet the legal requirements of the company's state of incorporation, including the law of taxation.<sup>77</sup> Additional expenses may result from the need to comply with financial accounting, financial disclosure, and audit requirements under the laws of both the home state and the host state.<sup>78</sup> The requirement that the Ltd. have a registered office in the UK,<sup>79</sup> too, causes expenses. Also, it should be borne in mind that, in most cases, doing business without sufficient capital (*i.e.*, equity capital or external financing) may not be as easy as it may appear at first glance, because corporate creditors are likely to bargain for explicit additional collateral and lending institutions might want to take a security interest in the Ltd.'s inventory and accounts receivable, if any, or, alternatively, receive a personal guarantee or adequate collateral from shareholders or directors, or both.<sup>80</sup> Last, not least, creditors, suppliers or customers may have only limited confidence in a minimally capitalized Ltd. and, hence, may hesitate or even decline to do business with such a company.<sup>81</sup>

## B. EMPIRICAL EVIDENCE

Due to the lack of reliable statistics, the exact number of English private limited companies having their principal place of business outside the U.K. is unknown. In Germany, however, empirical data illustrate that the English Ltd. is quite popular ("*Utopia, swamped by dull Prosperity*").<sup>82</sup> 9,703 English Ltd. were registered in Germany as of January 1,

75. Under the Company Directors Disqualification Act of 1986, c. 46, the court may render a disqualification order (section 1), for example, for general misconduct in connection with companies, conviction of an indictable offense (section 2), persistent breaches of companies legislation (section 3), or fraud in connection with the winding-up of a company (section 4). A disqualification order may also be made for unfitness (sections 6 through 9), for competition infringements, or fraudulent or wrongful trading (section 10). Company Directors Disqualification Act, 1986, c. 46, §§ 1–4, 6–9, 10. For details of this Act, see, for example, GOWER & DAVIES, *supra* note 61, at 251–69. For a comparative analysis, see, for example, STEFFEK, *supra* note 72, at 591–725.

76. For details, see *infra* notes 106 & 109.

77. Kessler & Kessler, *supra* note 54, at 2102; Rehm, *supra* note 49, at 328 n.7.

78. Kessler & Kessler, *supra* note 54, at 2102; Matthew G. Doré, *Déjà Vu All Over Again? The Internal Affairs Rule and Entity Law Convergence Patterns in Europe and the United States*, 8 BROOK. J. CORP. FIN. & COM. L. 317, 337 (2014). For a thorough analysis of the financial accounting and disclosure requirements of English Ltd. having their principal place of business in Germany, see ROLAND WEIS, RECHNUNGSLEGUNGSPFLICHTEN VON EU-SCHNEIDNAUSLANDSGESELLSCHAFTEN IM LAND IHRER TATSÄCHLICHEN WIRTSCHAFTLICHEN BETÄTIGUNG: INSBESONDERE IM HINBLICK AUF IN DEUTSCHLAND TÄTIGE ENGLISCHE LIMITEDS (2009).

79. Kessler & Kessler, *supra* note 54, at 2102.

80. See CLARK, *supra* note 3, at 728 n.7.

81. See Rehm, *supra* note 49, at 328 n.7; Doré, *supra* note 78, at 337. For a Swiss perspective, see, for example, Martin Steiger, *Englische Limited Company als Alternative zur Schweizer GmbH?*, <http://startwerk.ch/2012/12/11/rechtsformen-und-risiken-englische-limited-company-als-alternative-zur-schweizer-gmbh> [<http://perma.cc/NKH2-392X>].

82. GILBERT & SULLIVAN, *supra* note 4, at 53.

2015, amounting to 78.7% of all foreign companies registered in Germany.<sup>83</sup> The number of English Ltd. registered in Germany on January 1, 2015, is, of course, relatively small compared to the 1,156,434 closely-held corporations (*GmbH*), 15,716 public corporations (*Aktiengesellschaft* or *AG*), and the many other forms of corporate business associations, including the *Societas Europaea* that were registered in Germany on January 1, 2015.<sup>84</sup> Also, over the past several years, the number of English Ltd. registered in Germany has declined steadily.<sup>85</sup> Thus, the number of English Ltd. registered in Germany on January 1, 2015, was 7.5% lower than on January 1, 2014 (*i.e.*, 10,491).<sup>86</sup> The decline is even more significant if compared to the number of English Ltd. registered in Germany on January 1, 2012 (*i.e.*, 12,553),<sup>87</sup> or on January 1, 2010 (*i.e.*, 17,551).<sup>88</sup>

Nevertheless, the potential use of English Ltd. is manifold. In Germany, the Ltd. is typically utilized for small businesses and start-up companies, the owners of which want to limit their exposure to personal liability but do not have sufficient means to meet the minimum capital requirements of comparable forms of business associations under German law, such as the *GmbH*.<sup>89</sup> Yet, there are many more reasons to form a Ltd. For instance, many Ltd. serve as (sole) general partner of German limited partnerships (*Kommanditgesellschaft*),<sup>90</sup> which are limited partnerships in which no natural person is personally and unlimitedly liable for the debts of the business.<sup>91</sup> Such a combination of business forms

---

83. Kornblum, *supra* note 51, at 695.

84. *Id.* at 688, 695.

85. See *supra* note 49. For a detailed exposition of the reasons for this decline, see *infra* text accompanying notes 153–66.

86. Kornblum, *supra* note 51, at 695 (identifying 10,491 Ltd. on January 1, 2014).

87. Udo Kornblum, *Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand: 1. 1. 2013)*, 104 GMBHR 693, 695 (2013) (identifying 12,553 Ltd. on January 1, 2012).

88. See Udo Kornblum, *Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1. 1. 2010)*, 101 GMBHR 739, 746 (2010) (identifying 17,551 Ltd. on January 1, 2010).

89. See, e.g., CHRISTINE WINDBICHLER, *GESELLSCHAFTSRECHT* 213 (23d ed., 2013).

90. See, e.g., Oberlandesgericht [OLG] [Court of Appeals] of Stuttgart, Dec. 22, 2010, 85 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSR] 63, 64 (2010) (Ger.); see also text accompanying *infra* note 165.

91. In Germany, the limited partnership with a corporate general partner, typically a German *GmbH*, is the single most popular form of business association for small and medium-sized enterprises because, for many years, limited partnerships enjoyed certain tax and other advantages over corporate forms of business associations. See, e.g., WINDBICHLER, *supra* note 89, at 499–503. If the corporation is the sole general partner, the limited partnership is, however, treated like a corporate entity for purposes of the rigid financial disclosure laws of Germany for unlisted companies. See Werner F. Ebke, *Publizität – (k)ein Thema?*, in RECHNUNGSLEGUNG, PUBLIZITÄT UND WETTBEWERB 29, 30–35 (Werner F. Ebke & Andreas Möhlenkamp eds., 2010). In the late 1980s, many limited partnerships in Germany began to use a foreign corporation, such as the English Ltd. or a Dutch *besloten vennootschap*, instead of a domestic corporation to serve as their (sole) general partner. See Ebke, *supra* note 46, at 194–95. On January 1, 2014, there were 3,117 limited partnerships in Germany having an English Ltd. as a (sole) general partner, 612 (or 16.4%) less than on January 1, 2013. See Udo Kornblum, *Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1. 1. 2014)*, 105 GMBHR 693, 695, 700 (2014). Historically, such cross-border combinations of business forms were not permissible under

combines the advantages of limited personal liability with the benefits of personal, as opposed to corporate, income taxation.<sup>92</sup> Moreover, the Ltd. is often formed to serve as a “rescue company” (*Auffanggesellschaft*) in the context of bankruptcy proceedings or corporate restructurings<sup>93</sup> (“*And as for our posterity – We don’t care what they think!*”).<sup>94</sup> In addition, the Ltd. is employed for short-term projects (“*But the Liquidators say, ‘Never mind — you needn’t pay,’ So you start another company tomorrow!*”), such as testing new, liability-prone products or implementing pricing strategies in different markets. In some instances, Ltd. were established to circumvent Germany’s codetermination laws<sup>95</sup> that, at present, are applicable only to companies incorporated under German law.<sup>96</sup> Furthermore, due to its international name recognition from Canada to

---

the then prevailing German rules of conflicts of corporate laws. See Ebke, *supra* note 46, at 194–205. Today, however, corporations duly incorporated and registered in another EU member state enjoy the right to join, as (sole) general partner, a German limited partnership even if managing the business and affairs of the limited partnership is the only activity of the foreign corporation, provided, the law of the corporate general partner’s state of incorporation allows the corporation to become a general partner of a foreign limited partnership. See, e.g., Oberlandesgericht [OLG] [Court of Appeals] of Stuttgart, Dec. 22, 2010, 85 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSPR] 63, 64 (2010) (Ger.); accord Christoph Teichmann, *Die Auslandsgesellschaft & Co.*, 43 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 220, 223–28 (2014); see also *infra* note 165. With the rise of the *Unternehmergesellschaft (haftungsbeschränkt)*, *infra* note 164, in recent years, the limited partnership with a Ltd. as a (sole) general partner is going out of fashion, however. See *infra* note 164.

92. See Ebke, *supra* note 46, at 193.

93. See *Auffanggesellschaft—Gründung einer Limited*, CLICKBOXX.UK GROUP, <http://www.clickboxx.uk/#!/faq—auffanggesellschaft/cngo> [<http://perma.cc/BGY3-G4YN>].

94. See GILBERT & SULLIVAN, *supra* note 4, at 35.

95. Kessler & Kessler, *supra* note 54, at 2102. Often cited examples of the use of an English company as corporate general partner of a German limited partnership are Air Berlin PLC & Co. KG, which operates the second largest airline in Germany and the seventh largest air carrier in Europe, and Müller Ltd. & Co. KG, a major drug store chain in Germany. See Peter Hommelhoff, *Mitbestimmungsvereinbarungen zur Modernisierung der deutschen Unternehmensmitbestimmung: Zum Gesetzesentwurf des Arbeitskreises „Unternehmerische Mitbestimmung“*, 39 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 48, 55 (2010). The Hans-Böckler-Stiftung, an organization of the German Federation of Trade Unions, which is committed to the promotion of co-determination, reported that thirty-seven (as opposed to only seventeen in 2006) firms that were subject to the 2004 Law on Co-determination in 2010, see *supra* note 66, having their principal place of business in Germany were incorporated or re-incorporated in a country other than Germany, twenty-one of which were organized as a German limited partnership with a foreign corporation (e.g., an English Ltd., a Dutch *besloten vennootschap*, or a corporation incorporated in one of the states or territories of the United States) as general partner. See Böckler Impuls 5/2010 (Sept. 24, 2015, 11:30 PM), [http://www.boeckler.de/22497\\_22501.htm](http://www.boeckler.de/22497_22501.htm) [<http://perma.cc/AD2G-J5NM>]. According to the Hans-Böckler-Stiftung, several of these enterprises openly avow that they chose a foreign company to avoid Germany’s codetermination laws. *Id.*

96. As presently written, Germany’s codetermination laws of 1976 and 2004, *supra* note 66, apply only to companies formed under German law. It is still unsettled whether application of Germany’s codetermination laws could be extended to companies that are formed under the law of another EU Member State but conduct most or all of their business in Germany. See, e.g., Werner F. Ebke, *The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond*, 38 INT’L LAW. 813, 843–45 (2004) (concluding that such an application would not be in conformity with EU law). But see Peter Hommelhoff, *Gesetzgebungsprojekte im Gesellschafts- und Unternehmensrecht für die kommende Legislaturperiode*, 34 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2177, 2180



Hong Kong and from Ireland to South Africa, the Ltd. is often set up to engage in international business activities<sup>97</sup> ("*Bank, Railway, Loan, or Panama Canal. You can't embark on trading too tremendous*").<sup>98</sup> Last, not least, the Ltd. may also serve as parent company of a group of national or transnational enterprises.<sup>99</sup>

### C. FREEDOM OF ESTABLISHMENT

The proliferation of the English Ltd. in Germany was made possible by three seminal decisions of the European Court of Justice (ECJ) dealing with a company's "freedom of establishment" that, today, is set forth in the Treaty on the Functioning of the European Union (TFEU).<sup>100</sup>

#### 1. "In-Bound" or "Immigration" Cases

According to the ECJ's decisions in *Centros*,<sup>101</sup> *Überseering*,<sup>102</sup> and *Inspire Art*,<sup>103</sup> a corporation that is validly formed and registered in one of the 28 EU Member States, state of incorporation, but has its "real seat" (*siège réel* or *effektiver Verwaltungssitz*), or principal place of business, in another EU Member State, its host Member State, is entitled, under articles 49<sup>104</sup> and 54<sup>105</sup> of the TFEU, to be recognized by the host Member

---

(2013) (arguing in favor of an application of Germany's codetermination laws "at least" to "pseudo-foreign" corporations).

97. See Norbert Horn, *Deutsches und europäisches Gesellschaftsrecht und die EuGH-Rechtsprechung zur Niederlassungsfreiheit – Inspire Art*, 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 893, 900 (2004).

98. GILBERT & SULLIVAN, *supra* note 4, at 33.

99. See, e.g., Case C-80/12, *Felstowe Dock and Railway Co. Ltd. et al. v. The Comm'rs of Her Majesty's Revenue and Customs*, para. 27–36, <http://curia.europa.eu>; see also HORN, *supra* note 97, at 900.

100. Treaty on the Functioning of the European Union, O.J. (C 326) 1, 47 (EC).

101. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

102. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

103. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

104. TFEU, *supra* note 100, article 49:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital."

105. TFEU, *supra* note 100, article 54:

Companies or firms formed in accordance with the law of a Member State and having the registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

State as a corporation, the legal status and internal affairs of which are governed by the law of its state of incorporation.<sup>106</sup> As a result, an EU Member State may no longer resort to conflict-of-corporate-laws principles such as the “real seat doctrine” (*Sitztheorie*), which traditionally was applied by numerous Continental European countries (e.g., Austria, Belgium, France, Germany, Italy, Poland, Romania, Slovakia and Spain) and required courts *not* to recognize a corporation that had been duly formed and registered in one of the EU Member States but had its “real seat,” or principal place of business, in a Member State other than its state of incorporation.<sup>107</sup>

As a result of the ECJ’s jurisprudence on the freedom of establishment of EU companies, English Ltd. are free to transfer their principal place of business (real seat) to any other EU Member State without losing their legal status as an English company, the internal affairs of which are governed by English law.<sup>108</sup> The host Member State, in turn, has no choice—except in the rarest situations<sup>109</sup>—but to recognize the Ltd. as an English

---

106. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice], July 4, 2013, 69 JURISTEN-ZEITUNG [JZ] 102, 102-03 (2014) (Ger.); Bundesgerichtshof [Federal Court of Justice], Mar. 14, 2005, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1648, 1649 (2005) (Ger.).

107. Werner F. Ebke, *Not-for-Profit Organisations, Conflicts of Laws and the Right of Establishment under the EC Treaty*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 298, 304–05 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010). For details of the real seat doctrine, its history and objectives, see, for example, Werner F. Ebke, *The “Real Seat” Doctrine and the Conflict of Corporate Laws*, 36 INT’L LAW. 1015 (2002). The term “real seat” is commonly understood as referring to the place where the fundamental decisions by a corporation’s management are being implemented effectively into day-to-day activities of the firm. *Id.* at 1022. Thus, the term “real seat” refers to the principal place of business or center of administration (*centre d’exploitation*). *Id.* at 1022; see also *infra* text accompanying notes 270–73 & 315–19.

108. The right of establishment exists as long as the Ltd. continues to be duly registered in the Register of Companies in England. Cf. Oberlandesgericht [OLG] [Court of Appeals] of Hamm, Feb. 1, 2011, 86 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSPR] 34, 35 (2011) (Ger.) (holding that an English Ltd. that had been dissolved but had, thereafter, applied for “restoration to the register” *ex tunc*, had to be treated, pursuant to s. 1028[1] of the Company Act of 2006, as a valid English Ltd. “as if it had not been dissolved or struck off the register”). If the Ltd. has been dissolved or struck off the register but continues to have assets in Germany that cannot be legally allocated to another person, the company is treated as a “residual company” (*Restgesellschaft*) in regard to those assets until it has been completely wound up because otherwise the assets would be a *res nullius*. See Kammergericht [Court of Appeal] in Berlin, Mar. 17, 2014, 35 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1755 (2014) (Ger.). If, however, the dissolved Ltd. had only one shareholder, the Ltd.’s assets are treated, upon dissolution, as property of that shareholder. See Oberlandesgericht [OLG] [Court of Appeals] of Hamm, Apr. 11, 2014, 35 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1426 (2014) (Ger.).

109. See Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919, para. 92 (holding that “[i]t is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment[.]”) (emphasis added); accord Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155 (holding that “a Member State is entitled to take measures designed to prevent certain of its nationals from

company<sup>110</sup> and to apply English law to its internal affairs<sup>111</sup> even if, like in *Centros* and *Inspire Art*, the company had never engaged in any business activity, and had no intention whatsoever to do business, in its state of incorporation.<sup>112</sup> In the words of King Paramount I, “if it’s good enough for virtuous England—The first commercial country in the world—It’s good enough for us.”<sup>113</sup>

Within the EU, the “conflict-of-corporate-laws revolution”<sup>114</sup> initiated by the ECJ is met with approval by both courts and commentators (“Eagle high in cloudland soaring”), and rightly so because a truly liberal approach to the solution of conflict-of-corporate-laws cases within the European Internal Market requires – except in the rarest situations<sup>115</sup> – recognition by the host Member State of corporations duly formed and registered in another Member State, even though the law relating to the internal affairs of corporations has not yet been harmonized fully within

---

attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.”); Case C-378/10, *Vale Építési kft*, 2012 E.C.R. I-440, para. 39 (holding in a case of cross-border conversion that “[i]n so far as concerns justification on the basis of overriding reasons in the public interest, such a protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions, it is established that such reasons may justify a measure restricting the freedom of establishment on the condition that such a restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them[ ]” (footnotes omitted)). However, thus far, the ECJ has never held any such national measure to be in accordance with articles 49 and 54 of the TFEU. *See also* Case C-80/12, *Felstowe Dock and Railway Co. Ltd. et al. v. The Comm’rs of Her Majesty’s Revenue and Customs*, para. 27–36, <http://curia.europa.eu> (holding that “neither the preservation of powers of taxation as between the Member States nor the combating of tax avoidance can properly be relied upon in support of . . . a system . . . which in no way pursues a specific objective of combating purely artificial arrangements, but is designed to grant a tax advantage to companies that are members of groups generally, and in the context of consortia in particular”).

110. Bundesgerichtshof [BGH] [Federal Court of Justice], July 4, 2013, 69 JURISTEN-ZEITUNG [JZ] 102, 102–03 (2014) (Ger.) (involving an English Ltd.).

111. *See, e.g.*, Bundesgerichtshof [Federal Court of Justice], Mar. 14, 2005, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1648, 1649 (2005) (Ger.) (holding that Germany’s law on the liability of directors of a closely-held corporation [*GmbH*] could *not* be applied to an English Ltd. duly formed in England but having its principal place of business in Germany); *accord* Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 13, 2010, 85 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSR] 43, 46 (2010) (Ger.) (involving an English Ltd.); Finanzgericht [FG] [Tax Court] of Rhineland-Palatina, Mar. 14, 2005, 50 DSrR 738, 739 (2005) (Ger.) (involving a Liechtenstein “family foundation” [*Familienstiftung*] having its real seat in Germany). Also, English law governs the legal consequences of the dissolution of a Ltd. *See* Oberlandesgericht [OLG] [Court of Appeals] of Hamm, Feb. 1, 2011, 86 IPRS 34, 35 (2011) (Ger.); Finanzgericht [FG] [Tax Court] of Münster, May 11, 2011, 86 IPRS 35, 37–38 (2011) (Ger.).

112. Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 19, 2005, 164 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 148, 153 (2005) (Ger.).

113. GILBERT & SULLIVAN, *supra* note 4, at 34.

114. EBKE, *supra* note 96, at 844.

115. *See supra* note 109.

the EU<sup>116</sup> and efforts of the six founding Member States (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) in the mid-1960s to conclude an international convention (*i.e.*, treaty) on the mutual recognition of companies within the EU were not successful.<sup>117</sup>

By imposing upon the host Member State the duty to recognize the corporate status of a corporate entity organized and registered under the laws of another EU Member State and to apply the law of the state of incorporation to the internal affairs of that corporation, the ECJ has moved the Member States, at least in “in-bound” or “immigration” cases like *Centros*,<sup>118</sup> *Überseering*<sup>119</sup> and *Inspire Art*,<sup>120</sup> towards the “internal affairs doctrine” that has traditionally been applied, as a general rule, by courts in the United States of America to determine the law governing the internal affairs of sister-state corporations<sup>121</sup> as well as foreign corporations.<sup>122</sup> As the United States Supreme Court emphasized in *CTS Corp. v. Dynamics Corp. of America*, the “internal affairs rule” is essential for the functioning of the free market system: “[The] beneficial free market system depends at its core upon the fact that a corporation, except in the rarest situations, is organized under and governed by the law of a single jurisdiction, traditionally the corporate law of the state of its incorporation.”<sup>123</sup> And in *Shaffer v. Heitner*, the Court observed that “[t]he rationale for the general rule appears to be based more on the need for a uniform and certain standard to govern the internal affairs of a corporation than on the perceived interest of the State of incorporation.”<sup>124</sup> In *CTS Corp. v. Dynamics Corp. of America*, the “internal af-

116. See Werner F. Ebke, *Überseering: “Die wahre Liberalität ist Anerkennung,”* 58 JZ 927, 933 (2003) (noting that the project of a fifth company law directive on the structure of public companies, shareholder rights and codetermination is no longer being pursued by the EU due to the Member States’ opposition).

117. *Id.* at 928 (noting that the ECJ held in *Überseering* that while “conventions which may be entered into pursuant to Article 293 EC may . . . facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions” because “Article 293 EC does not constitute a reserve of legislative competence vested in the Member States[ ]”).

118. Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

119. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

120. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 ECR I-10155.

121. For a discussion of the origins of the internal affairs doctrine in the United States, see Richard M. Buxbaum, *The Origins of the American “Internal Affairs” Doctrine in the Corporate Conflict of Laws*, in *FESTSCHRIFT FÜR GERHARD KEGEL 75* (Hans-Joachim Musielak & Klaus Schurig eds., 1987).

122. See, e.g., *McDermott, Inc. v. Lewis*, 531 A.2d 206, 219 (Del. 1987) (Panama); *Hausman v. Buckley*, 299 F.2d 696, 705–06 (2d Cir. 1962), *cert. denied*, 369 U.S. 885 (1962) (Venezuela).

123. 481 U.S. 69, 90 (1987); see also *State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 114 Cal. App. 4th 434, 442 (2003) (stating that “[t]he internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs – matters peculiar to the relationship among or between the corporation and its officers, directors and shareholders – because otherwise a corporation could be faced with conflicting demands[ ]”).

124. 433 U.S. 186, 188 n.44 (1977).

fairs rule . . . has been virtually elevated to one of constitutional mandate by the U.S. Supreme Court . . . ."<sup>125</sup>

In light of the ECJ's jurisprudence concerning a corporation's freedom of establishment under articles 49 and 54 of the TFEU in "in-bound" or "immigration" cases,<sup>126</sup> too, it is virtually impossible for an EU Member State to take measures to defeat "unwanted" corporations from another EU Member State such as undercapitalized or in other respects "shallow" companies<sup>127</sup> (" . . . – *and War's impossible!*").<sup>128</sup> For the ECJ has repeatedly held that in order for them to be permissible under articles 49 and 54 of the TFEU, Member State measures that "prohibit, impede or render less attractive"<sup>129</sup> an EU corporation's exercise of the freedom of establishment must fulfil four conditions: "[T]hey must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."<sup>130</sup> To be sure, the real seat doctrine does not meet this "4-factor-test" or "Gebhard test," at least not in "in-bound" or "immigration" cases, as it hinders an EU corporation's right to transfer its "real seat," or principal place of business, from its state of incorporation to another EU Member State without losing its legal status as a corporation that is governed by the law of its state of incorporation.<sup>131</sup>

Also, it is important to note that in light of the ECJ's jurisprudence, legal principles and doctrines such as "abuse of rights" (*fraus legis*),<sup>132</sup>

125. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 1105 (3d ed. 2000).

126. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155; Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919; Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

127. For details of conflict-of-corporate-laws aspects of "corporate wars," see P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1. (1985).

128. GILBERT & SULLIVAN, *supra* note 4, at 52.

129. See Case 371/10, *Nat'l Grid Indus. BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, 2011 E.C.R. I-2273 (para. 42).

130. See Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1993 E.C.R. I-4165 (para. 37). The Gebhard test was reconfirmed by the ECJ. See, e.g., Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459 (para. 34); Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155 (para. 133); see also Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919 (para. 83-93); Case 371/10, *Nat'l Grid Indus. BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, [2011] ECR I-2273 (para. 42).

131. *Accord Bundesgerichtshof [BGH] [Federal Court of Justice]*, Apr. 13, 2010, 63 DER BETRIEB [DB] 1581, 1581–82 (2010) (Ger.); see Ebke, *supra* note 96, at 841 (stating that "within the EU, the real seat doctrine has been put to rest by the European Court of Justice in regard to corporations formed in any of the [then] twenty-five Member States[ ]"); see also Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 479 (2004) ("[T]he ability of corporations to choose the applicable corporate law regime has long faced a formidable obstacle in the so-called real seat doctrine.").

132. See *Bundesgerichtshof [BGH] [Federal Court of Justice]*, Mar. 14, 2005, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1648, 1649 (2005) (Ger.) (holding that it does not constitute an abuse of the right of establishment if the Ltd. was formed in England for the

“public policy” (*ordre public*),<sup>133</sup> “circumvention”<sup>134</sup> or “fraud”<sup>135</sup> cannot be invoked — except in the rarest circumstances<sup>136</sup> — by an EU Member State court to defeat the choice of law by the incorporators even if the corporation, like in *Centros*<sup>137</sup> or *Inspire Art*,<sup>138</sup> was formed with the intent never to do business in its state of incorporation or to avoid the more rigid laws of the Member State in which it wants to do all or most of its business.<sup>139</sup>

sole purpose of enjoying more favorable legislation even if the company conducts its activities entirely or mainly in Germany). *Accord Bundesgerichtshof [BGH] [Federal Court of Justice]*, Sept. 19, 2005, 164 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 148, 153 (2005) (Ger.); *Oberlandesgericht [OLG] [Court of Appeals] of Naumburg*, Dec. 6, 2002, 77, *DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS* [IPRSR] 56, 59 (2002) (Ger.); *Oberlandesgericht [OLG] [Court of Appeals] of Zweibrücken*, Mar. 26, 2003, 94 *GMBH-RUNDSCHAU* [GMBHR] 530, 532 (2003) (Ger.). For details of the “abuse of rights” defense, see, for example, Luca Cerioni, *The “Abuse of Right” in EU Company Law and EU Tax Law: A Re-Reading of the ECJ Case-Law and the Quest for a Unitary Notion*, 21 *EUR. BUS. L. REV.* 783 (2010); Pierre Schammo, *Arbitrage and Abuse of Rights in the EC Legal System*, 14 *EUR. L. J.* 351 (2008); Karsten Engsig Sørensen, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?*, 43 *COM. MKT. L. REV.* 423 (2006).

133. In recent years, several German courts have held, however, that, as a matter of German public policy (*ordre public*), a foundation (*Stiftung*) duly formed in accordance with the law of the Principality of Liechtenstein cannot be recognized in Germany as a legal person under Liechtenstein law if the *main* purpose of such a foundation is to evade taxation. While recognizing that, as a general rule, corporate entities, including foundations, formed under the law of the Principality of Liechtenstein, a Member State of the European Economic Area (EEA), *infra* note 187, enjoy the right of establishment according to articles 31 and 34 of the EEA Agreement, *infra* note 187, the Court of Appeals of Düsseldorf held that the foundation in question could not be recognized in Germany as a Liechtenstein foundation because, according to the Court, its *main* purpose was to facilitate tax evasion by its settlor. See *Oberlandesgericht [OLG] [Court of Appeals] of Düsseldorf*, Apr. 30, 2010, 17 *ZEITSCHRIFT FÜR ERBRECHT UND VERMÖGENSNACHFOLGE* [ZEV] 528, 532 (2010) (Ger.); see also *Oberlandesgericht [OLG] [Court of Appeals] of Stuttgart*, June 29, 2009, 17 *ZEITSCHRIFT FÜR ERBRECHT UND VERMÖGENSNACHFOLGE* [ZEV] 265 (2010) (Ger.) (holding that the Liechtenstein foundation was a mere façade which, according to the Court, allowed it to disregard the legal personality of the foundation and to attribute the foundation’s assets to the deceased settlor’s estate). For a critical analysis of the pertinent case law, see, for example, Peter Prast, *Anerkennung liechtensteinischer juristischer Personen im Ausland*, 111 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* [ZVGLRWISS] 391, 408–18 (2012).

134. See *Bundesgerichtshof [Federal Court of Justice]*, Sept. 19, 2005, 164 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 148 (2005) (Ger.). For details, see, for example, Christoph Allmendinger, *Company Law in the European Union and the United States: A Comparative Analysis of the Impact of the EU Freedoms of Establishment and Capital and the U.S. Interstate Commerce Clause*, 4 *WM. & MARY BUS. L. REV.* 67, 86 (2013).

135. See, e.g., Anders Kjellgren, *On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law*, 11 *EUR. BUS. L. REV.* 179, 180–83 (2000).

136. See *supra* note 109.

137. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

138. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

139. *Id.* at I-10155 (para. 139) (stating that “it is clear from settled case-law . . . that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provi-

It is equally important to note that, under the “*Gebhard* test,” an EU host Member State is not permitted to apply its own corporate law, including rules that are rooted in public policy considerations (e.g., liability of directors and officers, directors’ standard of care, indemnification of directors, election of directors, removal of directors, filling of director vacancies, minority shareholder protection rules, corporate governance rules, co-determination of employees), to “pseudo-foreign” corporations (i.e., corporations that are organized under the law of another EU Member State but doing all or most of their business in the host EU Member State).<sup>140</sup> As the ECJ held in *Inspire Art*, application of the Dutch Law of December 17, 1997 on Pseudo-Foreign Corporations (*Wet op de formeel buitenlandse vennootschappen*) to an English Ltd. would make the exercise of the Ltd.’s freedom of establishment less attractive which, in the Court’s opinion, could not be justified on basis of the “*Gebhard* test.”<sup>141</sup>

---

sions of Community law relating to the right of establishment.”); see also Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459 (para. 29).

140. See, e.g., Ebke, *supra* note 96, at 837–39; see also Werner F. Ebke, *CENTROS – Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623, 646–48 (2000).

141. See Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 ECR I-10155. Obviously, the legal treatment of “pseudo-foreign” corporations within the EU differs sharply from the situation of their counterparts in the United States. For details of “pseudo-foreign” corporations in the United States, see the seminal work of Elvin R. Latty, *Pseudo-foreign Corporations*, 65 YALE L.J. 137 (1955). For example, under § 2115 of California’s Corporation Code, if a corporation meets the “tax-factor” test of § 2115(a)(1) and the “shareholder-residence” test of § 2115(a)(2), California will consider the corporation a “pseudo foreign” corporation and will treat it, for certain purposes of fundamental importance to California, as if it had been incorporated in California in the first place. CAL. CORP. CODE § 2115 (West 2014). As a result, the corporation would be subject to a set of key California laws that are rooted in public policy concerns, including, among others, annual election of directors, removal of directors without cause, directors’ standard of care, indemnification of directors, officers and others, shareholders’ rights to cumulate votes at any election of directors. See, e.g., Werner F. Ebke, *Der Einfluss des US-amerikanischen Rechts auf das Internationale Gesellschaftsrecht in Deutschland und Europa: Rezeption oder Abwehr?*, in *DAS DEUTSCHE WIRTSCHAFTSRECHT UNTER DEM EINFLUSS DES US-AMERIKANISCHEN RECHTS* 175, 186–88 (Werner F. Ebke, Siegfried H. Elsing, Bernhard Grossfeld & Gunther Kühne eds., 2011). In the United States, it is still largely unsettled whether state pseudo-foreign corporation laws, or outreach statutes, are in conformity with the U.S. Constitution. For example, courts in Delaware consider the application of certain rules of California’s Corporation Law to non-public pseudo-foreign corporations formed under Delaware law to be unconstitutional. See, e.g., *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005); *Draper v. Gardner Defined Plan Trust*, 625 A.2d 859 (Del. 1993); *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987); *Arden-Mayfair, Inc. v. Louart Corp.*, 385 A.2d 3 (Del.Ch. 1978). Courts in California, by contrast, have upheld the constitutionality of § 2115 CAL. CORP. CODE. See, e.g., *Wilson v. Louisiana-Pacific Res., Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982) (imposing cumulative voting for directors on “pseudo-foreign” Utah corporation); see also *Valtz v. Penta Inv. Corp.*, 139 Cal. App. 3d 803, 188 Cal. Rptr. 922 (1983); *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 472 n.13, 11 Cal. Rptr. 330, 351 n.13, 834 P.2d 1148, 1169 n.13 (Cal. 1992). But see *Kruss v. Booth*, 185 Cal. App. 4th 699, 714, 111 Cal. Rptr.3d 56, 70 (Cal. Ct. App. 2010) (stating that the court had no occasion “to consider the more basic question of whether section 2115 would be upheld or applied by, say, the court of another state”). The issue of which state law applies to a pseudo-foreign corporation in California may ultimately turn on who wins the “race to the courthouse” in forum shopping. For classic examples of such a “race to the courthouse,” see *W. Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (Cal. Ct. App. 1961), *Louart v. Arden-Mayfair, Civ.No. C-192-091* (Super. Ct. of Los Angeles, May 1, 1978), and *VantagePoint Venture Partners*

## 2. The German Legislature's Response

Accordingly, the German legislature had no choice but to respond to the regulatory competition<sup>142</sup> resulting from both the ECJ's jurisprudence regarding an EU corporation's freedom of establishment in "in-bound" or "immigration" cases like *Centros*,<sup>143</sup> *Überseering*<sup>144</sup> and *Inspire Art*<sup>145</sup> and the growing number of English Ltd. doing most of their business in Germany. While some commentators cautioned against a "race to the bottom" ("*With fury deep we burn*") if the German legislature would lessen traditional legal standards in response to the proliferation of English Ltd. in Germany, other authors argued that it was not necessary to revise existing German company laws because a reputable traditional business association such as the *GmbH* was ultimately likely to gain more acceptance in the market for corporate charters than undercapitalized or "shallow" companies from other EU countries ("race for the top").<sup>146</sup>

After long and controversial debates, Germany's legislature decided to modernize the German law on closely-held corporations in order to put an end to the trend towards seemingly more attractive foreign forms of business association such as the English Ltd.,<sup>147</sup> but also similar companies incorporated in, for example, Gibraltar,<sup>148</sup> the Principality of Liech-

---

1996, 871 A.2d at 1117 (discussed by HAROLD MARSH, JR. & R. R. FINKLE, MARSH'S CALIFORNIA CORPORATION LAW 2118-21 (3d ed. 1990 Supp. 1997) (describing how a California Court found a statute unconstitutional, so that when the same corporation was litigating in Delaware that year, the court found it necessary to face the constitutional issue).

142. Werner F. Ebke, *Unternehmensrecht und Binnenmarkt – E pluribus unum?*, 62 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 196, 207-16 (1998). For a thoughtful economic analysis of the regulatory competition of company law legislations in Europe, see KLAUS HEINE, *REGULIERUNG-SWETTBEWERB IM GESELLSCHAFTSRECHT* (2004).

143. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

144. Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH*, 2002 E.C.R. I-9919.

145. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

146. See, e.g., WINDBICHLER, *supra* note 89, at 214-15. For the famous dispute, now forty years old, between the late Professor William Cary and Judge Ralph K. Winter, Jr., in the United States, see Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 890-95 (1990). But see Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN L. REV. 679 (2002).

147. See, e.g., Bundesgerichtshof [Federal Court of Justice], Mar. 14, 2005, 58 NEUE JURISTISCHE WOCHENSCHRIFT 1648 (2005) (Ger.); Oberlandesgericht [OLG] [Court of Appeals] of Naumburg, Dec. 6, 2002, 77 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSR] 56 (2002) (Ger.).

148. Landgericht [LG] [Regional Court] of Marburg, Aug. 27, 1992, 8 NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGS-REPORT [NJW-RR] 222 (1993) (Ger.).



tenstein<sup>149</sup> or in island jurisdictions like the Isle of Man,<sup>150</sup> the Channel Island of Jersey,<sup>151</sup> the British Virgin Islands,<sup>152</sup> the Bahamas,<sup>153</sup> or in offshore trust havens like the Cook Islands, St. Kitts and Nevis or the Cayman Islands<sup>154</sup> (“*Our pride and boast – the Army and the Navy – have both been reconstructed and remodeled upon so irresistible a basis that all the neighboring nations have disarmed*”).

Consequently, in Germany, the Act of October 23, 2008 on the “Modernization of the Law of Closely-held Limited Liability Companies and Combating Abuse”<sup>155</sup> created what is called an “*Unternehmergesellschaft (haftungsbeschränkt)*” (*UG*),<sup>156</sup> a loose translation of which would be “entrepreneur company (with limited liability)”. By enacting the statute, the legislature envisioned an “optimal degree of flexibility, swiftness, convenience and cost efficiency” (“*not only a replica of the English Ltd. but even better [‘more perfect’] than its role model*”).<sup>157</sup> The *UG* is not a new form of business association but rather a variation or derivative of the classic German limited liability company, the *GmbH*.<sup>158</sup> The single most important difference between the traditional *GmbH* and the novel *UG*, which is sometimes referred to as “*GmbH light*” or “*mini GmbH*,” is that the *UG* is not required to have the minimum legal capital (*Stammkapital*) of €25,000 (approximately USD 27,500) that an ordinary *GmbH* is required to have.<sup>159</sup> Rather, it is for the *UG* to determine the amount of legal capital that the company is to receive from those who subscribe to its shares, which may be as little as one Euro but must be less than

149. Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 28, 1980, 35, JURISTEN-ZEITUNG [JZ] 649 (1980) (Ger.) (involving an *Anstalt* formed under Liechtenstein law); Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 23, 1979, 33 WERTPAPIER-MITTEILUNGEN [WM] 692, 693 (1979) (Ger.) (involving an *Anstalt* formed under Liechtenstein law); Bundesgerichtshof [BGH] [Federal Court of Justice], May 17, 1977, 52 IPRSPR 395 (1977) (Ger.) (involving a *Treuunternehmen* formed under Liechtenstein law); Oberlandesgericht [OLG] [Court of Appeals] of Stuttgart, June 9, 1964, 18 NJW 1139 (1965) (Ger.) (involving a *Treuunternehmen* formed under Liechtenstein law).

150. Oberlandesgericht [OLG] [Court of Appeals] of Hamburg Mar. 30, 2007, 62 BETRIEBS-BERATER [BB] 1519 (2007) (Ger.); Amtsgericht [AG] [Local Court] of Hagen, June 17, 2010, 85 IPRSPR 47, 48 (2010) (Ger.).

151. Bundesgerichtshof [BGH] [Federal Court of Justice], July 1, 2002, 151 BGHZ 204 (2002) (Ger.).

152. Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 13, 2010, 63 DB 1581, 1581-82 (2010) (Ger.).

153. Oberlandesgericht [OLG] [Court of Appeals] of Düsseldorf, July 16, 2010, 85 IPRSPR 48 (2010) (Ger.).

154. For details of offshore trust havens, see, for example, JONAS P. HERMANN, ASSET PROTECTION TRUSTS 40 (2012). See also *infra* notes 293–304 and accompanying text.

155. Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen [MoMiG] [Law on the Modernization of the GmbH Law and Combating Abuses], of Oct. 23, 2008, BUNDESGESETZBLATT [BGBl.] [GERMAN OFFICIAL GAZETTE], BGBl. I 2008, 2026 (Ger.).

156. See GmbHG, *supra* note 56, Section 5a (the English version of this provision is available at [http://www.gesetze-im-internet.de/englisch\\_gmbhg/englisch\\_gmbhg.html#p0030](http://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html#p0030) [<http://perma.cc/FBR3-TUUL>]).

157. EUGEN KLUNZINGER, GRUNDZÜGE DES GESELLSCHAFTSRECHTS 234 (16th ed., 2012).

158. WINDBICHLER, *supra* note 89, at 236.

159. *Id.* at 237.

€25,000.<sup>160</sup> In most cases, of course, the ultimate goal of a *UG* would be to generate enough profits eventually to be able to put up the minimum capital required to be transformed into a *GmbH*.<sup>161</sup>

The rapid growth of the number of *UG* that have been incorporated under the Act of 2008 illustrates how popular the “*GmbH light*” has become in Germany. The Act entered into force on November 1, 2008.<sup>162</sup> As early as January 1, 2009, there were more *UG* registered in Germany than English Ltd.<sup>163</sup> On January 1, 2012, there were as many as 62,976 *UG* compared to 12,553 English Ltd.<sup>164</sup> And the trend towards the *UG* continues: on January 1, 2013, 78,680 *UG* were registered as opposed to 11,282 Ltd.,<sup>165</sup> on January 1, 2014, there were as many as 92,904 *UG* compared to 10,491 English Ltd.<sup>166</sup> On January 1, 2015, the number of *UG* (105,341) was almost eleven times higher than the number of Ltd. in Germany (9,703).<sup>167</sup> The development should not come as a surprise, however. The proliferation of the English Ltd. in Germany was an indication that there was a need for a new attractive and affordable form of business association, especially for start-up companies and owners of small businesses, and the *UG* appears to meet this need.<sup>168</sup>

### 3. Out-Bound or Emigration Cases

The ECJ’s liberal approach towards a company’s freedom of establishment in *Centros*,<sup>169</sup> *Überseering*,<sup>170</sup> and *Inspire Art*<sup>171</sup> suffered a significant setback, however, in the so-called “out-bound” or “emigration” cases. These cases are concerned with relations between a company and the Member State under the laws of which the company has been incorporated, in a situation in which the company wishes to transfer its “real

160. *Id.* at 237; BITTER, *supra* note 68, at 149.

161. WINDBICHLER, *supra* note 89, at 238. The *UG* is required to accumulate 25% of its annual earnings as legal reserve until it reaches €25,000. The owners may then decide to increase capital and rebrand to *GmbH*. *Id.*

162. See MoMiG, *supra* note 155, Art. 25.

163. See Kornblum, *supra* note 88, at 746.

164. See Kornblum, *supra* note 87, at 695.

165. *See id.*

166. See Kornblum, *supra* note 91, at 695. Of the 92,904 *UG*, 6,640 served as a general partner of a German limited partnership. *Id.* For the role of limited partnerships with a corporate general partner in Germany, see *supra* note 90. On January 1, 2015, the number of limited partnerships with a *UG* as (sole) general partner exceeded the number of limited partnerships with a Ltd. as (sole) general partner by 261.6% as compared to 113% on January 1, 2014. See Kornblum, *supra* note 51, at 693 (stating that the Ltd. as a [sole] general partner of a limited partnership in Germany is “getting out of fashion”).

167. See Kornblum, *supra* note 51, at 694.

168. WINDBICHLER, *supra* note 89, at 215. For critical comments, see, for example, GÜNTHER ROTH & PETER KINDLER, *THE SPIRIT OF CORPORATE LAW: CORE PRINCIPLES OF CORPORATE LAW IN CONTINENTAL EUROPE* 39 (2013) (“If this is supposed to be lauded as the success story of the new private limited company variation, the following question is entirely justified: Success for whom?”).

169. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

170. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

171. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

seat,” or principal place of business, to another Member State while retaining its legal status and legal personality in the Member State of incorporation.<sup>172</sup> Thus, much to the surprise of the author of the present article<sup>173</sup> as well as Advocate General *Poiares Maduro* in his opinion in *Cartesio*,<sup>174</sup> the ECJ held in *Cartesio*<sup>175</sup> that a Member State may preclude a company incorporated under its law from transferring its real seat, or principal place of business, to another Member State while retaining its status as a company governed by the law of the Member State of incorporation. Citing its decision in *Daily Mail*,<sup>176</sup> the Court noted that “companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning.”<sup>177</sup> Due to the absence of pertinent EU law, the Court observed, “[a] Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status.”<sup>178</sup> “That power,” the Court emphasized, “includes

172. See *supra* notes 167–69.

173. See WERNER F. EBKE, FEASIBILITY STUDY ON A EUROPEAN FOUNDATION STATUTE. FINAL REPORT 105, 129 (Klaus J. Hopt, Thomas von Hippel, Helmut Anheier, Volker Then, Werner F. Ebke, Ekehard Reimer & Tobias Vahlpahl eds., 2008), [http://ec.europa.eu/internal\\_market/company/docs/eufoundation/feasibilitystudy\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf) [<http://perma.cc/9KY4-FQJH>] (“In light of the Court’s holdings in *Hughes de Lasteyrie du Saillant v. Ministère de l’Économie, des Finances et de l’Industrie* and *Cadbury Schweppes* it is . . . inconceivable that the Court would construe a corporation’s freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty in the event of cross-border transfer of the real seat, principal place of business or center of administration to another country (‘emigration’ or ‘exit’ case) more restrictively than in an ‘immigration’ or ‘entry’ case such as *Überseering* or *Inspire Art*. To be sure, the negation by a Member State of the right of a cross-border transfer of the actual center of administration, principal place of business or real seat (‘emigration’) and the requirement to reincorporate in the other Member State (i.e., the state of establishment) would be tantamount to outright negation of freedom of establishment that Articles 43 and 48 of the EC Treaty are intended to ensure.”).

174. In his Opinion delivered on May 22, 2008, in Case C-210/06, *Cartesio Oktató és Szolgáltató* bt, Advocate General *Poiares Maduro* stated: “In sum, it is impossible, in my view, to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the ‘life and death’ of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. Otherwise, Member States would have *carte blanche* to impose a ‘death sentence’ on a company constituted under its laws just because it had decided to exercise the freedom of establishment. *Id.* at para. 31.

175. Case C-210/06, *Cartesio Oktató és Szolgáltató* bt, 2008 E.C.R. I-9641.

176. Case C-81/87, *The Queen v. HM Treasury and Comm’r of Inland Revenue, ex parte Daily Mail & General Trust plc*, 1988 E.C.R. 5483.

177. Case C-210/06, *Cartesio Oktató és Szolgáltató* bt, 2008 E.C.R. I-9641 (para. 104). For a thoughtful attempt to reconcile the ECJ’s jurisprudence on the “in-bound” and “out-bound” cases, see CASPAR BEHME, *SITZVERLEGUNG UND FORMWECHSEL VON GESELLSCHAFTEN ÜBER DIE GRENZE* (2015).

178. Case C-210/06, *Cartesio Oktató és Szolgáltató* bt, 2008 E.C.R. I-9641 (para. 110). From a comparative point of view, it is interesting to note that the U.S. Supreme Court used the argument that a corporation is a “creature of the law of its state of incorporation” to grant the *host* state, rather than the state of incorporation, the right to set forth such terms and conditions as the host State may think proper for the recognition of foreign corporations. See *Paul v. Virginia*, 75 U.S. 168, 181 (1869) (“Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its

the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.”<sup>179</sup>

From England’s perspective, however, the holding of the ECJ in *Cartesio* has no immediate effect on the “exportation” of the English Ltd. to other EU Member States.<sup>180</sup> As England, in conflict-of-corporate-laws cases, applies the liberal “state of incorporation” or “internal affairs” doctrine,<sup>181</sup> a Ltd. duly formed and registered under English law is generally free, as a matter of English law, to “emigrate” by transferring its “real seat”, or place of effective management, to another EU Member State without losing its status as a corporate entity governed by English law, as long as its registered office (*i.e.*, statutory seat) remains in the UK.<sup>182</sup> And, as was pointed out before,<sup>183</sup> the Member State to which the Ltd. wishes to transfer its real seat is required, under the ECJ’s holdings in *Centros*,<sup>184</sup> *Überseering*,<sup>185</sup> and *Inspire Art*,<sup>186</sup> to recognize the immigrating Ltd. as a corporate entity governed by English law.

---

contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.”); *see also* Allmendinger, *supra* note 134, at 90–98. *But see* Case C-378/10, *Vale Építési kft*, 2012 E.C.R. I-440 (para. 62) (holding that “Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from refusing, in relation to cross-border conversions, to record the company which has applied to convert as the ‘predecessor in law’, if such a record is made of the predecessor company in the commercial register for domestic conversions, and refusing to take due account, when examining a company’s application for registration, of documents obtained from the authorities of the Member State of origin[ ]”).

179. Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, 2008 E.C.R. I-9641 (para. 110). It should be noted, however, that national measures of an EU Member State, such as tax measures, that prohibit, impede or render less attractive the exercise of the freedom of establishment constitute a violation of the TFEU, *supra* note 100, articles 49 and 54 unless they are justified under the *Gebhard* test, *supra* note 130. *See also* Case 371/10, *Nat’l Grid Indus. BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, 2011 E.C.R. I-2273 (para. 42).

180. *See id.*

181. *See* Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome,”* 57 CAMBRIDGE L.J. 165, 167 (1998).

182. Ebke, *supra* note 96, at 817–18 (2004); MOSSLE, *supra* note 73, at 31.

183. *See supra* notes 150–52 and accompanying text.

184. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

185. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

186. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

## D. IMPLICATIONS

The “flowers of progress” in the conflict of corporate laws (*i.e.*, *Centros*,<sup>187</sup> *Überseering*<sup>188</sup> and *Inspire Art*<sup>189</sup>) had far-reaching implications, even beyond the 28 EU Member States.

1. *European Economic Area*

Thus, for example, articles 31 and 34 of the Agreement on the European Economic Area (EEA),<sup>190</sup> which entered into force on January 1, 1994, extend the freedom of establishment to companies formed under the law of a Member State of the European Free Trade Association (EFTA) (*i.e.*, Iceland, Liechtenstein and Norway, but not Switzerland).<sup>191</sup> Consequently, the 28 EU Member States are required to recognize companies that are duly formed and registered in Iceland, Liechtenstein, or Norway and have transferred their principal place of business to the EU Member State, even if they do their business exclusively or principally in the EU host country and even if they had no intention ever to conduct any business in their state of incorporation.<sup>192</sup>

2. *USA*

Moreover, the *Bundesgerichtshof*, Germany’s highest court in civil matters, has interpreted the Treaty of Friendship, Commerce, and Navigation of October 29, 1954, between the United States of America and the Federal Republic of Germany (TFCN),<sup>193</sup> to grant companies formed in one of the contracting states the right to be recognized by the other contracting state as a corporation the legal status and internal affairs of which are governed by the law of its state of incorporation. As a result, corporations incorporated, for example, in California,<sup>194</sup> Delaware,<sup>195</sup> or

187. Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

188. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

189. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

190. Agreement on the European Economic Area, Jan. 3, 1994, OJ No L1. The EEA Agreement enables its Member States “to participate in the Internal Market [of the EU] on the basis of their application of Internal Market relevant *acquis*. All new [EU] legislation is dynamically incorporated into the [EEA] Agreement and, thus, applies throughout the EEA, ensuring the homogeneity of the Internal Market.”

191. *Bundesgerichtshof* [BGH] [Federal Court of Justice], Sept. 19, 2005, 164 BGHZ 148, 151 (2005) (Ger.); *see also* Case C-48/13, *Nordea Bank Danmark A/S v. Skatteministeriet*, 2014 E.C.R., <http://curia.europa.eu>. For the status of Swiss corporations, *see infra* notes 214–23.

192. *See supra* text accompanying notes 108–10.

193. Treaty of Friendship, Commerce and Navigation, U.S.-Ger., Oct. 29, 1954, 7 U.S.T. 1840.

194. *Bundesgerichtshof* [BGH] [Federal Court of Justice], Oct. 13, 2004, 60 JURISTEN-ZEITUNG [JZ] 298 (2005) (Ger.).

195. *Bundesgerichtshof* [BGH] [Federal Court of Justice], July 5, 2004, 50 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 298 (2004) (Ger.).

Florida,<sup>196</sup> respectively, were recognized by the *Bundesgerichtshof* as corporations governed by the law of their respective states of incorporation even though, arguably, the corporations in question had their real seat, or principal place of business, in Germany.<sup>197</sup> Such a holding would have been impossible under the real seat doctrine (*Sitztheorie*) that was traditionally applied by German courts *vis-à-vis* corporations that were formed in the U.S. but had their real seat, or principal place of business, in Germany.<sup>198</sup> Accordingly, under the TFCN, German courts will apply the state-of-incorporation doctrine, or internal affairs doctrine, to corporations duly formed and registered under the law of any state or territory of the U.S., regardless of whether the corporation has its principal place of business in its state of incorporation or in Germany.<sup>199</sup>

Although the reasoning of the three different Panels (*Senate*) of the German Supreme Court in the three cases mentioned is neither uniform nor consistent, American corporations having their real seat, or principal place of business, in Germany are, in effect, subject to the same liberal recognition philosophy as corporations formed in the twenty-eight EU Member States in “in-bound” or “immigration” cases. Ultimately, the three decisions of the German Supreme Court are based upon the assumption that the German-American Friendship Treaty and the Treaty on the Functioning of the EU share similar values regarding the mutual rec-

---

196. Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 29, 2003, 153 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 353 (2003) (Ger.).

197. For a thorough analysis of the three decisions, see Werner F. Ebke, *Conflicts of Corporate Laws and the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany*, in Festschrift für Peter Hay 119, 124–37 (Hans-Eric Rasmussen-Bonne, Richard Freer, Wolfgang Lüke & Wolfgang Weitnauer eds., 2005).

198. *Id.* at 124–25.

199. It is still unsettled whether, as a precondition to such recognition, the American corporation is required to have a “genuine link” with its state of incorporation. Such a requirement, in effect, would limit the application of the state-of-incorporation doctrine, or internal affairs doctrine, to corporations that have a “nexus” or “contact” with their state of incorporation that goes beyond the fact that the corporation was formed and registered, and continues to be registered, in its state of incorporation. For details of the debate, see, for example, Boris Paal, *Deutsch-Amerikanischer Freundschaftsvertrag und genuine link – Ein ungeschriebenes Tatbestandsmerkmal auf dem Prüfstand*, 51 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] at 735 (2005). Two Panels of the German Supreme Court that have addressed the issue held, however, that “even minor business activities” in the United States, albeit not necessarily in the state of incorporation, satisfy the “genuine link” test. See Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 29, 2003, 153 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 353, 355–56 (2003) (Ger.) (discussing a Florida corporation that was entrusted with the administration of shares of stock deposited in Florida); Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 13, 2004, 60 Juristen-Zeitung [JZ] 298, 299 (2005) (Ger.) (addressing a California corporation with a telephone extension in San Francisco that transferred incoming calls to Germany). It is questionable, however, whether the genuine link requirement which was established by the International Court of Justice in the *Nottebohm* case (*Liechtenstein v. Guatemala*, [1955] I.C.J. 4) for purposes of the diplomatic protection of nationals, can be applied at all to the recognition of corporations and the conflict of corporate laws. See Ebke, *supra* note 197, at 134.

ognition of corporations.<sup>200</sup> This is particularly evident in the case decided by the Eighth Panel of the German Supreme Court, which cites the decision of the ECJ in *Überseering* in support of its holding that, under the U.S.-German Friendship Treaty, corporations duly formed in the United States of America having their real seat in Germany are entitled to recognition in Germany of their corporate status under the law of their respective states of incorporation.<sup>201</sup>

In order to facilitate the transfer by a German corporation of its real seat (*effektiver Verwaltungssitz*), or principal place of business, to a foreign country (including the United States), the German legislature revised existing provisions of the substantive law on closely-held corporations (*GmbHG*)<sup>202</sup> and the law of public corporations (*Aktiengesellschaften* or *AG*).<sup>203</sup> However, the German corporation's registered office, or "statutory seat" (*Satzungssitz*), must remain in Germany.<sup>204</sup> American corporations, in turn, have long enjoyed the right to do most or all of their business outside their state of incorporation, including in foreign countries,<sup>205</sup> provided the registered office remains in the state of incorporation.<sup>206</sup> Accordingly, the principle of mutual recognition of companies is now given full effect under the German-American Friendship Treaty in cases involving German and American corporations, both in in-bound and out-bound situations.<sup>207</sup>

---

200. CARSTEN KRUCHEN, EUROPÄISCHE NIEDERLASSUNGSFREIHEIT UND „INLÄNDISCHE“ KAPITALGESELLSCHAFTEN IM SINNE VON ART. 19 ABS. 3 GG at 212 (2009).

201. Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 29, 2003, 153 BGHZ 353, 358 (2003) (Ger.).

202. See *GmbHG*, *supra* note 56, section 4a, which reads as follows: "The company's registered office shall be the place in Germany designated in the articles of association."

203. See Law of Corporations (*Aktiengesetz*) of Sept. 6, 1965, BGBl. I 1965, 1089 (as amended), section 5. This provision reads as follows: "The company's registered office shall be the place in Germany designated in the articles of association."

204. WINDBICHLER, *supra* note 89, at 216. For a discussion of the controversial question whether section 4a, *supra* note 202, and section 5, *supra* note 203, are conflict-of-laws rules or provisions of substantive law, see, for example, MAX WESIACK, EUROPÄISCHES INTERNATIONALES VEREINSRECHT 179–82 (2011).

205. See, e.g., FRANKLIN A. GEVURTZ, CORPORATION LAW 36 (2000) ("[W]ithout regard to where the parties intend to conduct business.").

206. See, e.g., HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 300 (3d ed., 1983) ("Some jurisdictions require the corporation to have and to maintain continuously in the state a registered office.").

207. See JAN SEELINGER, GESELLSCHAFTSKOLLISIONSRECHT UND TRANSATLANTISCHER BINNENMARKT (2010) (calling it a "transatlantic internal market for corporations"). It is still largely unsettled, however, whether, in light of the German Supreme Court's interpretation of article XXV(5) of the German-American Friendship Treaty, *supra* note 193, and the Court's reliance upon the ECJ's construction of the freedom of establishment provisions of the TFEU, *supra* note 100, articles 49 and 54 in *Inspire Art*, *supra* note 101, pseudo-foreign corporation laws such as section 2115 CAL. CORP. CODE can be applied to German companies that carry on all or most of their business in California. For details, see Ebke, *supra* note 94, at 848. On the impact of international treaties entered into by the United States upon State law, including conflict-of-laws principles, see, for example, *Medellin v. Texas*, 552 U.S. 491 (2008).

## IV. ACT IV

Yet, the question remains: How should German courts determine the law governing the legal status and internal affairs of corporations that are not formed under the law of a Member State of the EEA or a nation, such as the United States<sup>208</sup> or Japan,<sup>209</sup> that enjoy the privilege of mutual recognition pursuant to a bilateral or multilateral international treaty (so-called “privileged” nations)? Should German courts extend their liberal conflict-of-corporate-laws approach beyond EEA companies and companies from privileged nations to corporations from “non-privileged” countries? To put it in the words of Scaphio, Justice of the Supreme Court of Utopia, should “affairs” keep “their original complexion,” or should the novel liberal approach (“the flowers of progress”) be applied to corporations from “non-privileged” countries as well? This question points directly to the fundamental issue of whether, from a public policy point of view, the real seat doctrine or the state-of-incorporation doctrine is preferable to solve conflict-of-corporate-laws cases.<sup>210</sup>

In 2007, a group of experts acting under the auspices of the *Deutscher Rat für Internationales Privatrecht*, a private group of leading conflict-of-laws scholars in Germany formed in 1954, consulted with Germany’s Justice Department and subsequently published a report on the reform of Germany’s conflict-of-corporate-laws rules.<sup>211</sup> The group’s recommendations formed the basis of a first draft of a “Law on the Conflict of Laws of Corporations, Associations and Legal Persons” that was presented early in 2008.<sup>212</sup> The draft suggested that the real seat doctrine be abolished *vis-à-vis* “non-privileged” nations and, as a general rule, the state-of-incorporation principle, or internal affairs doctrine, be applied to corporations incorporated in countries other than EEA Member States or nations with whom Germany has concluded a bilateral international treaty dealing with the (mutual) recognition of companies.<sup>213</sup> However, the draft did not gain widespread support in academic or political circles,

208. For a more detailed exposition, see *supra* text accompanying notes 193–207.

209. For conflict-of-corporate-laws issues arising under the Treaty of Commerce and Navigation between Germany and Japan of 1927, see Otto Sandrock, *Japanische Gesellschaften mit Verwaltungssitz in Deutschland*, in *PROBLEME DES DEUTSCHEN, EUROPÄISCHEN UND JAPANISCHEN RECHTS* 85 (Bernhard Großfeld, Koresuke Yamauchi, Dirk Ehlers & Toshiyuki Ishikawa eds., 2006). See generally EVA SCHWITTEK, *INTERNATIONALES GESELLSCHAFTSRECHT IN JAPAN* (2014).

210. For details, see, for example, Bernhard Grossfeld, *Commentary*, in JULIUS VON STAUDINGER, *EGBGB, INTERNATIONALES GESELLSCHAFTSRECHT* at ¶¶ 41–77 (1998).

211. See *VORSCHLÄGE UND BERICHTE ZUR REFORM DES EUROPÄISCHEN UND DEUTSCHEN INTERNATIONALEN GESELLSCHAFTSRECHTES, VORGELEGT IM AUFTRAG DER ZWEITEN KOMMISSION FÜR INTERNATIONALES PRIVATRECHT, SPEZIALKOMMISSION INTERNATIONALES GESELLSCHAFTSRECHT* (Hans-Jürgen Sonnenberger ed., 2007).

212. See [http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16\\_wp/int\\_gesr/reife.pdf](http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/int_gesr/reife.pdf) [<http://perma.cc/2JSN-BCRN>]. For details of the draft legislation, see DAVID PAULUS, *AUSSERVERTRAGLICHE GESELLSCHAFTER- UND ORGANWALTERHAFTUNG IM LICHT DES UNIONSKOLLISIONSRECHTS* 126–30 (2013); LEONHARD HÜBNER, *DIE KOLLISIONSRECHTLICHE BEHANDLUNG VON GESELLSCHAFTEN AUS „NICHT-PRIVILEGIERTEN“ DRITTSTAATEN* 152–66 (2011).

213. KRUCHEN, *supra* note 200, at 246–47.



and is not being pursued any further. Thus, until the legislature in Berlin or the European Institutions<sup>214</sup> have spoken, it is for the courts in Germany to decide which law should govern the legal status and the internal affairs of corporations from countries other than the EEA Member States or nations privileged by an international treaty.<sup>215</sup>

#### A. CONFOEDERATIO HELVETICA

In order not to forestall the German or European legislatures' decision (judicial self-restraint!),<sup>216</sup> the Second Panel (*Zivilsenat*) of Germany's highest court in civil matters, the *Bundesgerichtshof*, refused in the *Trabrennbahn* case to abolish the real seat doctrine, *i.e.*, the conflict-of-corporate-laws rule traditionally applied by German courts to foreign corporations formed outside the EU or treaty-privileged countries.<sup>217</sup> The case involved a corporation (*Aktiengesellschaft*) that was duly formed and registered under the law of Switzerland (*Confoederatio Helvetica*) but had its real seat, or principal place of business, in Germany. The Supreme Court observed that Germany was not required to recognize the Swiss corporation under either the TFEU or the EEA Agreement because Switzerland was a member of neither the EU nor the EEA.<sup>218</sup> Similarly, the Court concluded that it was not required either to deviate from the traditional real seat doctrine in light of the "Agreement of June 21, 1999 between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the

---

214. Various efforts of the EU and its Member States to harmonize the conflict-of-corporate-laws principles have not come to fruition yet. *See, e.g.*, GUIDO JESTÄDT, *NIEDERLASSUNGSFREIHEIT UND GESELLSCHAFTSKOLLISIONSRECHT* 45–50 (2005). Work on the proposed 14th company law directive on the cross-border transfer of registered offices of companies was cancelled in 2007. *See* European Commission, Impact assessment on the Directive on the cross-border transfer of registered office, SEC(2007)1707, (Dec. 12, 2007). *But see* Eur. Comm'n Internal Mkt. and Serv., Report of the Reflection Group on the Future of EU Company Law, (April 5, 2011), [http://ec.eu-ropa.eu/intern-al\\_market/company/docs/modern/re-flection-group\\_re-port\\_en.pdf](http://ec.eu-ropa.eu/intern-al_market/company/docs/modern/re-flection-group_re-port_en.pdf) [<http://perma.cc/53E3-XY93>]. The Reflection Group believes that "a right to transfer the registered office of national companies would not require major harmonisation of national law in respect of international private law and conflict of laws provisions." *Id.* at 76. Some members, however, believe "that it is time to envisage an EU regulation to clarify the conflict of law issues." *Id.* Accordingly, the Reflection Group invites "a debate on arguments in favour and against the real seat theory and possibly a comparative study conducted by the Commission" in connection with the cross-border transfer of registered offices of companies within the EU. *Id.*

215. In Germany, the rules on conflicts of corporate laws are not codified but rather judge-made law. *See* Ebke, *supra* note 107, at 1017.

216. *Cf.* Oberlandesgericht [OLG] [Court of Appeals] of Hamburg, Mar. 30, 2007, 62 BB 1519, 1521 (2007) (Ger.). While the Court expressed sympathy for the state-of-incorporation principle, or internal affairs doctrine, it refused to apply it in the case at hand to a company incorporated under the law of the Isle of Man, stating that it was "not the function of an appellate court to forestall the uniform development of the law in this respect." *Id.*

217. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 27, 2008, 178 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 192, 197 (2008) (Ger.).

218. *Id.* at 195.

free movement of persons.”<sup>219</sup> The General Agreement on Trade in Services (GATS)<sup>220</sup> and the European Convention on Human Rights (ECHR),<sup>221</sup> the Court opined, do not impose an obligation on Germany to recognize a Swiss corporation having its registered office, or statutory seat, in Switzerland but its real seat in Germany.<sup>222</sup>

The Court then explicitly refused to grant Swiss corporations “special treatment,”<sup>223</sup> arguing that the Swiss people, in a referendum held on December 6, 1992, had “deliberately” rejected EEA membership<sup>224</sup> that would have entitled Swiss corporations to enjoy the freedom of establishment to which EEA corporations are entitled throughout the present thirty-one Member States of the EEA, including Germany. The Swiss people’s decision, the Court underscored, “could not be disregarded by German courts.”<sup>225</sup> This statement sounds as if the Court’s reasoning was influenced by notions of the principle of *volenti non fit iniuria*, according to which one who knows and comprehends the danger, yet voluntarily exposes himself to it, though not negligent in so doing, is deemed to have assumed the risk and is therefore precluded from a recovery for an injury or disadvantage resulting therefrom. The Court also made it clear that it was not willing to grant the Swiss corporation in question the privilege of recognition of its legal status as a matter of comity (*comitas*), *i.e.*, not as a matter of general international law, but out of deference, respect, and good will *vis-à-vis* a friendly nation. According to the Court, an exception only for Switzerland would be inconsistent with the principle of legal certainty (*Rechtssicherheit*). If the exception were to be applied generally, the Court argued, German courts in future conflict-of-corporate-laws

---

219. 2002 O.J. (L 114) 6. Interestingly, the *Bundesgerichtshof* mentioned only one of the seven bilateral agreements of 1999 between the EU and Switzerland (collectively referred to as “Bilateral Agreements I”) that are mainly liberalization and market opening agreements, but failed to mention the nine bilateral agreements of 2004 (collectively referred to as “Bilateral Agreements II”) that strengthen cooperation in the economic sphere and extend cooperation between Switzerland and the EU. See 178 BGHZ 192, 195 (2008) (Ger.).

220. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183.

221. Convention on the Protection of Human Rights and Fundamental Freedoms, Protocol No. 14, Nov. 4, 1950, 213 U.N.T.S. 222.

222. *Bundesgerichtshof* [BGH] [Federal Court of Justice], Oct. 27, 2008, 178 BGHZ 192, 195–96 (2008) (Ger.).

223. This statement is a direct response by the Supreme Court to the Court of Appeals of Hamm, which, in 2006, held that the real seat doctrine was not applicable to a Swiss corporation (*Aktiengesellschaft*). The Court of Appeals opined that, compared to other non-EU and non-EEA countries, Switzerland enjoys “a special status.” See *Oberlandesgericht* [OLG] [Court of Appeals] of Hamm, May 26, 2006, 61 BB 2487, 2488 (2006) (Ger.). In support of its proposition, the Court of Appeals relied upon the various bilateral agreements between Switzerland and the EU. See *supra* note 219. While none of these agreements grant Swiss corporations the right of establishment *vis-à-vis* the EU, the Court of Appeals emphasized that, in light of these agreements, Switzerland was moving closer towards the EU which, in the interest of legal certainty and uniform standards for conflicts of corporate laws, justified application of the state-of-incorporation doctrine to Swiss corporations. *Id.* at 2489.

224. EEA membership was rejected by 50.3% to 49.7%.

225. *Bundesgerichtshof* [Federal Court of Justice], Oct. 27, 2008, 178 BGHZ 192, 197 (2008) (Ger.).

cases would be required to determine on a case-by-case basis whether "the legal order in question was so close to European standards as to treat it the same way as an EU Member State."<sup>226</sup>

From the judiciary's point of view, the latter argument may be understandable, as it is not clear what criteria or standards a court should or could use to make decisions, for example, in cases dealing with corporations incorporated in China, India, the Isle of Man,<sup>227</sup> Serbia,<sup>228</sup> Singapore,<sup>229</sup> South Africa,<sup>230</sup> Turkey,<sup>231</sup> Zambia,<sup>232</sup> or certain offshore tax havens.<sup>233</sup> However, the Court may have misconstrued the principle of comity. Rather than focusing on whether the Swiss "legal order" as a whole "was so close to European standards as to treat it the same way as an EU Member State," the real issue seems to be much narrower; namely, whether Switzerland, under its conflict-of-corporate-laws principles, would recognize a corporation duly formed under German law having its registered office in Germany, but its principal place of business in Switzerland, as a corporation governed by German law. If that were the case (and it is),<sup>234</sup> a German court could, in turn, recognize the executive act of the Swiss authorities to create the Swiss corporation in question as a legal person governed by Swiss law, not as a matter of international legal obligation, but out of deference, respect, and good will (*comity*), having due regard for the rights and privileges that German companies enjoy when they transfer their "real seat" from Germany to Switzerland (which, as stated above,<sup>235</sup> Germany explicitly permits German corporations to do under the Act of 2008).

---

226. *Id.* at 197.

227. See Oberlandesgericht [OLG] [Court of Appeals] of Hamburg, Mar. 30, 2007, 62 BB 1519 (2007) (Ger.); see also Amtsgericht [AG] [Local Court] of Hagen, June 17, 2010, 85 IPRSPR 47, 48 (2010) (Ger.). It is important to note, however, that the freedom-of-establishment provisions of the TFEU, *supra* notes 100-02, do not apply to companies incorporated in the Isle of Man due to the special status of the Isle of Man *vis-à-vis* the EU. See *infra* note 238.

228. See Amtsgericht [AG] [Local Court] of Ludwigsburg, July 20, 2006, 27 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1507, 1509 (2006) (Ger.) (holding that the real seat doctrine is no longer appropriate to deal with cases of conflict of corporate laws); see also text accompanying *infra* note 277.

229. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 8, 2009, 30 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2385 (2009) (Ger.).

230. Oberlandesgericht [OLG] [Court of Appeals] of Cologne, Jan. 31, 2006, 28 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 935 (2007) (Ger.).

231. Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 23, 2010, 48 DEUTSCHES STEUERRECHT [DStR] 1040, 1043 (2010) (Ger.).

232. Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Court of Appeals], Feb. 20, 2003, 43 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 387, 388 (2003) (Ger.).

233. See the references *infra* note 234.

234. For details from a Swiss lawyer's perspective, see, for example, Anton K Schnyder, *Keine Erstreckung der europarechtlichen Niederlassungsfreiheit auf Gesellschaften schweizerischen Rechts*, 6 ZEITSCHRIFT FÜR DAS PRIVATRECHT DER EUROPÄISCHEN UNION [GPR] 227 (2009). See also FRANK VISCHER, *Die Bestimmung des Personalstatus einer Gesellschaft – Auswirkungen der Urteile des EuGH i. S. Überseering und Inspire Art Ltd. aus schweizerischer Sicht*, in Festschrift für Ernst A. Kramer 985 (Franz Hasenböhler, Friedrich Harrer & Heinrich Honsell eds., 2004).

235. See *supra* notes 202-03.

The most unfortunate aspect of the Court's decision in *Trabrennbahn* is, however, that the Court not only held that the corporation in question could not be recognized in Germany as a corporation (*Aktiengesellschaft*) governed by Swiss law, but also that it had to be treated legally "as an entity subject to German law, i.e., as a general partnership (*offene Handelsgesellschaft*) or an 'association pursuant to the Civil Code' (*Gesellschaft bürgerlichen Rechts*)."<sup>236</sup> Under German law, general partnerships and "associations pursuant to the Civil Code" do not need to be registered in a register of companies, but instead come into existence *ipso iure*. In other words, the Second Panel's solution is to disregard the corporate status of the foreign corporation and treat it *à la Jersey*!

#### B. CHANNEL ISLAND OF JERSEY

In its *Jersey* decision, the Second Panel of the *Bundesgerichtshof* developed what has been called the "modified real seat doctrine" or "real seat doctrine *à la Jersey*."<sup>237</sup> In order to save the life of the German version of the real seat doctrine (*Sitztheorie*), the Second Panel held in *Jersey* that a company incorporated under the law of the Channel Island of Jersey, which arguably had its "real seat" in Germany, could not be recognized as a Jersey corporation but was to be treated legally as an "association pursuant to the Civil Code" (*Gesellschaft bürgerlichen Rechts*).<sup>238</sup> Under German law, such an association, albeit not a corporate entity, can sue and be sued in its name.<sup>239</sup>

By emphasizing the right of the Jersey firm as a (real or fictitious?) German association to bring a lawsuit in a German court, the Second Panel had apparently hoped that it would render moot the freedom-of-

236. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 27, 2008, 178 BGHZ 192, 199 (2008) (Ger.) (emphasis added).

237. Bundesgerichtshof [BGH] [Federal Court of Justice], July 1, 2002, 151 BGHZ 204 (2002) (Ger.).

238. In *Jersey*, the Second Panel overlooked that articles 49 and 54 of the TFEU do *not* apply to companies incorporated under Jersey law as the Channel Island of Jersey is neither a member nor an associate member of the EU but has a special status within the EU under article 355(5)(c) of the TFEU giving effect to the Protocol No. 3 of the UK's Treaty of Accession of 1972. Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 25, 1957, O.J. (C326). Article 355(5)(c) of the TFEU reads as follows: "The Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972." *Id.* Article 2 of the Protocol No. 3 on the Channel Islands and the Isle of Man provides: "The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from the Community provisions relating to the free movement of persons and services." Documents concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Protocol No. 3 on the Channel Islands and the Isle of Man, Mar. 27, 1972, O.J. (L073). However, article 4 of the Protocol No. 3 requires the authorities of the Channel Island of Jersey to "apply the same treatment to all natural and legal persons of the Community." *Id.* art. 4.

239. See Ebke, *supra* note 96, at 822.

establishment issue in *Überseering*<sup>240</sup> and thereby preclude the ECJ from ruling on this issue in *Überseering*.<sup>241</sup> The *Überseering* matter, which had been referred to the ECJ for a preliminary ruling<sup>242</sup> by the Seventh Panel of the *Bundesgerichtshof*<sup>243</sup> without prior consultation with the Court's Second Panel, was a thorn in the Second Panel's side ("You'd best take care — Please recollect we have not been consulted.").<sup>244</sup> While, generally, the Second Panel of the *Bundesgerichtshof* has jurisdiction to hear corporate law cases, it had, for procedural reasons, no jurisdiction in *Überseer-*

240. The issue in *Überseering* was whether Germany was obligated under articles 49 and 54 of the TFEU to recognize a Dutch closely-held corporation (*besloten vennootschap*) as a corporate entity governed by Dutch law even though the corporation in question had its real seat, or principal place of business, in Germany, whereas its registered office continued to be in the Netherlands. See Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

241. See *Ebke*, *supra* note 96, at 822. Justices Hartwig Henze and Wulf Goette, former members of the Second Panel of the German Federal Court of Justice, have made no secret of the fact that the decision in *Jersey*, *supra* note 237, was intended by the Panel to render moot the freedom-of-establishment issue in *Überseering* in order to save the life of the German version of the real seat doctrine. See Hartwig Henze, *Europäisches Gesellschaftsrecht in der Rechtsprechung des Bundesgerichtshofs*, 56 DER BETRIEB [DB] 2159, 2164 (2003) (Ger.); Wulf Goette, *Anmerkung*, 40 DEUTSCHES STEUERRECHT [DStR] 1679, 1680 (2002) (Ger.); see also Werner F. Ebke, *Überseering und Inspire Art: Die Revolution im Internationalen Gesellschaftsrecht und ihre Folgen*, in Festschrift für Reinhold Thode 593, 594, 611 (Rolf Kniffka, Friedrich Quack, Thomas Vogel & Klaus-R. Wagner eds., 2005) (with a list of authorities). The Panel's considerations were based upon the observation that the ECJ has consistently refused to rule on issues that are technically moot or hypothetical. See, e.g., *Ebke*, *supra* note 140, at 645 (citing Case C-83/91 — *Meilicke v. ADV/ORG AG*, [1992] ECR I-4919); see also Case C-378/10, *Vale Építési kft*, 2012 E.C.R. I-440 (para. 18) (stating, "[t]he Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it" (footnotes omitted)).

242. The right of the ECJ to give preliminary rulings is based upon TFEU, *supra* note 100, art. 267. This provision reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgment, request the Court to give a ruling thereof.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

243. See *Bundesgerichtshof* [BGH] [Federal Court of Justice], Mar. 30, 2000, 46 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 555 (2000) (Ger.). For details of the Seventh Panel's request for a preliminary ruling, see *Ebke*, *supra* note 140, at 652–55. The Seventh Panel of the *Bundesgerichtshof* hears, *inter alia*, cases involving construction contracts but, as a general rule, does not hear corporate law matters.

244. See GILBERT & SULLIVAN, *supra* note 4, at 34.

ing. Thus, the Second Panel was furious (“*with fury deep we burn*”)<sup>245</sup> because the referral by the Seventh Panel to the ECJ for a preliminary ruling on the freedom-of-establishment issue in *Überseering* posed a threat to the life of the real seat doctrine, which, in the opinion of the Second Panel, was to survive as a matter of German public policy.<sup>246</sup>

However, the ECJ in *Überseering* did not pay any attention to the “rivalry” between the Second Panel and the Seventh Panel of the *Bundesgerichtshof*, and rendered a judgment, holding that Germany could not refuse to recognize a Dutch limited liability company (*besloten vennootschap*), even though it had transferred its principal place of business (or “real seat”) from its state of incorporation to Germany.<sup>247</sup> Thereby, the ECJ implicitly held that the real seat doctrine is not in conformity with an EU company’s freedom of establishment pursuant to articles 49 and 54 of the TFEU, at least not in “in-bound” or “immigration” cases.<sup>248</sup> Accordingly, in its final decision in the *Überseering* case, the Seventh Panel of the *Bundesgerichtshof* disregarded the Jersey rule and instead followed the ECJ’s view in *Überseering*, holding that the Dutch corporation in question was to be treated as a corporation governed by Dutch law and consequently could, in its capacity as a Dutch closely-held limited liability company, institute a lawsuit in Germany.<sup>249</sup> The Seventh Panel correctly noted that if the Jersey rule were applied to a corporation formed in another EU Member State such as the Netherlands, the decision would “constitute a violation of the freedom of establishment”<sup>250</sup> pursuant to articles 49 and 54 of the TFEU.

### C. SOME LEGAL COMPLICATIONS

That was not the end of the so-called “modified real seat doctrine” or Jersey rule, however. Due to the special legal relationship between the Channel Island of Jersey and the EU,<sup>251</sup> it was unclear whether the Jersey rule was applicable only to companies incorporated in a jurisdiction having a similarly special status under EU law (*e.g.*, the Isle of Man)<sup>252</sup> or generally to all companies incorporated in countries other than EEA

---

245. See *id.* at 42.

246. See Henze, *supra* note 241, at 2164; Goette, *supra* note 241, at 1680.

247. Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919.

248. See Ebke, *supra* note 96, at 823–25.

249. Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 13, 2003, 49 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 474 (2003) (Ger.). The lower courts follow suit. See, *e.g.*, Oberlandesgericht [OLG] [Court of Appeals] of Zweibrücken, Mar. 26, 2003, 94 GMBHR 530, 531–32 (2003); see also Oberlandesgericht [OLG] [Court of Appeals] of Celle, Dec. 10, 2002, 94 GMBHR 532, 533 (2003).

250. See Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 13, 2003, 49 RIW 474, 475 (2003) (Ger.).

251. See *supra* note 238.

252. For the special status of the Isle of Man *vis-à-vis* the EU, see *supra* note 238. German courts continue to apply the Jersey rule to corporations incorporated in the Isle of Man. See cases cited *infra* note 227.

Member States or “privileged” treaty nations (e.g., the U.S. or Japan).<sup>253</sup> In *Trabrennbahn*, the Second Panel of the German Supreme Court emphasized, however, that its holding in *Jersey* was “not limited to corporations having their statutory seat on the Channel Island of Jersey or in similar territories enjoying a special status within the European Union,” but that it equally applied to corporations incorporated in Switzerland, a non-EEA country whose corporations are not privileged by a special international treaty.<sup>254</sup>

The result of the Court’s holding in *Trabrennbahn* constitutes a classic chiasmus (χίμαρος): While, under EU law, Germany is required to allow the immigration of corporations from other EU Member States to Germany, but is free under articles 49 and 54 of the TFEU to preclude German corporations from emigrating to another EU Member State (*Cartesio*), the *Bundesgerichtshof*’s decision in *Trabrennbahn* effectively blocked the immigration of Swiss corporations to Germany (i.e., the transfer of a Swiss corporation’s real seat to Germany while retaining its statutory seat in Switzerland), whereas the German legislature, under the Act of 2008,<sup>255</sup> permits German corporations that wish to emigrate to Switzerland to transfer their principal places of business (*effektiver Verwaltungssitz*) from Germany to Switzerland without losing their legal statuses as German corporations, as long as their registered offices, or statutory seats (*Satzungssitz*), remain in Germany. Shortly after the Second Panel handed down its judgment in *Trabrennbahn*, the Ninth Panel of the German Supreme Court applied the *Jersey* rule to a corporation from Singapore.<sup>256</sup> Thus, it is fair to assume that the *Jersey* rule will be applied by German courts to corporations from “non-privileged” countries until it has been overruled by national or European legislation.

The legal problems resulting from the *Bundesgerichtshof*’s holding in *Jersey* are obvious. As the Seventh Panel of the German Supreme Court noted, under the *Jersey* rule, the foreign corporation is involuntarily “pushed into another form of business association with special risks, for example, liability risks.”<sup>257</sup> Yet, the risk of the shareholders of the non-recognized foreign corporation that is being “re-qualified” and treated as an unincorporated business association under German law to be personally liable for the entity’s liabilities is not the only detrimental consequence of the *Jersey* rule. A similarly grave risk stems from the fact that

253. See *supra* notes 208–09.

254. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 27, 2008, 178 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 192, 199 (2008) (Ger.).

255. See *supra* notes 202–203.

256. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 8, 2009, 30 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2385, 2386 (2009) (Ger.).

257. Bundesgerichtshof [Federal Court of Justice], Mar. 13, 2003, 49 RIW 474, 475 (2003) (Ger.); accord Brigitte Haar, *Konsolidierung des Binnenmarktes in der aktuellen Rechtsprechung des EuGH zum europäischen Gesellschaftsrecht*, 7 ZEITSCHRIFT FÜR DAS PRIVATRECHT DER EUROPÄISCHEN UNION [GPR] 187, 188 (2010) (arguing that “this solution appears not to be free of doubts and needs to be reformed to avoid a ‘split approach’ vis-à-vis third states”).

the *Jersey* rule, in effect, leads to the creation of a (real or fictitious?) “new” company governed by German law, which gives rise to unprecedented exposures and perils for the creditors of the non-recognized foreign corporation. Thus, for example, it is highly unlikely that a German judgment against the “new” company could be enforced against the assets of the “old” foreign corporation, as the “new” company cannot, and will not, be treated by courts in the “old” corporation’s home country (and possibly other countries) as legitimate successor to the “old” company.<sup>258</sup> And it is equally questionable whether the “new” company could enforce a judgment rendered by a German court in its favor against any of the debtors of the “old” company, as any debtor is likely to defend himself against the enforcement of such a judgment on the ground that he has no legal relationship with the “new” company and, therefore, is not its debtor.<sup>259</sup>

## V. ACT V

Thus, the question remains: How should the current division of Germany’s conflict-of-corporate-law rules be resolved? Is a conflict-of-corporate-laws rule (*i.e.*, the state-of-incorporation principle) that appears to serve Germany well within the EU as well as *vis-à-vis* countries privileged pursuant to an international treaty granting mutual recognition to corporations incorporated in a contracting state (*e.g.*, the U.S. and Japan) not equally appropriate for corporations from all other countries in the world (so-called “non-privileged” countries)?

### A. IN SEARCH OF THE LAW GOVERNING CORPORATIONS

Courts and commentators agree that there is no general principle of public international law that requires a nation to recognize the legal status of a corporation that has been duly formed and registered in another country that has its statutory seat, or registered office, in that country, but has its “real seat,” or principal place of business, in the former country.<sup>260</sup> Multilateral international treaties, like the General Agreement on Trade in Services (GATS), the World Trade Organization (WTO) or the European Human Rights Convention (EHRC), also do not impose such an obligation,<sup>261</sup> as the German Supreme Court recently reconfirmed in

258. Ebke, *supra* note 241, at 610–11.

259. For a critical analysis, see, for example, HÜBNER, *supra* note 212, at 71–73; Daniel Walden, *Niederlassungsfreiheit, Sitztheorie und der Vorlagebeschluss des VII. Zivilsenats des BGH v. 30. 3. 2000*, 11 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT [EWS] 256 (2001); Mark K. Binz & Gerd Mayer, *Die Rechtsstellung von Kapitalgesellschaften aus Nicht-EU/EWR/USA-Staaten mit Verwaltungssitz in Deutschland*, 60 BETRIEBS-BERATER [BB] 2361, 2363–65 (2005) (Ger.).

260. See, *e.g.*, JESTÄDT, *supra* note 214, at 234; KRUCHEN, *supra* note 200, at 219–20; HÜBNER, *supra* note 212, at 114; Ebke, *supra* note 107, at 1018.

261. For a more detailed exposition, see, for example, HÜBNER, *supra* note 212, at 77–79 & 100–12; KRUCHEN, *supra* note 200, at 224–26. See generally, SEBASTIAN MÜLLER, *DER ZUZUG VON KAPITALGESELLSCHAFTEN AUS DRITTSTAATEN* (2011).



*Trabrennbahn*.<sup>262</sup> Bilateral Agreements, such as the Friendship Treaty of 1954 between the United States of America and Germany that provide for the mutual recognition of companies incorporated in a contracting state, are an exception rather than the rule and, hence, do not contain a general principle of public international law binding courts in cases that do not fall within the ambit of the Agreement.<sup>263</sup> The Rome I Regulation on the Law Applicable to Contractual Obligations<sup>264</sup> and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations<sup>265</sup> do not deal with the issue either because corporate matters, as a general rule, are excluded from the scope of these Regulations.<sup>266</sup> Lastly, Germany's Constitution (*Grundgesetz*) has been interpreted not to require German courts to treat companies formed in "non-privileged" countries the same as companies established in an EEA Member State or in nations, like the United States<sup>267</sup> or Japan,<sup>268</sup> with whom Germany has concluded a bilateral treaty on the mutual recognition of companies formed and registered in a contracting state.<sup>269</sup>

Not surprisingly, the legal literature in Germany is therefore replete with fine discussions by scholars arguing in favor of the retention of the real seat doctrine *vis-à-vis* companies organized under the law of a "non-

---

262. See Bundesgerichtshof [Federal Court of Justice], Oct. 27, 2008, 178 BGHZ 192, 195–96 (2008) (Ger.).

263. HÜBNER, *supra* note 212, at 88–90; KRUCHEN, *supra* note 200, at 220–22. Bilateral treaties constitute an interesting alternative to a unilateral general legislative fiat because a bilateral international treaty allows the development of fair and adequate solutions on a country-by-country basis. See Ebke *supra* note 116, at 930.

264. See Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 1(2)(f), 2008 O.J. (L 177) 6, 10 (EC). Article 1(2)(f) of the Rome I Regulation excludes from the scope of this Regulation "[q]uestions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body." *Id.*

265. See Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 1(2)(d), 2007 O.J. (L 199) 40, 43 (EC). Article 1(2)(d) of the Rome II Regulation excludes from the scope of this Regulation "non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents."

266. For details, see, for example, JUSTIN BORG-BARTHET, *THE GOVERNING LAW OF COMPANIES IN EU LAW* 20–21 (2012); Marc-Philippe Weller, *Internationales Unternehmensrecht 2010 – IPR-Methodik für grenzüberschreitende gesellschaftsrechtliche Sachverhalte*, 39 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 679, 695–706 (2010).

267. See *supra* notes 191–202.

268. See *supra* note 209.

269. Ebke, *supra* note 116, at 930.

privileged” country<sup>270</sup> (“*Upon our sea-girt land*”).<sup>271</sup> The proponents of the real seat doctrine are reluctant to grant incorporators the right to choose the proper law of corporation, allowing them to take advantage of regulatory arbitrage. The *Sitztheorie*, like other variations of the real seat doctrine, is based upon the assumption that only one state should have the authority to regulate a corporation’s internal affairs, while the most plausible state to supply that law is the state in which the corporation has its principal place of business. The real seat doctrine assumes that the state in which a corporation has its principal place of business is typically the state most strongly affected by the activities of the entity and, hence, should have the power to govern the internal affairs of that corporation.<sup>272</sup> The real seat doctrine stresses the importance of equal treatment (*Gleichbehandlung*), by requiring that all corporations having their principal place of business, or real seat, in a particular state, be incorporated under and subject to that state’s law. Thereby, the doctrine creates a level playing field and prevents companies from escaping that state’s legal controls through incorporation in a jurisdiction that has less stringent laws. As a result, all concerned corporations are subject to the same rules and principles of law, including laws that aim at protecting shareholders, creditors, employees, and other stakeholders.<sup>273</sup>

Other commentators, by contrast, favor the incorporators’ freedom to choose the proper law of a corporation<sup>274</sup> (“*Eagle high in cloudland soar-*

---

270. See, e.g., PAULUS, *supra* note 212, at 81 (stating that, “overall,” the real seat doctrine is “the more appropriate solution”); JESTÄDT, *supra* note 214, at 255–56 (“a plea for the real seat doctrine”); Peter Kindler, *Commentary*, 11 MÜNCHENER KOMMENTAR ZUM BGB, IntGesR, ¶ 455 *et seq.* (Roland Rixecker & Franz Jürgen Säcker eds., 5th ed. 2010) (arguing in favor of retention of the real seat doctrine); accord Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung “Überseering”*, 48 DEUTSCHES STEUERRECHT [DStR] 159, 168 (2003) (Ger.).

271. GILBERT & SULLIVAN, *supra* note 4, at 52.

272. Ebke, *supra* note 107, at 304. Thus, for example, the highest court of the Free State of Bavaria concluded that the *Sitztheorie* is preferable because it leads to the application of the law of the state that has the most significant contacts with the corporation and is most strongly affected by the corporation. See Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Court of Appeals], May 7, 1992, 46 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT, WERTPAPIER-MITTEILUNGEN [WM] 1371 (1992) (Ger.).

273. Ebke, *supra* note 107, at 1027–28; see also BORG-BARTHET, *supra* note 266, at 14 (“territorial approach”).

274. See, e.g., BORG-BARTHET, *supra* note 266, at 14 (“party autonomy”); HÜBNER, *supra* note 212, at 167–81; KRUCHEN, *supra* note 200, at 247–49; see also Jochen Dierksmeier, *Kapitalgesellschaften aller Länder willkommen! Die deutsche GmbH im Wettbewerb der Rechtsformen 2010*, in DAS DEUTSCHE WIRTSCHAFTSRECHT UNTER DEM EINFLUSS DES US-AMERIKANISCHEN RECHTS 207, 217 (Werner F. Ebke, Siegfried H. Elsing, Bernhard Großfeld & Gunther Kühne eds., 2011); Stefan Leible & Jochen Hoffmann, *Cartesio – fortgeltende Sitztheorie, grenzüberschreitender Formwechsel und Verbot materiellrechtlicher Wegzugsbeschränkungen*, 64 BETRIEBS-BERATER [BB] 58, 62 (2009) (stating that “the better reasons support the proposition that Germany . . . should change over to the state-of-incorporation doctrine”); accord Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa*, 23 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2233, 2244 (2002); Eva-Maria Kieninger, *Internationales Gesellschaftsrecht nach „Centros”, „Überseering” und „Inspire Art”: Antworten, Zweifel und offene Fragen*, 12 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEuP] 685, 702–03 (2004); Stephan Balthasar, *Gesell-*

ing").<sup>275</sup> To apply the liberal state-of-incorporation doctrine universally to all conflict-of-corporate-laws cases is considered to be "imperative" ("oberstes Gebot").<sup>276</sup> Some courts support this proposition. Thus, for example, the Local Court (*Amtsgericht*) of Ludwigsburg in Southern Germany concluded that the real seat doctrine is an "outmoded concept" ("*nicht mehr zeitgemäß*") to deal with conflicts of corporate laws *vis-à-vis* corporations from "non-privileged" countries.<sup>277</sup> A few months later, the Court of Appeals of Hamburg also expressed sympathy for the state-of-incorporation doctrine. The Court stressed the need for "uniform and certain" standards to govern the internal affairs of a corporation regardless of where it has been incorporated.<sup>278</sup> The Court worried that to distinguish between companies from "privileged" states (*i.e.*, EEA Member States and "privileged" treaty nations) and other ("non-privileged") nations would, "in the long run," be detrimental to international business.<sup>279</sup> The Court added that the protection by means of the real seat doctrine becomes obsolete "when English *Limiteds*, *Anstalten* formed in Liechtenstein, and corporations incorporated in Delaware . . . are being recognized" today by German courts even though, historically, "these corporate entities were considered to be subject to particularly 'lax' ('*regelungsarme*') regulations and, therefore, viewed as 'especially dangerous' for those conducting business with them."<sup>280</sup> If necessary, the Court of Appeals of Hamburg suggested,<sup>281</sup> courts could resort to pseudo-foreign corporation doctrines or *Sonderanknüpfungen* (*i.e.*, outreach rules)<sup>282</sup> to give effect to laws that are rooted in public policy considerations of the state in which the foreign corporation does all or most of its business. Yet, is a combination of the liberal state-of-incorporation doctrine and the more restrictive pseudo-foreign corporation doctrine or outreach rules really a viable model for the future treatment of conflict-

---

*schaftsstatut und Gläubigerschutz: Ein Plädoyer für die Gründungstheorie*, 54 RIW 221, 223 (2009).

275. GILBERT & SULLIVAN, *supra* note 4, at 42.

276. Peter Behrens, *Die GmbH im internationalen Recht*, in 1 GMBHG GROSSKOMMENTAR 92 (Peter Ulmer, Mathias Habersack & Martin Winter eds., 2005).

277. Amtsgericht [AG] [Local Court] of Ludwigsburg, July 20, 2006, 27 ZIP 1507, 1509 (2006) (Ger.) (the case involved a company formed under the law of Serbia).

278. Oberlandesgericht [OLG] [Court of Appeals] of Hamburg, Mar. 30, 2007, 62 BB 1519 1521 (2007) (Ger.). Ultimately, however, the Court applied the traditional real seat doctrine in the case at hand because it was of the opinion that it was not for an appellate court to change well established conflict-of-laws principles or to forestall legislative decisions. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*; accord Behrens, *supra* note 276, at 93.

282. For details concerning the application of those doctrines, see Otto Sandrock, *Die Schrumpfung der Überlagerungstheorie. Zu den zwingenden Vorschriften des deutschen Sitzrechts, die ein fremdes Gründungsstatut überlagern können*, 102 ZVGLRWiss 447, 502-04 (2003). For a thoughtful discussion of the role of outreach rules in the United States, see Norwood P. Beveridge Jr., *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW. 693, 698-701 (1989).

of-corporate-laws cases involving corporations from “non-privileged” countries?<sup>283</sup>

### B. PROS AND CONS

Conceptually, application of the state-of-incorporation doctrine requires that, in conflict-of-corporate-laws cases, the substantive and procedural rules of the corporate laws of the states in question are, at least to a certain degree, functionally equivalent. Otherwise, there is an incentive for incorporators to incorporate their business outside the state with which the corporation is to have its closest contacts to avoid that state’s more stringent laws.<sup>284</sup> A massive disparity between pertinent rules and regulations and the resulting arbitrage will distort the legislative and regulatory competition among these states and foster a trend towards the establishment of pseudo-foreign corporations. This development is illustrated by the legislative or judicial responses of corporate law importing states such as California,<sup>285</sup> New York,<sup>286</sup> the Netherlands,<sup>287</sup> and Switzerland<sup>288</sup> to the growing number of pseudo-foreign corporations in these jurisdictions.

The correlation between the freedom to choose the proper law of a corporation and the functional equivalence of the laws of the states involved in a conflict of corporate laws was stressed by the ECJ in *Daily Mail*,<sup>289</sup> the first case in which the ECJ had the opportunity to deal with a corporation’s freedom of establishment under EU law. While today,

283. As stated earlier, within the EEA, pseudo-foreign corporation laws are, as a general rule, not in conformity with European law. See *supra* notes 140–41 and accompanying text.

284. But see Doré, *supra* note 78, 8 BROOK. J. CORP. FIN. & COM. L. 317, 331–33 (2014) (listing disincentives for EU businesses to use foreign company laws); see also Ebke, *supra* note 173, at 138 n. 119 (stating that “[e]ven in the United States of America where a corporation can be formed in any state, no matter where the corporation does business, it has been recommended that the decision where to incorporate ‘should be approached with a strong predisposition to incorporate in the state where the corporation’s principal business activity will be located.’” [footnotes omitted]). The local preference is due to several economic considerations. See, e.g., JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 48–49 (2d ed. 2003).

285. For details, see Ebke, *supra* note 96, at 832.

286. For details, see *id.* at 832–33.

287. For details, see, for example, Harm-Jan de Kluiver, *De wet formeel buitenlandse vennootschappen op de tocht?*, WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE [WPNR] 527 (1999); Levinus Timmerman, *Das niederländische Gesellschaftsrecht im Umbruch*, in Festschrift für Marcus Lutter 173, 184–5 (Uwe H. Schneider, Peter Hommelhoff, Karsten Schmidt, Wolfram Timm, Barbara Grunewald & Tim Drygala eds., 2000). For the current text of the Dutch Law on Pseudo-foreign Corporations of Dec. 5, 2014 which no longer applies to corporations from EU Member States, see [http://wetten.overheid.nl/BWBR0009191/geldigheidsdatum\\_05-12-2014](http://wetten.overheid.nl/BWBR0009191/geldigheidsdatum_05-12-2014) (last viewed on Nov. 23, 2015). For details, see, for example, I.G.F. Cath, *Het Inspire Art-arrest en de Wet formeel buitenlandse vennootschappen: Een dreigend einde of een inspirerend begin?*, NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT (NTER) 62 (2004).

288. For details, see Schnyder, *supra* note 234, at 229.

289. Case C-81/87, *The Queen v. HM Treasury and Commissioner of Inland Revenue ex parte Daily Mail and General Trust plc*, 1988 ECR 5483. The Court held that “[i]n the present state of Community law, Articles 52 and 58 of the Treaty [now Articles 49 and 54 of the TFEU], properly construed, confer no right on a company incorporated under the leg-

within the EU, harmonization of the laws for protecting shareholders and stakeholders at Community level is no longer a constitutive prerequisite for the exercise of freedom of establishment under articles 49 and 54 of the TFEU,<sup>290</sup> the situation *vis-à-vis* corporations from outside the EU, the EEA, or otherwise privileged states is entirely different. The assumption that corporation laws of different countries are functionally equivalent and, hence, interchangeable has been called a “dangerous illusion.”<sup>291</sup> Indeed, contemporary corporation statutes of different countries contain provisions that serve diverse and sometimes irreconcilable functions. These functions are often shaped not only by efficiency considerations, but also by history and politics.<sup>292</sup> Initial conditions, determined by the accident of history or the design of politics, influence the path that a country’s corporation statute will take. Path dependency, or institutional persistence, is, however, not the only force influencing the direction and objectives of corporate law rules. The development, objectives, and functions of corporate law are also driven by powerful external forces, linking traditional rules and complementary institutions in order to enhance the pre-existing rules for the benefit of local, national, and international interests of a state.

In Europe, this development became apparent in the mid-1960s and 1970s with the rise of corporate entities such as *Anstalten*, *Treuunternehmen*, and *Familienstiftungen* that were formed under the law of the Principality of Liechtenstein and differed fundamentally from most forms of corporate entities existing in the neighboring European countries.<sup>293</sup> In later years, island jurisdictions such as the Bahamas,<sup>294</sup> Barbados, the British Virgin Islands,<sup>295</sup> the Cayman Islands, the Channel Islands

---

isolation of a Member State and having its registered office there to transfer its central management and control to another Member State” (emphasis added).

290. See Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 ECR I-9919 (para. 93) (holding that the fact there is no harmonization at the Community level of the rules for protecting shareholders and creditors “cannot . . . justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC” [now articles 49 and 54 of the TFEU]). Thereby, the ECJ indirectly imposed pressure on the EU Member States to intensify their efforts to accomplish more convergence of the law of business associations within the EU. See Ebke, *supra* note 96, at 825.

291. Grossfeld, *supra* note 210, at ¶ 13.

292. See Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996). See generally Amir N. Licht, *The Mother of All Path Dependencies: Toward A Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001).

293. See the cases cited in *supra* note 149. For details of the so-called “Liechtenstein” cases, see Werner F. Ebke, *Das Internationale Gesellschaftsrecht und der Bundesgerichtshof*, in 50 JAHRE BUNDESGERICHTSHOF – FESTGABE AUS DER WISSENSCHAFT, 799, 811–12 (Andreas Heldrich & Klaus J. Hopt eds., 2000).

294. Oberlandesgericht [OLG] [Court of Appeals] of Düsseldorf, July 16, 2010, 85 IPRSPR 48 (2010) (Ger.).

295. Bundesgerichtshof [BGH] [Federal Court of Justice], April 13, 2010, 63 DB 1581, 1581–82 (2010) (Ger.).

(Guernsey and Jersey),<sup>296</sup> the Isle of Man,<sup>297</sup> Gibraltar,<sup>298</sup> the Cook Islands,<sup>299</sup> St. Kitts and Nevis,<sup>300</sup> St. Vincent and the Grenadines,<sup>301</sup> St. Lucia,<sup>302</sup> Antigua,<sup>303</sup> the Turks and Caicos Islands, Barbuda, and Niue<sup>304</sup> (“the little group of isles beyond the wave – so tiny, you might almost wonder where it is”)<sup>305</sup> entered the market for corporate charters and demonstrated an even greater divergence in statutory or judicial approaches to the regulation of the internal affairs of corporate and other entities. In addition, a growing number of corporations from countries with lesser-developed corporate laws entered the market for corporate charters and created novel legal issues.<sup>306</sup> In light of the increasing divergence, courts and commentators questioned whether the liberal state-of-incorporation doctrine was capable of coping with the ensuing legal, economic, and social issues.

Obviously, modern control mechanisms such as the market for corporate control<sup>307</sup> and disclosure-based approaches to achieve shareholder and stakeholder protection<sup>308</sup> have only limited effects in the case of

296. See *supra* note 151.

297. See *supra* note 150.

298. See *supra* note 148.

299. The Cook Islands claim to be the first country to have enacted an explicit asset protection law, implementing particular provisions in 1989 to its International Trusts Act. For details, see HERMANN, *supra* note 154, at 82–106.

300. *Id.* at 106.

301. *Id.*

302. *Id.* at 106–07.

303. Lisa B. Querard, *Antigua Introduces Robust Legislation for Asset Protection Trusts*, 12 TRUST & TRUSTEES 16 (2006).

304. HERMANN, *supra* note 154, at 107 n.464.

305. GILBERT & SULLIVAN, *supra* note 4, at 54.

306. The issues include the question of what law a court should resort to if the contents of the applicable foreign corporation law cannot be ascertained because, for example, of the lack of published court decisions in that country or the unavailability of legal literature dealing with the applicable law. For details, for example, Werner F. Ebke, *Die Anknüpfung der Rechtsnachfolge von Todes wegen nach niederländischem Kollisionsrecht. Zum Rückgriff auf die „wahrscheinlichste Anknüpfung“ bei nicht sicher feststellbarem Inhalt ausländischer Kollisionsregeln*, 48 RABELSZ 319, 335–37 (1984); see also HÜBNER, *supra* note 212, at 284–95.

307. For details of the effects of the market for corporate control, see the seminal work by Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). See also JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 118–26 (2010); Werner F. Ebke, *Unternehmenskontrolle durch Gesellschafter und Markt*, in *INTERNATIONALE UNTERNEHMENSKONTROLLE UND UNTERNEHMENSKULTUR* 7, 25–28 (Otto Sandrock & Wilhelm Jäger eds., 1994). For a critical analysis of the effects of the market for corporate control in light of inefficient capital markets, see PETER KLORMANN, *EXTERNE CORPORATE GOVERNANCE UND INEFFIZIENTE KAPITALMÄRKTE* (2015).

308. For an in-depth analysis of the “information model”, see, for example, ALEXANDER HENNE, *INFORMATION UND CORPORATE GOVERNANCE* (2011). See also Werner F. Ebke, *The Impact of Transparency Regulation on Company Law*, in *CAPITAL MARKETS AND COMPANY LAW* 173 (Klaus J. Hopt & Eddy Wymeersch eds., 2003). The ECJ stressed the significance of creditor protection through disclosure of material information as early as 1999. See Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1495 (para. 36) (holding that “[s]ince the company in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which

small, unlisted private companies that constitute the bulk of the conflict-of-laws cases in Europe.<sup>309</sup> Furthermore, in the cases discussed in this chapter, traditional conflict-of-laws doctrines such as "abuse of rights" (*fraus legis*), "circumvention," "fraud," or "public policy" (*ordre public*)<sup>310</sup> are not particularly helpful in coping with the undesirable effects of massive discrepancies between the regulation of a corporation's internal affairs and the protection of shareholders and stakeholders. These doctrines are amorphous exceptions that are not easily explained. To the extent that they can be defined, they have been found to embrace nebulous concepts of a state's most basic notions of fairness and justice.<sup>311</sup> It is impossible to predict what the opinion of a judge might be as to whether or not the prerequisites of a particular doctrine are met in a given case. This is particularly true of the public policy (*ordre public*) exception, which almost two centuries ago was described by an English judge as an "unruly horse" that carries its rider to unpredictable destinations.<sup>312</sup> Public policy is a variable quantity; it must vary, and does vary, with the outlooks and perceptions of the public. Internationally minded, recognition-friendly jurisdictions have, therefore, developed a restrictive approach to the public policy exception in cases of conflicts-of-corporate laws.<sup>313</sup> In any event, in corporate law matters, public policy has remained a refuge of last resort for courts,<sup>314</sup> and rightly so. As a result, however, it is to a certain extent understandable that many states desire to make applicable their own internal affairs rules to corporations whose business and personnel are predominantly identified with their state rather than the state of incorporation.

Needless to say, the real seat doctrine too has its limitations and shortcomings. Critics of the real seat doctrine often point to the harshness of the "sanctions" of the doctrine in cases in which a foreign corporation has its real seat, or principal place of business, in a state other than its state of

---

govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [OJ 1978 L 222, p. 11], and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member States by certain types of company governed by the law of another State [OJ 1989 L 395, p. 36]").

309. Cf. Doré, *supra* note 78, 8 BROOK. J. CORP. FIN. & COM. L. 317, 335 (2014).

310. See *supra* notes 132–35.

311. See, e.g., Introductory Law [Einführungsgesetz] to the BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Sept. 21, 1994, BUNDESGESETZBLATT, TEIL I [BGBl. I] 2494, as amended, art. 6 (Ger.) which reads as follows:

A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights.

312. See, e.g., Richardson v. Mellish, 2 Bing. 229, 252 (1824) (per Burrough, J.) ("Public policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you.").

313. HÖBNER, *supra* note 212, at 298–99.

314. *Id.* at 299–300.

incorporation.<sup>315</sup> Indeed, the decision of the German Supreme Court in *Trabrennbahn* illustrates how difficult it is to cope with the legal consequences of the real seat doctrine *à la Jersey*.<sup>316</sup> Yet, it should be noted that, in practice, those consequences have seldom materialized, as most incorporators are aware of the consequences of incorporating their business under the “wrong” law and, consequently, have chosen the “proper” law of corporation.<sup>317</sup> Accordingly, in practice, “catastrophic” cases are extremely rare.<sup>318</sup> Critics also argue that in a globalized economy it is increasingly difficult to determine where a corporation has its real seat, or principal place of business, which gives rise to legal uncertainty.<sup>319</sup> While that point may be accurate in some cases,<sup>320</sup> it is equally true that pseudo-foreign corporation laws are not free of legal uncertainty either. For constitutional and public international law grounds, pseudo-foreign corporation statutes as well as outreach laws require strong ties (nexus) with the jurisdiction that wishes to impose certain corporate law rules upon out-of-state corporations. Experience shows that even well established and sophisticated pseudo-foreign corporation laws, such as Section 2115 Cal. Corp. Code, can create legal uncertainty that runs contrary to “the need for a uniform and certain standard to govern the internal affairs of a corporation,” which, as was pointed out by the United States Supreme Court in *Shaffer v. Heitner*, is one of the objectives of sound and satisfactory conflict-of-corporate-laws principles.<sup>321</sup>

Thus, for example, in the case of Section 2115 Cal. Corp. Code, legal uncertainty results directly from the statutory prerequisites of that provision.<sup>322</sup> As the California Court of Appeals observed in *Kruss v. Booth* with a view towards Section 2115(a)(1) Cal. Corp. Code, “[t]he need to look at tax returns (or, more exactly, the data that goes into the tax returns), plus common sense, dictates that the applicability of California law to a given action by the board of an out-of-state corporation can only kick in after a certain time lag. In a close case, for example, a corporation wouldn’t know whether its property, payroll and sales added up to doing more than half its business in California until its tax returns are final-

---

315. See, e.g., Brigitte Knobbe-Keuk, *Umzug von Gesellschaften in Europa*, 154 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 325, 356 (1990); Behrens, *supra* note 276, at 82.

316. See *supra* note 237 and accompanying text.

317. See Grossfeld, *supra* note 210, at ¶ 60.

318. *Id.*

319. See, e.g., Behrens, *supra* note 276, at 78.

320. But see, e.g., Oberlandesgericht [OLG] [Court of Appeals] of Cologne, Jan. 31, 2006, 28 ZIP 935, 935–36 (2007) (Ger.) (holding that the company had no real seat in Cape Town, South Africa, because it did not conduct business there but was using the address of a local attorney solely as a “letter box”). Ultimately, the location of a company’s “real seat” becomes a question of (the burden of) proof.

321. *Shaffer v. Heitner*, 433 U.S. 186, 188 n. 44 (1977).

322. Another legal uncertainty arises, of course, from the still unsettled question of whether Section 2115 CAL. CORP. CODE is constitutional because, thus far, the U.S. Supreme Court does not seem to have had an opportunity to rule on this issue. See *supra* note 141.



ized.”<sup>323</sup> Similar issues may arise in connection with the business-voting stock standard under Section 2115(a)(2) Cal. Corp. Code.<sup>324</sup> Accordingly, rather than relying upon uncertain pseudo-foreign corporations laws, many states that aim at protecting certain national interests in corporate law matters will prefer to adopt the real seat doctrine, especially in the absence of constitutional or international law constraints, to be able to apply their own corporate law, including rules and principles that are rooted in public policy considerations of the particular state.

## VI. EPILOGUE

State-of-incorporation doctrine (“internal affairs doctrine”) or real seat doctrine – that is the question. Specifically, should German courts apply the state-of-incorporation doctrine to corporations incorporated outside the EEA or other treaty-privileged nations such as the U.S. and Japan—even if, as a result, the number of pseudo-foreign corporations in Germany is likely to rise? Or should German courts, in the absence of a bilateral or international treaty, adhere to the real seat principle and require a foreign corporation that conducts all or most of its business in Germany to (re)incorporate under German law in order to create a level playing field for all corporations doing all or most of their business in Germany?

Germany’s highest court in civil matters, the *Bundesgerichtshof*, has spoken: In *Trabrennbahn*,<sup>325</sup> the Court made it clear that it will continue to apply the “real seat doctrine *à la Jersey*”<sup>326</sup> in all cases in which a foreign corporation has its real seat, or principal place of business, in Germany while its registered office, or statutory seat, remains in its state of incorporation (“affairs keep their original complexion”); unless, of course, the corporation is duly formed and registered and continues to be registered in a Member State of the EEA or in a nation that has concluded an international treaty with Germany granting corporations a right of mutual recognition.<sup>327</sup> In other words, the German Supreme Court is not willing to effectuate, by judicial fiat, a fundamental change of

323. *Kruss v. Booth*, 185 Cal. App. 4th 699, 719, 111 Cal. Rptr. 3d 56, 74 (Cal. App. 4th Dist., June 11, 2010).

324. *Ebke*, *supra* note 141, at 188.

325. *Bundesgerichtshof [BGH] [Federal Court of Justice]*, Oct. 27, 2008, *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ]* 192, 197 (2008) (Ger.).

326. *See supra* note 238 and accompanying text.

327. *See supra* notes 192–201 and accompanying text; *see also Bundesgerichtshof [BGH] [Federal Court of Justice]*, Oct. 8, 2009, 30 *ZIP* 2385 (2009) (Ger.) (involving a Singapore company); *Amtsgericht [Local Court] of Hagen*, June 17, 2010, 85 *DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSR]* 47–48 (2010) (Ger.) (involving an Isle of Man company). If, however, a company incorporated under the law of a “non-privileged” country has both its registered office and its principal place of business in that country, it will be recognized in Germany as a company whose legal status and internal affairs are governed by the law of the state of incorporation. *See Oberlandesgericht [OLG] [Court of Appeals] of Düsseldorf*, July 16, 2010, 85 *DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS [IPRSR]* 48, 48 (2010) (Ger.) (involving a company from the Bahamas).

conflict-of-corporate-laws principles<sup>328</sup> that have been applied continuously by German courts since the nineteenth century.<sup>329</sup> In the words of Justice Benjamin Nathan Cardozo, “[a] change so revolutionary, if expedient, must be wrought by legislation.”<sup>330</sup>

A growing number of legal scholars, by contrast, argue in favor of an application of the state-of-incorporation doctrine (“internal affairs doctrine”) to corporations from “non-privileged” countries.<sup>331</sup> In the opinion of the Local Court (Amtsgericht) of Ludwigsburg in Germany, the real seat doctrine can no longer be considered an adequate approach to solving conflicts of corporate laws, even in cases involving corporations formed and registered in a “non-privileged” country that have their principal place of business in Germany.<sup>332</sup> The Court of Appeals of Hamburg also expressed its sympathy for a uniform treatment of conflict-of-corporate-laws cases, even though in the case at hand it followed the traditional real seat doctrine rather than the liberal state-of-incorporation doctrine, holding that it was not for an appellate court to forestall the uniform development of the law in this respect.<sup>333</sup>

Yet, do we know exactly what we are getting ourselves into if we externalize the “flowers of progress” of the conflict-of-corporate-laws revolution initiated by the ECJ within the EU, and give it effect in a completely different legal environment outside the EU, the EEA, and a couple of countries privileged under an international treaty (e.g., the United States and Japan)? Is it not possible that, like Princess Zarah in *Utopia Limited*, we overlook a “most essential element”? Do we really completely comprehend every aspect underneath the corporate veil of a foreign corporate entity? Do we fully understand all elements of the corporate governance of a foreign company? And are we really capable of looking beyond the letter of the law of the foreign corporation’s state of incorporation in case we need to? Or are we, ultimately, captives of our own

---

328. Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 29, 2008, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 192, 197 (2008) (Ger.).

329. For a brief account of the history of the real seat doctrine in Germany, see Ebke, *supra* note 107, at 1021–22.

330. *Ultramares Corp. v. Touche & Co.*, 174 N.E. 441, 447 (1931).


331. See *supra* note 274.

332. Amtsgericht [AG] [Local Court] of Ludwigsburg, July 20, 2006, 27 ZIP 1507, 1509 (2006) (Ger.).


333. See Oberlandesgericht [OLG] [Court of Appeals] of Hamburg, Mar. 30, 2007, 66 BB 1519, 1521 (2007) (Ger.). As stated before, several proponents of an enabling choice-of-corporate-law approach *vis-à-vis* companies from “non-privileged” countries, including the Court of Appeals of Hamburg, would be willing, however, to regard an out-of-state corporation as a “pseudo foreign” corporation to treat it, for certain purposes of fundamental importance to Germany, as if it had been incorporated in Germany in the first place. See *supra* notes 277–81. Accordingly, the corporation would be subject to a set of key German laws that are rooted in public policy considerations despite its being incorporated in another country. *Id.* As a result, the liberal approach of the state-of-incorporation doctrine would be constrained significantly, turning the enabling doctrine into a pseudo-liberal doctrine of conflict-of-corporate-laws.

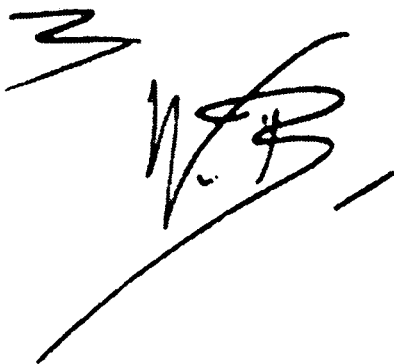
legal system, legal tradition, legal language, and legal thinking?<sup>334</sup>

In his poem "Schein und Sein" ("Appearance and Reality"), the German poet Wilhelm Busch put it this way:<sup>335</sup>

Schein und Sein .  


Mein Kind, es sind allhier die Dinge,  
 Gleiches, ob große, ob geringe,  
 Im Wesentlichen so ungeteilt,  
 Erst wenn sie nicht wie Nüssen kernt.

  
 Man willt sie die Unterglieder,  
 Auszug der Menschen zu verbinden.  
 In Kunst sie nur von Außenwärts.  
 In Kunst die Kunst, nicht das Herz.



334. For the interrelationship of law and language, see BERNHARD GROSSFELD, DREAMING LAW: COMPARATIVE LEGAL SEMIOTICS 35-69 (2010).

335. The hand-written poem is reprinted in WILHELM BUSCH, SCHEIN UND SEIN - NACHGELASSENE GEDICHTE 1 (1909).

The hand-written text reads as follows:

*Mein Kind, es sind allhier die Dinge,  
Gleichviel, ob große, ob geringe,  
Im Wesentlichen so verpackt,  
Daß man sie nicht wie Nüsse knackt.  
Wie wolltest Du Dich unterwinden,  
Kurzweg die Menschen zu ergründen.  
Du kennst sie nur von außenwärts.  
Du siehst die Weste, nicht das Herz.*

In a loose translation into English, the poem reads as follows:

*My child, all the things here,  
Regardless of whether they are big or small,  
Essentially are packaged such  
That one cannot crack them like nuts.  
How would you dare,  
Without hesitation, to fathom people.  
You know them only from the outside.  
You see the vest, not the heart.*

