The "Real Seat" Doctrine in the Conflict of Corporate Laws

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I. Introduction

The decision of the Court of Justice of the European Communities of March 9, 1999, in the matter of Centros Ltd. v. Erhvervs- og Selskabsstyrelsen has given rise to a new debate of the fundamental and still largely unresolved issue of whether the real seat (siege réel) doctrine is in conformity with articles 432 and 481 of the European Community (EC) Treaty. The real seat doctrine is a conflict-of-laws principle that recognizes that only one state should have the authority to regulate a corporation's internal affairs and that this authority belongs to the state in which the corporation has its real seat (siege réel or effektiver Sitz).

2. 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.


3. Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community 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.

EC TREATY, supra note 2, art. 48.

Although there is no generally accepted definition of the term real seat, the term is commonly construed as referring to the place where the central management decisions are being implemented on a day-to-day basis. Thus, the real seat doctrine, which is applied in one form or another by the majority of the Member States of the European Union (EU), gives effect to the law of the state that has the most significant relationship to a corporation. Obviously, the real seat doctrine limits the promoters' choice of the state of incorporation and, consequently, the choice of law. In addition, the real seat doctrine has far-reaching effects on a corporation's choice of law after it has been incorporated.

The real seat doctrine's approach is certainly different from the one applied by British, Danish, Dutch, Italian, Swiss, and, of course, U.S. courts. Thus, for example, under the laws of the Netherlands, Great Britain, and the fifty states of the United States, promoters are free to choose the state of incorporation. According to the choice-of-corporate-law principles of these countries, courts will, as a general rule, apply the law of the state of incorporation to the relationships among a corporation and its officers, directors, and shareholders (internal affairs doctrine, state-of-incorporation rule, or Gründungstheorie). In most jurisdictions that have adopted the liberal internal affairs doctrine or state-of-incorporation rule, the choice of corporate law is, however, subject to limitations. In an effort to protect their citizens, some states apply, either as a matter of statutory law or by means of judicially created conflict rules, some or all of their internal affairs or other corporate law rules to corporations that have significant contacts with that state even though the corporations are incorporated elsewhere.

The present essay does not intend to answer the still unsettled question of whether and to what extent the real seat doctrine is in accordance with articles 43 and 48 of the EC Treaty. The implications of the forthcoming decision of the European Court of Justice in the matter of Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH also transcend the modest scope of this article. Similarly, this article does not attempt to contribute to the ongoing debate about the future of company law harmonization within the EU; nor will this article address the important policy issue of whether and to what

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6. See infra note 54.


9. See infra notes 140–152 and accompanying text.

10. See infra notes 103 & 113 and accompanying text.


14. See infra notes 100–115 and accompanying text.

extent harmonization of company laws or regulatory competition is desirable in multijurisdictional legal systems such as the EU. Likewise, the ramifications of the recently adopted statute for a European Company (Societas Europaea) and its impact on the conflict of corporate laws are beyond the scope of this paper. Most importantly, this article does not intend to promote or even defend the real seat doctrine. Rather, the present article will analyze the background, origins, scope, and implications of Germany's version of the real seat doctrine, the Sitztheorie. Without a clear understanding of the background, origins, scope and implications of the Sitztheorie, the present debate of the fate of the Sitztheorie in light of the freedom of (primary and secondary) establishment under articles 43 and 48 of the EC Treaty will lack the necessary foundations. The present article will focus primarily on the conflict of corporate laws although some of the observations, conclusions, and propositions herein may be equally applicable to conflicts involving unincorporated business associations such as limited partnerships.

This article first casts some light on the background of the Sitztheorie. The article then focuses upon the historical foundations of the Sitztheorie and pertinent German case law. Following this, the article outlines fundamental policy considerations underlying the Sitztheorie. In the final section, the article briefly explores some of the practical implications of the Sitztheorie.

II. Background

In Germany, unlike in several other Member States of the EU, the conflict of corporate laws is not regulated by statute.

A. No Statutory Conflict Rule

The Introductory Law of the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch), which provides rules and principles to determine the applicable law in private law matters (for example, contracts, torts, domestic relations, estates, agency relationships, and unjust enrichment), has traditionally been silent as to the conflict of corporate laws. Article 10 of the Introductory Law of the Civil Code of January 1, 1900, which was repealed in 1964, only addressed the very limited question of the recognition by German courts of foreign associations (Vereine). The revised Introductory Law of the Civil Code, which entered into force on September 1, 1986, left expressly open the question of which law a court is required to apply to the internal affairs of a business association. Article 37 of the


17. For details, see, e.g., Grossfeld, supra note 5, at 42–44; Peter Kindler, Commentary, in Münchener Kommentar zum BGB: Internationales Gesellschaftsrecht 129–30 (Kurt Rehmans et al. eds., 3d ed. 1999).


revised Introductory Law states that the conflict-of-laws principles of the Rome Convention of June 19, 1980, on the Law Applicable to Contractual Obligations shall not apply to companies (Gesellschaften), associations (Vereine), and incorporated entities (juristische Personen). Thus, the laws applicable to the formation, legal capacity, powers, internal organization, liquidation of a corporation, liability of the shareholders, directors or officers, and agency cannot be determined on the basis of the conflict-of-laws principles applicable to contractual relationships even though corporations are formed on the basis of a contract (Gesellschaftsvertrag). The German legislature expressly refrained from codifying conflict-of-corporate-laws principles because of the work done in the EU to harmonize the member states' law of business associations.

Obviously, the German legislature's decision was made with a view towards the EEC Convention on the Mutual Recognition of Companies and Legal Persons of February 29, 1968. This convention recognizes, as a general rule, the state-of-incorporation doctrine but provides exceptions for states following the real seat doctrine. The EEC Convention, based upon article 293 (ex 220) of the EC Treaty, never came into force, however, for lack of ratification by the Netherlands. It is highly unlikely that the EEC Convention will be revitalized in the foreseeable future although some authors have argued for a "more positive reappraisal of proposals for a Convention on the Mutual Recognition of Companies . . .". The fact that Germany, like four other original EC Member States, ratified the EEC Convention of 1968 does not have any immediate legal effect upon Germany's conflict-of-corporate-laws principles. Specifically, German courts are not required to apply any of the choice-of-corporate-law principles stated in the ECC Convention.

B. PUBLIC INTERNATIONAL LAW

It is generally agreed that there is no obligation under public international law for states to recognize the legal personality of a foreign corporation. Currently, international treaties do not require Germany either to apply a specific conflict-of-corporate-laws principle or to recognize the legal capacity of foreign corporations. Thus, for example, the Hague Convention of October 31, 1951, on the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations was not signed by Germany, and the Hague Convention has not entered into force for other states either. Bilateral international treaties, such as:

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22. Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: . . . the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another . . . .

EC Treaty, supra note 2, art. 293.
24. Grossfeld, supra note 5, at 33.
as friendship, commerce, or investment protection treaties, to which Germany is a party also do not require German courts to apply a certain choice-of-corporate-law rule. Although such treaties provide, as a general rule, for the mutual recognition of companies formed in accordance with the law of either party to the treaty, most bilateral international treaties do not address the question of which law is to be applied to determine whether a given enterprise can be regarded as a corporate entity for purposes of the treaty or which law applies to a corporation's internal affairs. This is also true, at least according to the view of most legal commentators in Germany, of Article XXV Section 5 of the Friendship Treaty of October 29, 1954, between Germany and the United States. Similarly, Germany's double tax treaties, like other international tax treaties, typically do not address the conflict of corporate laws because the classification of enterprises for tax treaty purposes follows rules and principles that differ from those applicable for purposes of commercial and company law.

C. EUROPEAN LAW

The impact of the law of the EU upon the conflict of corporate laws within the EU is still largely unsettled. As stated before, efforts to solve the problem of the mutual recognition of member state companies by means of an international convention pursuant to article 293 (ex 220) of the EC Treaty have not come to fruition. Thus far, the EU has not used its power under Article 65 lit. b of the EC Treaty to take measures to enhance the comparability of the member states' conflict-of-corporate-laws principles. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 expressly left open the question of when a business association or legal person is to be recognized by a state that is a party to the Brussels Convention. The European Convention on Human Rights and Fundamental Freedoms, to which Germany is a party, thus far has not been interpreted to require courts of the signatory states to recognize the legal personality of foreign corporations. This convention, however, may affect a corporation's right to sue in the courts of a signatory state.

31. See SIEHR, supra note 21 and accompanying text.
34. See Judgment of Nov. 12, 1990, Cour de Cassation (Chambre Criminelle) [Court of Cassation (Criminal Chambers)], France, 110 REVUE DES SOCIÉTÉS [REV.SOC.] 39 (1992). For details of this decision, see Bernhard
EU's Charter of Fundamental Rights adopted on December 7, 2000, in Nice, France, and the effects of the right to due process, which the European Court of Justice has recognized as a general principle of European law, on corporations is still unclear.15

There is, however, substantial debate about the effects, both present and future, of articles 43 and 48 of the EC Treaty on the choice of corporate law within the EU. Several commentators suggest that articles 43 and 48 of the EC Treaty require that incorporators be given the right to choose the state of incorporation and, hence, the proper law of a corporation.16 Some scholars, however, are willing to grant Member States the power to impose their laws, in whole or in part, on corporations formed in another member state if the corporation in question has more substantial contacts with the former than with its state of incorporation.17 Commentators who favor a right to choose the proper law of a corporation, suggest that after formation, a corporation is also entitled to transfer its central management and control from one member state to another without dissolution.18

Other commentators, by contrast, rely heavily upon dicta in the Daily Mail decision of the European Court of Justice for the proposition that, "in the present state of Community law,"19 articles 43 and 48 (ex 52 and 58) of the EC Treaty, properly construed, cannot be interpreted as conferring on promoters the right to freely choose the state of incorporation;20 or on "companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State."21 These authors conclude that Centros has not overruled Daily Mail.

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35. On the impact of human rights on conflict of laws, see generally Dirk Looschelders, Die Ausstrahlung der Grund- und Menschenrechte auf das Internationale Privatrecht, 65 RabelsZ 463 (2001). For the right of a foreign corporation to sue in another country's courts, see also infra note 146.


38. For details, see, e.g., Study on Transfer of the Head Office of a Company from One Member State to Another without Dissolution (KPMG ed., 1993). See also infra notes 150–56 and accompanying text.


40. See, e.g., Grossfeld, supra note 5, at 27–30; Kindler, supra note 17, at 118–25.


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nor does it constitute a departure from the view expressed by the Court in its controversial obiter dictum in the Daily Mail decision. Thus far, the Court of Justice of the European Communities has not had an opportunity to rule on this issue.

III. The View of the German Judiciary

Because of the lack of domestic and international rules on the conflict of corporate laws, German courts were required to fill the gap and erect an edifice of choice-of-corporate-law rules and principles to deal with the ever-increasing number of cases involving either foreign companies doing business in Germany or German companies doing business abroad.

A. Historical Foundations

In the nineteenth century, courts and commentators in Germany and other European countries suggested a wide variety of principles, rules, and doctrines to solve conflict-of-corporate-laws issues. Among the many choice-of-law factors (Anknüpfungspunkte) suggested were the place of formation, the promise to purchase the corporation's equity securities, the nationality of the controlling shareholders or the directors, the company's central management and control, the central administration, and the company's business establishment (Betriebsstätte or lieu d'exploitation). In France, scholars and courts favored the real seat doctrine to determine the lex societatis. Belgium was the first European country statutorily to recognize the real seat doctrine.

In 1904, the then-highest court in Germany, the Reichsgericht, also recognized the fundamental rule that the internal affairs of a corporation are governed by the law of the state...
in which the corporation has its seat (Sitz). According to the Reichsgericht, a corporation having its seat in Germany is required to incorporate under German law (Sitztheorie), subject always to the requirements of general principles of public international law or bilateral international treaties. Conversely, under the Sitztheorie, a business association having its seat outside of Germany cannot be incorporated under German law.

B. Post-World War II Case Law

Shortly after World War II, Germany's highest court in civil matters, the Bundesgerichtshof, followed the view taken by the Reichsgericht and adopted the Sitztheorie to solve conflict-of-corporate-laws questions.

1. General Rule

The central term, seat, within the meaning of the Sitztheorie does not refer to the seat stated in the corporation's articles of incorporation or by-laws (Satzungssitz). Rather, the term refers to the real or effective seat (effektiver Verwaltungssitz) of the corporation. The German Supreme Court construed the term real seat as referring to the place where "the fundamental business decisions by the managers are being implemented effectively into day-to-day business activities." In determining the place of the real seat of a corporation, courts look at several factors. In addition, German courts developed a set of sophisticated rules to determine which party has the burden of proof as to the location of the real seat of a corporation if the parties disagree on this issue. If a corporation is duly formed in accordance with its lex societatis, recognition (Anerkennung) will follow ipso iure. Under the principle of automatic recognition (Prinzip der automatischen Anerkennung), a separate act of recognition is no longer required under German law.

50. See Judgment of Mar. 9, 1904, Reichsgericht (Supreme Court), Germany, 1904 JURISTISCHE WOCHENSCHRIFT [JW] 231. See also Judgment of June 29, 1911, Reichsgericht, Germany, 77 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 19, 22 (1912); Judgment of Dec. 16, 1913, Reichsgericht, Germany, 83 RGZ 367, 369-70 (1914); Judgment of Jan. 19, 1918, Reichsgericht, Germany, 92 RGZ 73, 76 (1918); Judgment of June 3, 1927, Reichsgericht, Germany, 117 RGZ 215, 217 (1927); Judgment of Oct. 29, 1938, Reichsgericht, Germany, 159 RGZ 33, 46 (1939).

51. See, e.g., Grossfeld, supra note 5, at 20-21; Kindler, supra note 17, at 102.

52. See Judgment of July 11, 1957, Bundesgerichtshof (Supreme Court), Germany, 25 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFERS IN ZIVILSACHEN [BGHZ] 134, 144 (1958).

53. See Judgment of Mar. 21, 1986, Bundesgerichtshof (Supreme Court), Germany, 97 BGHZ 269, 272 (1986).


55. For details, see, e.g., Rüdiger Werner, Der Nachweis des Verwaltungssitzes ausländischer juristischer Personen (1998); Stephan Travers, Der Beweis des Anknüpfungskriteriums "faktischer Sitz der Hauptverwaltung" im Internationalen Gesellschaftsrecht (1998). Thus, contrary to the view that was recently expressed by the Court of Appeals of Frankfurt am Main, Germany, there can be no "company without a real seat." Judgment of June 23, 1999, Oberlandesgericht (Court of Appeals), Frankfurt am Main, Germany, 45 RIW 783 (1999). It ultimately becomes a question of which party has the burden to prove where the real seat of the company in question is located. See Elke, supra note 4, at 651. The appeal in this case is still pending before the German Supreme Court (Bundesgerichtshof).

56. Grossfeld, supra note 5, at 46. See also Wulf H. Roth, Recognition of Foreign Companies in Siége Réel Countries: A German Perspective, in CURRENT ISSUES IN CROSS-BORDER ESTABLISHMENT OF COMPANIES IN THE EUROPEAN UNION 29 (Jan Wouters & Uwe H. Schneider eds., 1995).
Over the last fifty years the German Supreme Court has applied the real seat doctrine without exception.57 The lower courts in Germany followed suit.58 In applying the real seat doctrine the courts do not distinguish between corporations formed in another member state of the EU and companies incorporated elsewhere. Rather, the real seat doctrine is applied to corporations irrespective of their state of incorporation. While it is clearly established with respect to corporate entities, there is some discussion as to whether and to what extent the real seat doctrine can also be applied to unincorporated business associations such as general partnerships (offene Handelsgesellschaften) or limited partnerships (Kommanditgesellschaften).59

2. Scope

According to the German Supreme Court, the law of the state of the real seat governs a corporation’s formation, its life, and its liquidation.60 From the doctrine’s inception, the scope and effects of the real seat doctrine have been tested in German courts in a broad variety of cases. These cases include, but are by no means limited to, the expropriation by the East German government of shares held by shareholders residing in West Germany61 or corporate property situated in West Germany;62 and the recognition of pseudo-foreign corporations (Scheinauslandsgesellschaften), or mailbox companies (Briefkastengesellschaften) formed in the Principality of Liechtenstein.63 More recent court cases also deal with efforts of English limited companies to enter, as the sole corporate general partner, into a German limited partnership (Kommanditgesellschaft)64 and transfers of the corporate headquarters across borders.65 Equally complex and complicated conflict-of-laws questions arise in cases

58. See the long list of cases cited in Ebke, supra note 25, at 806 n. 53.
60. See Judgment of July 11, 1957, Bundesgerichtshof (Supreme Court), Germany, 25 BGHZ 134, 144 (1958). For details of the scope of the lex societatis, see, e.g., Grossfeld, supra note 5, at 19–25; Kindler, supra note 17, at 142–80; Kegel & Schürg, supra note 29, at 505–10; Krophöller, supra note 27, at 542–43.
61. See Judgment of Jan. 30, 1956, Bundesgerichtshof (Supreme Court), Germany, 20 BGHZ 4, 12 (1956).
of transnational mergers, acquisitions, and take-overs (tender offers). The new information technology, too, poses novel choice-of-corporate-law questions.

3. Freedom of Establishment

It was not until the rise of the English limited company cases, however, that courts and commentators in Germany began to question whether the real seat doctrine is in conformity with articles 43 and 48 of the EC Treaty. In light of the Daily Mail decision of the Court of Justice of the European Communities, some commentators argued that articles 43 and 48 of the EC Treaty require that the real seat doctrine be put to rest. To some authors, the "expulsion of the seat doctrine from Europe" seemed to be inevitable after Daily Mail. Yet, the view that the Daily Mail does not require courts to abolish the real seat doctrine clearly prevailed in the legal literature as well as in opinions of German courts published in the 1980s and 1990s.

In 1999, the issue of whether the real seat doctrine was consistent with articles 43 and 48 of the EC Treaty arose again in connection with the decision of the European Court of Justice in Centros. Several commentators suggested that Centros abolished the real seat doctrine. Upon closer review, however, many authors concluded that Centros only involves a company's freedom of secondary rather than primary establishment, and that the court did not address the issue of the validity of the real seat doctrine. In its Written Observations, submitted pursuant to article 20(2) of the Statute of the Court of Justice of the European Communities in the matter of Überseering BV v. NCC Nordic Construction Company
Baumanagement GmbH, the Commission of the European Communities shared such a view. Thus far, no German court has held, in light of Centros, that the real seat doctrine may no longer be applied to determine the law applicable to the legal capacity and the internal affairs of a corporation (lex societatis).

In contrast, the European Commission is of the opinion that articles 43 and 48 of the EC Treaty, properly construed, mandate that the legal capacity of a corporation be determined, and its internal affairs be governed, by the law of the state of incorporation rather than the state in which the corporation has its real or effective seat (tatsächlicher Verwaltungssitz). However, according to the European Commission, articles 43 and 48 of the EC Treaty, properly construed, do not hinder a member state in which a corporation, duly formed in another member state, has its real seat to take appropriate measures to prevent or sanction fraud (Betrügereien). Such measures, the European Commission observed, may be taken against both the corporation and its shareholders if the corporation’s central man-

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77. See Written Observations submitted by the Commission of the European Communities pursuant to article 20(2) of the Statute of the Court of Justice of the European Communities, Aug. 30, 2000, JURM (2000) 72 CS hg [hereinafter Written Observations].

In its Written Observations, the Commission pointed out:

In addition, it should be noted that the Court in Centros was not required to address the question of the validity and the significance of the real seat doctrine: First, the general recognition of the British company in question was never questioned by the Danish authorities; secondly, the case dealt with the establishment of a branch as opposed to the transfer of the principal place of business (Hauptverwaltungssitz); thirdly, it was the right of the host country (Zuzugsstaat), and not that of the country of origin (Herkunftsstaat), that was at issue. In this context, it should be emphasized once again that the decisions in Centros and Daily Mail concerned entirely different situations and, therefore, gave rise to different legal issues. Accordingly, they [i.e., the decisions] are by no means inconsistent with each other, and it cannot be said that the Court in its decision in Centros has implicitly undergone a complete reversal in its legal position.

Written Observations at para. 44 (Ebke trans.). The same view was expressed earlier in Ebke, supra note 42, at 658 & 660; Ebke, supra note 4, at 641.

78. See, e.g., Judgment of Mar. 26, 2001, Oberlandesgericht (Court of Appeals), Düsseldorf, Germany, 47 RIW 463, 463-64 (2001); Judgment of Feb. 1, 2001, Oberlandesgericht, Hamm, Germany, 47 RIW 461, 462-63 (2001); Judgment of May 31, 2000, Oberlandesgericht, Brandenburg, Germany, 46 RIW 798 (2000), aff'g Judgment of Sept. 30, 1999, Landgericht [District Court], Potsdam, Germany, 46 RIW 145, 146 (2000); Judgment of Sept. 10, 1998, Oberlandesgericht, Düsseldorf, Germany, 55 Z 203 (2000); Judgment of July 22, 1999, Landgericht, Munich I, Germany, 46 RIW 61, 61-62 (2000). The Austrian Supreme Court, by contrast, held in two factually similar cases that, in light of Centros, the legal personality of a company duly formed and existing under the laws of a member state of the EU is to be determined on the basis of the law of the corporation's state of incorporation; provided, the corporation's registered seat, headquarters or main branch is located in one of the EU Member States. See Judgment of July 15, 1999, Oberster Gerichtshof [Supreme Court], Austria, 55 ZJ 199 (2000); Judgment of July 15, 1999, Oberster Gerichtshof, Austria, 11 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 156 (2000). For a critical analysis of the two decisions, see, e.g., Ebke, supra note 4, at 656-57; Susanne Kalss, Die Auswirkungen von Centros auf die mittel- und osteuropäischen Staaten, in Centros und die Betrittswucher 8, 12-14 (Susanne Kalss ed., 2000); Barbara Höf l, Die Sitztheorie, Centros und der österreichische OGH, 11 EuZW 145 (2000); Eva-Maria Kieninger, Anmerkung, 3 Neue Zeitschrift für Gesellschaftsrecht [NZG] 39 (2000); Gerald Mäsch, Anmerkung, 55 ZJ 201 (2000). See also infra note 89.

79. See Written Observations, supra note 77, at 24 (sub V).

80. See id. at 25 (sub V). On the jurisprudence of the European Court of Justice on circumvention, fraud, and other misuses of Community law, see Anders Kjellgren, On the Border of Abuse—The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law, 2000 Eur. Bus. L. Rev. 179.
agement or control was transferred to the other member state in order to escape obligations towards private or public creditors.81

4. References to the European Court of Justice

In view of Centros and the debate about its legal implications, the local court (Amtsgericht) of Heidelberg, Germany, referred a question to the European Court of Justice under article 234 of the EC Treaty. The lower court inquired into whether articles 43 and 48 of the EC Treaty require a member state to permit a corporation formed under its laws to transfer its real seat to another member state without dissolution.82 As predicted elsewhere,83 the European Court of Justice recently decided not to rule on this matter because, in the case in question, the local court of Heidelberg was effectively acting in an administrative as opposed to a judicial capacity.84 The European Court of Justice will, however, soon have the opportunity, in the matter of Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH,85 to rule on the impact of articles 43 and 48 of the EC Treaty on Germany’s real seat doctrine in a case submitted to it by the Seventh Chamber of the German Supreme Court (Bundesgerichtshof) for a preliminary ruling in March 1999.86

Überseering BV involves a Dutch closely-held corporation (besloten vennootschap) that transferred its principal place of business from the Netherlands to Germany without dissolution under Dutch law and subsequent reincorporation under German law. In accordance with Germany’s version of the real seat doctrine, the Court of Appeals (Oberlandesgericht) of Düsseldorf confirmed the decision of the District Court (Landgericht) of Düsseldorf that, because of the transfer of its principal place of business from the Netherlands to Germany, the plaintiff lacked legal personality and, consequently, could not sue, in its capacity as a Dutch corporation, in a German court.87 While the non-recognition of a corporation that

81. See Written Observations, supra note 77, at 25 (sub V).
82. See Judgment of Mar. 3, 2000, Amtsgericht [Local Court], Heidelberg, Germany, 46 RIW 557, 558 (2000) (concerning the transfer of the principal place of business from Germany to Spain).
83. Ebke, supra note 4, at 656.
86. See Decision of Mar. 30, 2000, Bundesgerichtshof [Supreme Court], Germany, 46 RIW 555 (2000). For details of this case, see Ebke, supra note 4, at 651–55. On December 4, 2001, Advocate General Dámaso Ruiz-Faraldo Colomer submitted to the European Court of Justice his opinion in Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH, supra note 85. In his opinion, the Advocate General suggested that as long as the pertinent choice-of-corporate-law rules are not harmonized within the EU, the Member States are generally free to set their own choice-of-corporate-law rules and that it is for the Member State courts to interpret and apply such rules. See Opinion of the Advocate General in Case C-208/00, Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH at para. 69, available at http://europa.eu.int/jurisp (last visited Aug. 15, 2002) [hereinafter Opinion]. The Advocate General pointed out, however, that the practical effects of the Member States’ choice-of-corporate-law rules need to be in accordance with Community law. Id. See also infra note 146. For details of the function of the Advocate General, see Trevor C. Hartley, The Foundations of European Community Law 52–54 (2d ed. 1988).
87. See Judgment of Sept. 10, 1998, Oberlandesgericht (Court of Appeals), Düsseldorf, Germany, 55 JZ 203 (2000). For details of this decision, see Werner F. Ebke, Anmerkung, 55 JZ 203 (2000). Several commentators have suggested that, in this case, it was unnecessary to refer the question to the European Court of Justice for a preliminary ruling under article 234 of the EC Treaty because, for purposes of procedural law, the Dutch corporation should have been treated by the German court as a general partnership (offene Handelsgesellschaft).-
is incorporated in accordance with the law of a state other than the state in which it has its real seat is an inevitable consequence of the real seat doctrine, the legal implications of the real seat doctrine in this case and other cases are far from being settled. It seems to be generally accepted, however, that shareholders of a corporation (the legal capacity of which is not recognized under the Sitztheorie) may not invoke the privilege of limited liability for debts of their corporation. Rather, under the Sitztheorie, shareholders of such an entity may be held personally liable for the debts of their company, similar to the principles applicable to general partnerships (offene Handelsgesellschaften) or private associations (Gesellschaften bürgerlichen Rechts).

IV. Policy

In view of the aforementioned consequences, it may be helpful to take a closer look at the policy underlying the Sitztheorie.

A. Equal Treatment versus Freedom of Choice

As stated before, the Sitztheorie, like other variations of the real seat doctrine, recognizes 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 real seat. The real seat doctrine is based upon the assumption that the state in which a corporation has its real seat is typically the state that is most strongly affected by the activities of the entity, and therefore should have the power to govern the internal affairs of that corporation. The real seat doctrine stresses the importance of uniform treatment (Gleichbehandlungsgrundsatz) by requiring that all corporations having their principal place

88. See infra notes 141-56 and accompanying text.

89. See also Judgment of Nov. 27, 2000, Landgericht (District Court), Salzburg, Austria, 4 NZG 459 (2001) (submitting to the European Court of Justice for a preliminary ruling the question of whether Austria’s version of the Sitztheorie is in conformity with articles 43 and 48 of the EC Treaty). For the view of the Austrian Supreme Court, see supra note 78.

90. For details, see Grossfeld, supra note 5, at 108-09. But see also Walden, supra note 87, at 259-60.

91. Another possible source of law governing internal affairs of a corporation is European law, were the EU to adopt the proposed Statute for a European Company (Societas Europaea), supra note 16, or the proposed Fifth Directive concerning the Structure of Public Limited Companies and the Powers and Obligations of their Organs, COM (91) 372 final (Nov. 20, 1991), O.J. EC (C 321) at 9 et seq. It appears, however, that the proposed Fifth Directive has now been abandoned. For the latest developments of the proposed Statute for a European Company, see the authors cited supra note 16. For the difficulties concerning the harmonization of company law in the EU, see, e.g., Werner F. Ebke, Company Law and the European Union: Centralized versus Decentralized Lawmaking, 31 Int’l Law. 961 (1997).

92. 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 that corporation. See Judgment of May 7, 1992, Bayerisches Oberes Landesgericht (Bavarian Supreme State Court), Germany, 46 WERTPAPIER-MITTEILUNGEN [WM] 1371 (1992).
of business, or real seat, in a particular state be incorporated under 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 corporations concerned are subject to the same rules and principles of corporate law, including laws that aim at protecting shareholders, creditors, employees, and other stakeholders.

Obviously, this approach is fundamentally different from the one employed by the state-of-incorporation doctrine. The state-of-incorporation doctrine emphasizes, as a general rule, the promoters’ freedom to choose the proper law of a corporation. Consequently, the lex societatis (or in the language of British law, the lex domicili) is the result of the incorporators’ own volition. Thus, for example, under British law, a corporation duly created in a foreign country is to be recognized as a corporation in Great Britain, and accordingly foreign corporations can both sue and be sued in their corporate capacity in the courts. Conversely, a corporation duly formed in Great Britain will be recognized as a corporation in Great Britain even if it conducts most or even all of its business abroad. Of course, the real seat doctrine also grants incorporators freedom of choice, though to a somewhat more limited extent, in that it recognizes the incorporators’ choice of where they want their enterprise to have its principal place of business (real seat).

Clearly, the Sitztheorie aims at effectuating material legal, economic, and social values of the country having the most significant relationship with a particular company. Germany, for instance, has detailed laws concerning the protection of minority shareholders, employees, and affiliated companies, which are not available in other Member States of the EU. A choice-of-corporate-law rule that would allow corporations having their real seat in Germany to be incorporated elsewhere, could undermine the functioning of such laws even though Germany would be the state having the closest connections with the corporation in question. Thus, unless the pertinent foreign law is functionally equivalent to the German law in question or unless there is European law to regulate the aspect in question, there is always the possibility that promoters incorporate their business outside the state with which the corporation is to have its closest contacts in order to avoid that state’s more stringent laws. Obviously, states that recognize a political, or even a constitutional, need to protect certain interests (such as the interests of minority shareholders, employees, creditors or other stakeholders, especially in the context of large publicly-held corporations) will favor the real seat doctrine. In contrast, states that support the idea of party autonomy in

94. See Written Observations, supra note 77, at 22 (para. 56). The two elements of German company law most frequently cited by German scholars as in danger of being evaded through incorporation in EU Member States such as England are the doctrine of creditor protection by means of minimum capital and the mandatory board representation for employees of large German companies pursuant to the German Law of Co-determination (Mitbestimmungsgesetz). A thorough discussion of these two elements of the German law of business enterprises is clearly beyond the scope of the present paper. It should be noted, however, that some German authors have pointed out that the importance of legal capital is purely symbolic and that mandatory board representation of employees does not affect the majority of companies because the full-fledged regime of Mitbestimmung applies only, as a general rule, to companies having 2,000 or more employees. For further details, see, e.g., Harald Halbhuber, National Doctrinal Structures and European Company Law, 38 COMMON MKT. L. REV. 1385, 1417-19 (2001).
96. Cf. BERND VON HOFFMANN, INTERNATIONALES PRIVATRECHT 258-59 (6th ed. 2000); KROPHOLLER, supra note 27, at 539-40; SIEHR, supra note 21, at 308; Grossfeld, supra note 5, at 6; Kindler, supra note 17, at 102.
If viewed from this perspective, conflict-of-corporate-laws rules are, to some extent, a reflection of the general attitude of a legal culture towards the socio-economic role of (large) corporations and the function of the substantive and procedural rules of the law of corporations for purposes of protecting and furthering the multifarious and sometimes hard to reconcile interests of shareholders, stakeholders, and affiliated companies. For purposes of comparative analyses, it is important always to keep in mind that conflict-of-corporate-laws rules, like other legal institutions of all national legal systems, are shaped not only by efficiency, but also by history and politics. Initial conditions, determined by the accident of history or the design of politics, influence the path that a conflict-of-laws rule will take. Path dependency, or institutional persistence, is, however, not the only force influencing the direction and objectives of a conflict-of-corporate-laws rule. The development of choice-of-corporate law rules is also driven by powerful environmental forces linking traditional conflict rules, such as the real seat doctrine or the state-of-incorporation rule, and complementary institutions (e.g., pseudo-foreign corporation laws or insolvency laws) in order to enhance the preexisting rules for the benefit of local or other interests.

B. Pseudo-foreign Corporations

Interestingly, a state's desire to make applicable its internal affairs rules to corporations whose business and personnel are predominantly identified with that state, is not limited to jurisdictions that have adopted the real seat doctrine. Rather, even jurisdictions that apply the liberal state-of-incorporation doctrine sometimes feel a need to apply some or all of their local internal affairs rules to foreign corporations carrying on most or all of their business within their territory (Scheinauslandsgesellschaften). Thus, for example, New York and California have chosen to exercise this power over what has been called pseudo-foreign corporations. This applies to corporations that carry on most of their activities or have a majority of their shareholders in the state but are incorporated in another state. California and New York expressly mandate the application of local law to specified internal affairs questions in corporations that have significant connections with the state in question. In the United States, there are, however, constitutional limitations on applying local law to the internal affairs of a foreign corporation. The scope of such limitations, however, remains unsettled. The pseudo-foreign corporation statute of the Netherlands of December 17, 1979.

97. Cf. Grossfeld, supra note 5, at 6; Siehr, supra note 21, at 308.
98. For a more detailed exposition of this view, see Bernhard Grossfeld, ZAUBER DES RECHTS 15–26 (1999); Bernhard Grossfeld & Werner F. Ebke, Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe, 26 AM. J. COMP. L. 397 (1978).
100. See Elvin R. Latty, Pseudo-foreign Corps, 65 YALE L.J. 137 (1955). According to Latty, pseudo-foreign corporations are enterprises essentially local in character whose business and personnel are predominantly identified with one state. Their out-of-state incorporation makes them tramp corporations. Cf. DeMott, supra note 12, at 166.
101. See CAL. CORP. CODE § 2115 (West 2002); N.Y. BUS. CORP. LAW §§ 1317–1320 (McKinney 2002). For details, see, e.g., Lewis D. Solomon et al., CORPORATIONS: LAW AND POLICY 206 (3d ed. 1994); DeMott, supra note 12, at 164–66.
102. Ebke, supra note 34, at 215–16. For a thoughtful analysis of the constitutional limitations on applying the law of the forum state to the internal affairs of a foreign corporation, see, e.g., Beveridge, supra note 12, at
1997 (Wet op de formeel buitenlandse vennootschappen), is a modern European example of a legislative effort to cope with corporations that are trying to circumvent more stringent laws (e.g., minimum capital requirements) of the state that has a more significant relationship with the corporation than the corporation's state of formation.103

Similar results may be achieved by means of general principles of conflict-of-laws such as the common law outreach rules of some U.S. jurisdictions104 or conflict-of-laws doctrines developed by legal scholars, such as Professor Otto Sandrock's superimposition doctrine (Überlagerungstheorie)105 or Professor Peter Behrens' limited state-of-incorporation doctrine (eingeschrankte Gründungstheorie).106 However, in the EU, articles 43 and 48 of the EC Treaty seem to impose some restrictions upon a member state's power to apply some or all of its corporate law rules upon pseudo-foreign corporations. The exact scope of such restrictions, however, is far from being certain at this point in time.107

Great Britain, too, has laws that are explicitly outreaching in order to protect local interests. While it is generally recognized today under British law that promoters are free to incorporate their business in a country of their choice,108 a foreign corporation having established a place of business in Great Britain (overseas company) is subject to certain obligations under part XXIII of the Companies Act 1985. Part XXIII of this act provides an effective method of exercising jurisdiction and control over overseas companies.109 In addition, under section 453 of the Companies Act 1985, foreign companies carrying on business in Great Britain are subject to the vigorous provisions of part XIV of the act concerning the investigation of companies and their affairs (subject to certain exceptions). Additionally, under the Company Directors Disqualification Act 1986, a court may disqualify a director of a foreign company for up to fifteen years if the company has become insolvent and the director's conduct makes him or her unfit to be involved in the management of a company.110 Furthermore, foreign companies may be dissolved under sections 709-15; Richard M. Buxbaum, Delaware Supreme Court Finds the State-of-Incorporation Version of the Internal Affairs Doctrine Embedded in the United States Constitution, 15 CAL. BUS. REP. 173 (1994); Richard M. Buxbaum, The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law, 75 CAL. L. REV. 29 (1987).

103. For details of the statute, see, e.g., Harm-Jan de Kluiver, De Wet Formeel Buitenlandse Vennootschappen op de Tocht? 1999 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT & REGISTRATIE [WPNR] 527; Levinus Timmerman, Das niederländische Gesellschaftsrecht im Umbruch, in Festschrift für Marcus Lutter 173, 183-85 (Uwe H. Schneider et al. eds., 2000); Ebke, supra note 4, at 644-45.

104. Beveridge, supra note 12, at 698-701.


106. Peter Behrens, Commentary, in Max Hachenburg & Peter Behrens, GmbHG at Einl. annot. 125, 128 (8th ed. 1992). See also Professor Daniel Zimmer's combination doctrine (Kombinationstheorie): DANIEL ZIMMER, INTERNATIONALES GESellschaftsrecht (1996).

107. See, e.g., Ebke, supra note 4, at 644-46; Timmerman, supra note 103, at 183-85; Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 AM. J. COMP. L. 329, 354 n. 86 (2001). Unfortunately, Case C-410/99, Kamer van Koophandel en Fabrieken voor Groningen v. Challenger Trading Company Ltd., 11 EWS 280 (2000), which involved an English pseudo-foreign company with a principal place of business in the Netherlands, was struck from the company register.

108. See, e.g., Dicey & Morris, supra note 93, at 1107; Drury, supra note 23.

109. This law is presently under review, however. For details, see The Company Law Review Steering Group, Modern Company Law—For a Competitive Economy, Final Report (July 26, 2001).

110. See Company Directors Disqualification Act 1986 § 6(1) (1986). For the territorial scope of the Company Directors Disqualification Act, see, e.g., Seagull Manufacturing Co. Ltd. (In Liquidation) (No. 2), [1994]
220 and 221 of the Insolvency Act 1986. Such dissolution triggers, *inter alia*, the Insolvency Act's provisions concerning fraudulent or wrongful trading, which, in certain circumstances, may lead to personal liability of the directors.\(^1\)

By including business associations incorporated abroad into the ambit of creditor protection and insolvency laws, Great Britain superimposes its respective laws on foreign corporations and their directors who have taken steps to avoid local legal controls.\(^2\) The pseudo-foreign corporation statutes of California, New York, and the Netherlands, like outreach rules that achieve similar results, also aim at effectuating important forum policy vis-à-vis pseudo-foreign corporations. Therefore, these statutes represent a fundamental departure from the liberal choice-of-corporate-law approach that has wholeheartedly embraced the internal affairs doctrine and the state-of-incorporation rule, respectively.\(^3\) Critics of the internal affairs and state-of-incorporation doctrines argue that the conflict-of-laws developments in the jurisdictions mentioned illustrate that the idea of granting promoters and corporations unlimited freedom of choice of corporate law has failed in practice.\(^4\) The real seat doctrine, by contrast, generally aims at creating a level playing field for all corporations having their principal place of business within the state by requiring that corporations be formed in accordance with the laws of the state that is being most affected by their activities.\(^5\)

C. FURTHER CONSIDERATIONS

To many corporate lawyers in Continental Europe, the real seat doctrine is presently irresistible for yet another reason. As stated before, the real seat doctrine provides that one body of corporate law governs a corporation's internal affairs; whereas, the pseudo-foreign corporation statutes (or case law that achieves similar results), may subject a corporation to the laws of more than one jurisdiction. While the real seat doctrine may be required, in certain instances, to apply the law of another state to specified questions,\(^6\) application of a law other than the law of the real seat state is a rare exception.\(^7\) Similarly, states that follow the real seat doctrine hardly ever resort to conflict-of-laws devices such as public policy (*ordre public*), fraud, circumvention, or misuse of law (*fraus legis*) to deny the existence or legal capacity of a foreign corporation.\(^8\) The state-of-incorporation rule is often said to favor such important choice-of-law factors as certainty, predictability, uniformity of re-


\(^2\) Whether and to what extent the British laws in question are in conformity with articles 43 and 48 of the EC Treaty is debatable. On the jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community law, see Kjellgren, *infra* note 80.

\(^3\) See DeMott, *infra* note 12, at 162.

\(^4\) See Grossfeld, *infra* note 5, at 13 (arguing that, in the United States, the state-of-incorporation doctrine is shipwrecked); Kegel & Schurig, *infra* note 29, at 502–03.


\(^6\) See, e.g., id. at 64–65.

\(^7\) Id. at 10, 13.

suit, protection of justified expectations of the parties, and ease in the application of the law to be applied.\textsuperscript{119} However, proponents of the real seat doctrine argue that the rapid growth of pseudo-foreign corporations has led states that follow the state-of-incorporation rule to adopt pseudo-foreign corporation statutes or common law rules to make applicable local internal affairs laws, which in turn leads to an undesirable mix of the law of different jurisdictions.\textsuperscript{120}

Proponents of the real seat doctrine also have pointed out that the real seat doctrine is preferable because it does not require a state to run after a foreign corporation that has established a place of business within its territory. The doctrine requires from the outset, incorporators to play by rules that apply to all participants in the market place.\textsuperscript{121} In addition, the real seat doctrine is said to be more realistic than the liberal state-of-incorporation doctrine because it recognizes that corporation laws of different countries are not interchangeable.\textsuperscript{122} The assumption that corporation laws are interchangeable has been called a "dangerous illusion."\textsuperscript{123} Indeed, contemporary corporation statutes have provisions that serve diverse functions. Conflicts arise from the fact that each statute is itself heterogeneous and may treat a particular matter differently from the statute of any other state. Hence, the potential for conflicts among statutes is inevitable, both within the EU and beyond. Professor Bernhard Grossfeld recently reminded us of the late Professor Martin Wolff's observation that "[t]he reasons why promoters who do business in their own state prefer to subject their corporation to a different law are not always very reputable."\textsuperscript{124}

D. The Effect of Legal Harmonization

Obviously, the role of the conflict-of-laws rules as a means to effectuate a state's local policy vis-à-vis companies operating across state borders diminishes gradually if and as, within a multijurisdictional legal system such as the United States or the EU, legislatures (or others)\textsuperscript{125} succeed in effectively harmonizing the internal affairs laws so as to create a competitive market for corporate charters that is not distorted.\textsuperscript{126} Developments in the United States illustrate that the internal affairs or state-of-incorporation doctrine as a

\textsuperscript{119} DeMott, supra note 12, at 162 (citing Restatement Second of Conflict of Laws 302, comment e).
\textsuperscript{120} Grossfeld, supra note 5, at 15.
\textsuperscript{121} Id. at 10.
\textsuperscript{122} Id. at 13.
\textsuperscript{123} Id.
\textsuperscript{124} Martin Wolff, Private International Law 300 (2d ed. 1950).
\textsuperscript{125} See Werner F. Ebke, Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute? in Festschrift für Bernhard Grossfeld 189 (Ulrich Hübner & Werner F. Ebke eds., 1999) (suggesting that a European Law Institute, patterned after the American Law Institute, be established to facilitate the company law harmonization process within the EU); Ebke, supra note 91, at 985. The proposal has received a great deal of support from legal commentators. See, e.g., Martina Deckert, Zu Harmonisierungsbedarf und Harmonisierungsgrenzen im Europäischen Gesellschaftsrecht, 64 RABELS Z 478, 496 (2000); Christoph U. Schmid, Bottom-up Harmonisation of European Private Law: Is Commune and Restatement, in Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU 103, 120 (European University Institute Working Papers, Law No. 99/7, Sonja Feiden & Christoph U. Schmid eds., 1999) (arguing that "a sort of European counterpart of the American Law Institute, designing Restatement-like compilations of European private law, could be of great use").
conflict-of-corporate-law rule is feasible only if the corporate law of the various jurisdictions are functionally equivalent (albeit not necessarily uniform). Yet, even then states may be tempted to make applicable certain corporate law provisions to foreign corporations that are essentially local in character, for the benefit of their citizens or others.

This observation is not to deny the theoretical relevance and conceptual attractiveness of the idea of a race for the top to which a legislative competition for corporate charters may give rise. This idea, which was born in the United States, may not be equally applicable in the EU at this point in time. In the United States, the need to protect local interests (e.g., shareholders) is diminished, at least to some extent, by the existence of comprehensive and highly sophisticated federal securities laws that aim at ensuring investor confidence and the functioning of the national securities markets. Without such legislation, the attitude of U.S. legislatures and courts towards legislative competition for corporate charters might very well have developed in a different direction.

In contrast, in the EU there is an enormous divergence in statutory approaches to the regulation of the internal affairs of corporations as well as to securities regulation. Corporation statutes in the EU differ not only in detail, but in basic regulatory philosophies, assumptions about the appropriate regulatory force of the statute itself; allocations of prerogatives and risks within the corporation, and roles of stakeholders in corporate governance. The statutory approaches are paralleled by a richly varied body of case law. Efforts to harmonize the Member States’ laws on the structure and organization of corporations have not come to fruition. In addition, there is no comparable body of comprehensive European securities laws that could represent an effective counterbalance to the divergent approaches of the Member States’ laws towards the protection of shareholders and other security holders of large or listed companies.

Accordingly, in the present state of Community law, it is at least understandable that the majority of EU Member States are unwilling to abolish the real seat doctrine and to make the state-of-incorporation doctrine mandatory, especially in light of the fact that it is unclear at the moment whether and to what extent a member state may use pseudo-foreign corporation statutes or judicially created outreach rules to achieve similar results. In view


129. Ebke, supra note 29, at 217-20; Grossfeld, supra note 5, at 7.


131. See generally Janet Dine, Company Law Developments in the European Union and the United Kingdom: Confronting Diversity, 1998 S. AFR. L.J. 245; Ben Pettet, The Stirring of Corporate Social Conscience: From “Cakes and Ale” to Community Programmes, 50 CURRENT LEGAL PROBS. 279 (1997); Wedderburn of Charlton, Companies and Employees: Common Law or Social Dimension? 109 L.Q.R. 220 (1993). See also Halbhuber, supra note 94, at 1405-08 (arguing that the extent to which company laws have been harmonized in the EU is overstated by many European scholars).

of the present state of Community company law, choice-of-corporate-law rules should not become a means to put pressure on the Member States to enhance their efforts to harmonize their laws on the internal affairs of corporations and to create a comprehensive body of European securities laws. Such efforts should be made by the member states because they are necessary for the proper functioning of the internal market.  

E. Sound and Satisfactory

The proponents of the real seat doctrine admit that the identity of the state in which a corporation has its real seat is not always readily ascertainable and that the real seat may not be constant because a corporation and its constituents may have contacts with several jurisdictions. Yet the real seat doctrine, its proponents argue, has shown to work in practice. In the words of the late Professor Martin Wolff, the "doctrine is sound and satisfactory; the criterion chosen is one which everybody who comes into commercial contact with the corporation can easily check, since the main administrative centre can hardly be kept secret." Others have pointed to the fact that the law of taxation, too, uses similar criteria, such as central management and control, Geschäftsführung, or geschäftliche Oberleitung in determining a corporation's liability to taxation. The fact that even the law of taxation relies on such criteria indicates that the real seat criterion is practical and capable of serving its purpose.

V. Implications

One of the most controversial aspects of the real seat doctrine (Sitztheorie) is that a corporation that has been incorporated in a jurisdiction other than the state in which it has its real seat is not recognized as a corporation in the real seat state.

A. Liability and Non-Recognition

A corporation, for example, duly created in a foreign country having its real seat in Germany will not be recognized in Germany as a corporation. Likewise, a corporation

133. See Werner F. Ebke, Die Zukunft der Rechtsetzung in multijurisdikionalen Rechtsordnungen: Wettbewerb der Rechtsordnungen oder zentrale Regelvorgabe—am Beispiel des Geschäfts- und Unternehmensrecht, 1999 Zeitschrift für Schweizerisches Recht [ZSR] 106 (supp. 28). For a discussion of the need to harmonize company law within the EU, see, e.g., Deckert, supra note 125; Ebke, supra note 91. For an analysis of the need to harmonize the securities regulation within the EU, see Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (Lamfalussy Report) (Feb. 15, 2001). For a discussion of the desirability of regulatory competition in the European market for company laws, see the authors cited supra notes 127 and 128.

134. See Grossfeld, supra note 5, at 11 & 59–60; Kindler, supra note 17, at 103–05. A similar view was expressed by the EU Commission in its written observations in Case C-208/00, Überseering B.V. v. Nordic Construction Company Baumanagement GmbH, 2002 ECR (pending final decision). See Written Observations, supra note 77, at 23 (para. 58).

135. Grossfeld, supra note 5, at 11. For the factors at which German courts look in determining the real seat of a corporation, see the authors listed in supra note 54.


137. For Great Britain, see Dicey & Morris, supra note 93, at 1103 & 1105.

138. Cf. Germany's Corporate Income Tax Act (Körperschaftsteuergesetz) § 1(1).


140. Grossfeld, supra note 5, at 11 & 60; Kindler, supra note 17, at 105–06.

141. Grossfeld, supra note 5, at 14 & 106; Kindler, supra note 17, at 102.
can be duly formed in a real seat-doctrine jurisdiction only if it has its real seat in that jurisdiction.\textsuperscript{142} The non-recognition is said to be the sanction imposed by the real seat doctrine on enterprises that are incorporated in the wrong state.\textsuperscript{143} In theory, such sanctions are vigorous and uncompromising. Non-recognition generally entails an end of the limited liability of the owners (shareholders) of such entities,\textsuperscript{144} which is a rather dangerous and potentially burdensome consequence. The sanctions also bar access to local courts because an enterprise that lacks legal capacity under the Sitztheorie cannot sue; though, the enterprise may be sued in its capacity as a corporate entity.\textsuperscript{145} Obviously, this effect is embarrassing and detrimental when the corporation wishes to bring a lawsuit or file a counterclaim.\textsuperscript{146}

In practice, however, German courts have hardly ever been required to impose the real seat doctrine's sanctions on foreign corporations. The real seat doctrine's inevitable consequence of non-recognition resulting from an incorporation in a wrong state are well known in the business and legal communities. This seems to have led foreign enterprises to set up a subsidiary corporation in Germany formed under German law, instead of a foreign corporation having its real seat in Germany.\textsuperscript{147} In economic terms, it is easy and relatively inexpensive for corporations to contract around what is perceived by some to be a defective conflict-of-laws rule, the Sitztheorie. Not surprisingly, therefore, contrary to what is sometimes suggested by critics of the real seat doctrine, there are, at least in Germany,

\begin{itemize}
  \item \textsuperscript{142} Grossfeld, supra note 5, at 106; Kindler, supra note 17, at 102; SIEHR, supra note 21, at 309.
  \item \textsuperscript{143} Grossfeld, supra note 5, at 11 & 105–11.
  \item \textsuperscript{144} Id. at 108–10. See also ANDREAS LACHMANN, HAFTUNGS UND VERMÖGENSfolgen bei SitzVERLEGUNG AUSLÄNDischer Kapitalgesellschaften ins INLAND (2000).
  \item \textsuperscript{145} For details, see Grossfeld, supra note 5, at 73–75 & 110. See also supra text accompanying note 87.
  \item \textsuperscript{146} It is questionable whether it is in conformity with the laws of the EU for a member state to deny another member state's corporation the right to sue if, under the pertinent conflict-of-corporate-laws rules of that member state, the out-of-state enterprise is not recognized as a legal entity. In his Opinion of Dec. 4, 2001, in Case C-208/00, Überseering B.V. v. NCC Nordic Construction Company Baumanagement GmbH, supra note 15, Advocate General Dámaso Ruiz-Jarabo Colomer concluded that an EU member state may not deny a corporation that has been duly formed in accordance with the laws of another member state, the right to sue in its capacity of a corporate entity. See Opinion, supra note 86, at para. 52. The Advocate General was of the opinion that such a denial constitutes a material restriction of the company's Freedom of Establishment under articles 43 and 48 of the EC Treaty and that the restriction cannot be justified in light of the court's traditional four-factor test because it is not suitable for securing the attainment of the objective which the pertinent German law allegedly pursues and because it goes beyond what is necessary in order to attain it. Id. In addition, the Advocate General opined, the denial of the right to sue in its capacity as a corporate entity constitutes a severe infringement of various rights that the company enjoys under the European Convention on Human Rights and Fundamental Freedoms, which has been ratified by every member state (e.g., the company's right to a fair hearing pursuant to article 6[1] and its rights under article 13 of the Convention). Id. at paras. 57–58. The Advocate General also suggested that the denial of the right to sue as a corporate entity violates articles 17 and 47 of the EU's Charter of Fundamental Rights adopted on Dec. 7, 2000, in Nice, France, as well as the right to due process which the European Court of Justice has recognized as a general principle of law. Id. at paras. 59–60. The conclusions of the Advocate General, which are is not binding on the Court, do not come as a surprise. See Ebke, supra note 4, at 654 (stating that it "is conceivable that the European Court of Justice will hold that [the denial of the right to sue pursuant to] Section 50(1) of the German Rules of Civil Procedure violates Articles 43 and 48 of the EC Treaty by not granting a corporation duly formed under the law of another Member State the right (Parteifähigkeit), as a corporate entity, to institute a lawsuit in a German court"). It remains to be seen whether the European Court of Justice will follow the view expressed by the Advocate General in his Opinion.
  \item \textsuperscript{147} See Grossfeld, supra note 5, at 48.
\end{itemize}
hardly any catastrophic cases resulting from the application of the real seat doctrine.\textsuperscript{148} For those theoretically possible exceptional cases, the Sitztheorie has developed legal devices to protect creditors and other third parties from economically unwarranted effects.\textsuperscript{149}

B. Migration of Companies

Certainly, as stated above, the real seat is not necessarily constant because a corporation and its constituents may have contacts with several jurisdictions. It may be that the real seat of a corporation is later transferred from one state to another without dissolution of the company in the one state and reincorporation in the other state. Under the Sitztheorie, the transfer of a duly formed corporation’s real seat across borders is, as a general rule, fatal to the corporation.\textsuperscript{150} Thus, for instance, a corporation duly formed in Germany cannot transfer its real seat from Germany to another state (emigration) without dissolution.\textsuperscript{151} Similarly, under the Sitztheorie, a corporation duly formed in a state other than Germany cannot move its real seat to Germany (immigration) without dissolution in its state of formation and reincorporation in Germany.\textsuperscript{152}

The existence of limitations on the migration of companies within the EU has led commentators to call the Sitztheorie a repressive doctrine that violates the right of primary establishment granted by articles 43 and 48 of the EC Treaty.\textsuperscript{153} Under the Sitztheorie, a company is incarcerated in its state of incorporation, and “the escape from prison is punished with the death penalty.”\textsuperscript{154} The fact that the complex problem of the migration of companies within the EU is still enveloped in the mists of metaphor should not divert from the fact, however, that there are numerous solutions, at both EU\textsuperscript{155} and member state\textsuperscript{156} levels, for the problem that should not be overlooked. The most recent draft of a Fourteenth

\textsuperscript{148} \textit{Id.} at 11.

\textsuperscript{149} For a more detailed exposition of these devices, see \textit{id.} at 14 & 108.

\textsuperscript{150} For details, see \textit{id.} at 145-63; \textit{Kindler, supra} note 17, at 133-41. The Sitztheorie will, however, recognize the transfer of the principal place of business of a corporation duly formed in accordance with the laws of a state-of-incorporation-doctrine state (e.g., Great Britain) to another state-of-incorporation-doctrine state (e.g., Denmark). See, e.g., \textit{Ebke, supra note} 4, at 633 n. 67.

\textsuperscript{151} \textit{See Judgment of Feb. 1, 2001, Oberlandesgericht (Court of Appeals), Hamm, Germany, 47 RIW 461, 462-463 (2001) (concerning the transfer of the real seat from Germany to England); Judgment of Mar. 3, 2000, Amtsgericht (Local Court), Heidelberg, Germany, 46 RIW 557 (2000) (involving the transfer of the real seat from Germany to Spain).}

\textsuperscript{152} \textit{See Judgment of Sept. 10, 1998, Oberlandesgericht (Court of Appeals), Düsseldorf, Germany, 55 JZ 203 (1999) (regarding the transfer of the real seat of a Dutch closely-held corporation from the Netherlands to Germany). For details of this decision, see \textit{Ebke, supra note} 87. See also \textit{Judgment of Mar. 26, 2001, Oberlandesgericht (Court of Appeals), Düsseldorf, Germany, 47 RIW 463, 463-64 (2001) (concerning the transfer of the principal place of business from the Netherlands to Germany). For further details, see, e.g., \textit{LACHMANN, supra note} 144.}

\textsuperscript{153} \textit{Knobbe-Keuk, supra note} 71, at 356.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{See Draft of a Fourteenth Directive on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law, Doc. XV/D2/6002/97—EN REV. 2. For details of the proposed directive, see, e.g., \textit{Robert R. Drury, Migrating Companies, 24 EUR. L. REV. 354 (1999); Jochen Hoffmann, Neue Mgeglichkeiten zur identitatswahrenden Sitzverlegung in Europa, 164 ZHR 43 (2000).}

\textsuperscript{156} \textit{Grossfeld, supra note} 5, at 163; \textit{Wymeesch, supra note} 49, at 648-52. See also \textit{Peter O. Müllert & Klaus Schmolke, Die Reichweite der Niederlassungsfreiheit von Gesellschaften—Anwendungsgrenzen der Artt. 43 ff. EGV bei kollisions- und sachrechtlichen Niederlassungshindernissen, 100 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSSWISSENSCHAFT [ZVgRWiss] 233, 262-71 (2001).}

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Directive on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law would not even require Member States to give up the real seat doctrine. Needless to say, the applicable tax laws must not make (re-)incorporation in another member state prohibitively expensive. Tax laws having such prohibitive effects may themselves be inconsistent with the freedom-of-establishment provisions of the EC Treaty.

VI. Conclusions

The legal implications of the German Sitztheorie are indicative of the fact, emphasized many times by Professor Bernhard Grossfeld, that the real seat doctrine is a "Theorie auf Zeit." Thus, the Sitztheorie is a doctrine that will no longer be justified within the EU as soon as the Member States (or other bodies) have succeeded in creating internal affairs rules that are functionally equivalent (albeit not necessarily uniform) so as to create a level playing field for companies in the internal European market. The creation of a level playing field for business associations within the EU, it seems to this author, is the single most important task today. Without a body of harmonized laws concerning the internal affairs of corporations and a set of comprehensive securities laws to protect investors and to ensure the proper functioning of the market for equity and other securities (i.e., the market for corporate control), the competition between and among the EU Member States for corporate charters will be distorted. Like the various pseudo-foreign corporation statutes, case law that achieves similar results, and the British approach to overseas companies, the Sitztheorie aims at coping with the fundamental distortions resulting from the divergent corporation, stakeholder and securities laws that continue to exist within the EU and beyond. In view of the present state of EU company and securities law, it is not surprising that most Member States of the EU continue to adhere to the real seat doctrine. Whether this practice is in accordance with articles 43 and 48 of the EC Treaty will, one hopes, soon be decided by the Court of Justice of the European Communities in the matter of Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH.


158. For the impact of articles 43 and 48 of the EC Treaty on the EU Member States' law of taxation, see, e.g., Werner F. Ebke & Kevin Deutschmann, Einkommenbesteuerung im Recht der Europäischen Union, 54 JZ 1131, 1132–38 (1999); Jan Wouters, The Principle of Non-discrimination in European Community Law, 8 EC TAX Rev. 98 (1999). For the role of European law in corporate income taxation in the European Union, see, e.g., Jan Brinkmann, Der Einfluss des Europäischen Rechts auf die Unternehmensbesteuerung (1996).

159. See, e.g., Grossfeld, supra note 5, at 30.

160. For the potential role of the proposed European Law Institute, see Ebke, supra note 125, at 212–16. For the actual impact of the courts in this context, see Werner F. Ebke, Unternehmenskontrolle durch Gesellschafter und Markt, in INTERNATIONALE UNTERNEHMENSKONTROLLE UND UNTERNEHMENSKULTUR 7, 29–31 (Otto Sandrock & Wilhelm Jäger eds., 1994).

161. For a thoughtful and thorough study of whether harmonization efforts such as the Fifth Company Law Directive are legally desirable and economically relevant, see THE SIMPLIFICATION OF THE OPERATING REGULATIONS FOR PUBLIC LIMITED COMPANIES IN THE EUROPEAN UNION (Luc Julien-Saint-Amand ed., 1995).
