

precludes any rules that severely restrict the rights of nonresidents who have been admitted as members from practicing law in the province. The ability of provincial law societies to arrest the trend toward national law firms in Canada would appear to be minimal in the face of *Black*.

Together with the decision in *Andrews v. Law Society of British Columbia*,<sup>13</sup> the *Black* decision suggests a trend towards closer scrutiny of provincial law societies where their rules infringe upon individual rights guaranteed by the *Charter*. In *Andrews*, the Supreme Court of Canada struck down a provision barring all non-Canadian citizens from membership in the British Columbia Law Society. That provision was held to be an unconstitutional infringement of the equality guarantee in section 15 of the *Charter*.<sup>14</sup>

Interestingly, the trend toward closer scrutiny of professional regulatory bodies is in line with recent developments in the United States. In a recent decision, the United States Supreme Court invalidated a state residence requirement for admission to the state bar in *Supreme Court of New Hampshire v. Piper*.<sup>15</sup>

## European Corporate Law\*

The Court of Justice of the European Community has recently rendered an important decision concerning the freedom of establishment of companies.<sup>1</sup> The decision will have a far-reaching impact on the choice of corporate law within the European Community (EC).<sup>2</sup> The Court has indirectly upheld the controversial

13. 1 S.C.R. 143 (1989); 2 W.W.R. 289 (1989).

14. *Charter*, *supra* note 10, § 15.

15. 470 U.S. 274 (1985).

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1. *The Queen and H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC*, Case 81/87, 1988 E. COMM. CR. J. REP., Common Mkt. Rep. (CCH) ¶ 14,510 (1988).

2. Although the "European Communities" are often thought of as a single entity, there are three legally independent Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom).

“seat rule” according to which the internal affairs of a corporation are governed by the law of the state in which the corporation has its principal seat (“siège social”) instead of by the law of the state of incorporation. The “seat rule” is currently applied by some, but not all, of the Member States of the EC.<sup>3</sup> Unlike under American choice of corporate law, which, as a general rule, defers to the law of the state of incorporation (“internal affairs rule”),<sup>4</sup> under the “seat rule” an entity’s legal status as a corporation is recognized only if the business association is incorporated under the laws of the state where its commercial activities are carried on and its major business decisions are being implemented.<sup>5</sup> As a result, the choice of the shareholders to incorporate their business in the jurisdiction with the most permissive laws is somewhat limited as compared to the choice of corporate law that shareholders have in the United States. The limitations resulting from the choice-of-corporate-law principles also affect transnational combinations of business forms, as is vividly illustrated by the recent German *Druckhaus Landshut* case.<sup>6</sup>

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See Treaty Instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167. The Merger Treaty of 1965 did not merge the three Communities as such. Rather, the Treaty instituted a single Commission to replace the High Authority of the European Coal and Steel Community and the Commissions of the European Economic Community and the European Atomic Energy Community, and a single Council to replace the separate councils of the three Communities. See Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, 4 I.L.M. 776. For background and effects of the Merger Treaty, see Houben, *The Merger of the Executives of the European Communities*, 3 COMMON MKT. L. REV. 37 (1965-66); Weil, *The Merger of the Institutions of the European Communities*, 61 AM. J. INT’L L. 57 (1967). The following countries are today members of the European Economic Community (in alphabetical order): Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom; Turkey has the status of an associated country. On February 1, 1985, Greenland, a self-ruled Danish territory, became the first country to pull out of the European Economic Community. See Ebke, *Enforcement Techniques within the European Communities: Flying Close to the Sun with Waxen Wings*, 50 J. AIR L. & COM. 685, 685 n.2 (1985).

3. The “seat rule” is applied, for example, by Belgium, France, Luxembourg, Portugal, and Turkey (associated EC country). The United Kingdom, Italy, and The Netherlands, by contrast, defer to the state of incorporation. See Ebke, *The Limited Partnership and Transnational Combinations of Business Forms: “Delaware Syndrome” Versus European Community Law*, 22 INT’L LAW. 191, 196 n.21 (1988).

4. For details of the “internal affairs rule,” see DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161 (1985); Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1; E. SCOLES & P. HAY, *CONFLICT OF LAWS* 883-914 (1982). For an excellent analysis of the origins of the “internal affairs” rule, see Buxbaum, *The Origins of the American “Internal Affairs” Rule in the Corporate Conflict of Laws*, in Festschrift für Gerhard Kegel 75 (H. J. Musielak & K. Schurig eds. 1987). See also REV. UNIF. LTD. PARTNERSHIP ACT § 901, 66 U.L.A. 354 (Supp. 1989); REV. MODEL BUS. CORP. ACT § 15.05(c) (1984).

5. For a detailed analysis of the question of how the “principal seat” (siège) of a business association is to be determined, see, e.g., Grossfeld, *Internationales Gesellschaftsrecht*, in J. VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 354-55 (12th ed. 1981).

6. Judgment of March 21, 1986, Oberstes Landesgericht (Court of Civil Appeals), Bavaria, 1986 ENTSCHEIDUNGEN DES BAYERISCHEN OBERSTEN LANDESGERICHTS IN ZIVILSACHEN [Bay. OLGZ] 61. For a detailed analysis of this case, see Ebke, *supra* note 3. In a recent decision, the Oberlandesgericht VOL. 24, NO. 1

While the EC is by no means a federal system, the EEC Treaty imposes significant limitations on the Member States' choice of law. The Court of Justice has repeatedly applied various Treaty provisions to strike a balance between conflicting interests of Member States and has used the Treaty in a number of cases as a limitation on the application of forum law. In the area of choice of corporate law, the EEC Treaty's provisions on freedom of establishment play an important role. Article 52<sup>7</sup> in connection with article 58<sup>8</sup> of the EEC Treaty provides that companies, like natural persons, have the right of freedom of establishment. Prior to the *Daily Mail* case,<sup>9</sup> discussion surrounded the question of whether limiting the shareholders' choice of corporate law by means of the "seat rule" is in conformity with the EEC Treaty's provisions of freedom of establishment.<sup>10</sup> Until the advent of the *Daily Mail* case, the Court of Justice had not had an opportunity to rule directly on the issue. In *Daily Mail*, the Court implies that the "seat rule" continues to be valid, at least for the time being. The purpose of this article is to analyze the *Daily Mail* decision and to throw some light on the issue of what law EC Member States' courts should apply to the "internal affairs" of corporate enterprises after *Daily Mail*.

## I. Harmonization Versus National Divergence

Choice of corporate law is extremely important within the EC because of numerous fundamental differences that traditionally have existed, and still exist, in the laws of business associations of the Member States of the EC. Business associations have always been subject to the laws of the Member States of the

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(Court of Civil Appeals) of Saarbrücken held that the holding of the Bavarian Court also applies to companies that are not incorporated in a Member State of the EC. Judgment of April 21, 1989, reprinted in 42 DER BETRIEB [DB] 1076 (1989).

7. EEC Treaty, *supra* note 2, art. 52. In its pertinent part, art. 52 reads as follows:

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 progressively abolished. . . .

Freedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also to set up and manage enterprises and, in particular, companies within the meaning of Article 58, second paragraph, under the conditions laid down by the law of the country of establishment for its own nationals. . . .

8. EEC Treaty, *supra* note 2, art. 58. In its pertinent part, art. 58 reads as follows:

Companies constituted in accordance with the law of a Member State and having their registered office, central management or main establishment within the Community shall . . . be assimilated to natural persons being nationals of Member States.

The term "companies" shall mean companies under civil or commercial law, including co-operative companies, and other legal persons under public or private law, with the exception of non-profit-making companies.

9. The Queen and H.M. Treasury and Commissioners of Inland Revenue *ex parte* Daily Mail and General Trust PLC, Case 81/87, 1988 E. COMM. CT. J. REP., Common Mkt. Rep. (CCH) ¶ 14,510 (1988).

10. *See, e.g.*, Ebke, *supra* note 3, at 196-203.

EC. The body of European law governing business associations, however, is growing.<sup>11</sup> Article 54 of the EEC Treaty requires that Member States harmonize their company laws "with respect to the provisions concerning the protection of shareholders and third parties."<sup>12</sup> According to article 54(3)(g) in connection with article 54(2), the EC Council is obliged to implement the harmonization mandate by issuing directives<sup>13</sup> so as to equalize the "safeguards" that "are required by the Member States of companies or firms within the meaning of the second paragraph of article 58."<sup>14</sup>

The Council has issued a number of directives<sup>15</sup> that are aimed at harmonizing the Member States' company laws. The ultimate goal of these directives is to abolish legal and structural differences existing in regulations that are within the ambit of article 58.<sup>16</sup> Directives are binding on the Member States<sup>17</sup> and the Member States are required to comply with the directives by revising their national laws accordingly. Some directives have been held to be directly applicable, granting individuals the right to rely upon them as either a cause of action or as a defense before the national courts. It is recognized that directives must satisfy certain criteria of legal certainty in order to be directly applicable.<sup>18</sup>

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11. For a survey of methods and tools of harmonization and of efforts to harmonize company laws within the EC, see R. BUXBAUM & K. HOPT, *LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE* 226-54 (1988).

12. EEC Treaty, *supra* note 2, art. 54. In its pertinent part, art. 54 reads as follows:

2. In order to implement the general programme or, if no such programme exists, to complete one stage towards the achievement of freedom of establishment for a specific activity, the Council shall . . . issu[e] directives.

3. The Council and the Commission shall exercise the functions entrusted to them by the above provisions, in particular:

. . . .  
(g) by co-ordinating, to the extent that is necessary and with a view to making them equivalent, the guarantees demanded in Member States from companies within the meaning of Article 58, second paragraph, for the purpose of protecting the interests both of the members of such companies and of third parties.

13. Article 100 generally empowers the Council to promulgate directives. EEC Treaty, *supra* note 2, art. 100 reads as follows:

The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.

The Assembly and the Economic and Social Committee shall be consulted concerning any directives whose implementation in one or more of the Member States would involve the amendment of legislative provisions.

14. EEC Treaty, *supra* note 2, art. 54(3)(g). For the text of art. 54(3)(g), see *supra* note 12.

15. The Council Directives on Company Law are reprinted in *ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW*, vol. C III, pt. C3 (1988).

16. EEC Treaty, *supra* note 2, art. 58. For the text of art. 58, see *supra* note 8.

17. EEC Treaty, *supra* note 2, art. 189. The pertinent part of art. 189 reads as follows: "Directives shall bind any Member State to which they are addressed, as to the result to be achieved while leaving to domestic agencies a competence as to form and means."

18. See Ebke, *supra* note 2, at 705-06.

The First Council Directive on company law harmonization<sup>19</sup> is concerned with financial disclosure requirements and applies to companies formed under the laws of a Member State. It addresses the question of whether acts by organs of a company are binding upon it and provides for the legal effects of wrongful incorporations. A Second Council Directive, issued on December 13, 1976, deals with the formation of "public limited liability companies" and their capital structure.<sup>20</sup> The Fourth Directive, which was issued before the Third, provides for the harmonization of the laws of annual accounts of certain companies.<sup>21</sup> On October 9, 1978, the Council promulgated the Third Directive,<sup>22</sup> which deals with mergers of "public limited liability companies." While the process of harmonization has been successful in the areas mentioned, the proposed Council Directive on Employee Participation and Company Structure<sup>23</sup> has not yet been agreed upon. Due to different views of the Member States as to the structure of corporate boards of directors<sup>24</sup> and the participation of employees in the decision-making processes of corporations,<sup>25</sup> it is unlikely that the Directive will become effective in the near future.

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19. Council Directive 68/151 of March 9, 1968, On Co-ordination of Safeguards which, for the Protection of the Interest of Members and Others, are Required by Member States of Companies within the Meaning of the Second Paragraph of Article 58 of the Treaty, with a View to Making such Safeguards Equivalent throughout the Community, *reprinted in* O.J. EUR. COMM. (No. L 65/8) (1968).

20. Second Council Directive 77/91 of December 13, 1976, On Co-ordination of Safeguards which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect to the Formation of Public Limited Liability Companies and the Maintenance and Alteration of their Capital, with a View to Making such Safeguards Equivalent, *reprinted in* O.J. EUR. COMM. (No. L 26/1) 20 (1977).

21. Fourth Council Directive 78/660 of July 25, 1978, Based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, *reprinted in* 78 O.J. EUR. COMM. (No. L 222/11) 21 (1978).

22. Third Council Directive 78/855 of October 9, 1978, Based on Article 54(3)(g) of the Treaty Concerning Mergers of Public Limited Liability Companies, *reprinted in* 78 O.J. EUR. COMM. (No. L 295/36) 21 (1978).

23. Commission of the European Communities, *Employee Participation and Company Structure*, BULL. OF THE E.E.C., Supp. no. 8/75, at 54 (1975).

24. For details of the structure of corporate boards in the United States and Europe, see, e.g., M. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 137-85 (1976). See also Conard, *The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law*, 82 MICH. L. REV. 1459 (1984); Grossfeld & Ebke, *Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe*, 26 AM. J. COMP. L. 397 (1978); Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23 (1966).

25. For comments on employee participation in the company laws of the EC Member States, see Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 MICH. L. REV. 1338 (1984); Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79 (1980); Mertens & Schanze, *The German Codetermination Act of 1976*, 2 J. COMP. CORP. & SEC. REG. 75 (1979). For analyses of the pros and cons of union representation on corporate boards in the United States, see Comment, *An Economic and Legal Analysis of Union Representation on Corporate Board of Directors*, 130 U. PA. L. REV. 919 (1982); Note, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 COLUM. L. REV. 639 (1981).

In addition to Council directives, harmonization of company laws of the Member States can also be accomplished by conventions or treaties. According to article 220(3)<sup>26</sup> of the EEC Treaty, the Member States shall enter into negotiations of mutual recognition of companies and the retention of legal personality in the event of transfer of a company's seat from one country to another. This retention of legal personality was of particular importance in the *Daily Mail* case.

Of similar importance is the mutual recognition of companies within the EC. The failure of one EC Member State to recognize the legal status of a corporation formed under the laws of another Member State may result, inter alia, in personal liability of the shareholders of that entity in that Member State. The consequences are similar to the effects of an American court disregarding a foreign corporate entity that has failed to get a license to do business and to register in the forum state. Thus far, no convention or treaty within the meaning of article 220(3) has become effective. The Agreement on Mutual Recognition of Companies, concluded on February 29, 1968, has been ratified by Belgium, France, Germany, Italy, and Luxembourg, but not by The Netherlands.<sup>27</sup> Since the negotiations have ceased, ratification of the Agreement by The Netherlands and by countries that have subsequently joined the Community is unlikely.

Under article 235 of the EEC Treaty,<sup>28</sup> the Council is empowered, upon recommendation by the Commission, to take appropriate measures deemed necessary for the establishment of a common market. On the basis of this provision, the Council, on July 25, 1985, released a Regulation on the Establishment of the European Economic Interest Grouping (EEIG),<sup>29</sup> which came into force in Germany and other EC Member States on January 1, 1989. The Regulation creates a supranational form of business enterprise that, in many respects, resembles a partnership. If properly formed, an EEIG does not face the problem of recognition because it is recognized by all Member States. The scope of the EEIG is, however, limited. It may not have more than 500 employees and

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26. EEC Treaty, *supra* note 2, art. 220. The pertinent section of art. 220 reads as follows:  
Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals:

. . . . .  
—the mutual recognition of companies within the meaning of Article 58, second paragraph, the maintenance of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the municipal law of different Member States to form mergers. . . .

27. See Ebke, *Die "ausländische Kapitalgesellschaft & Co. KG" und das europäische Gemeinschaftsrecht*, 16 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 245, 251 (1987).

28. EEC Treaty, *supra* note 2, art. 235. Article 235 reads as follows:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

29. For details, see, e.g., K. SCHMIDT, GESELLSCHAFTSRECHT 1422-29 (1986).

is prohibited from trading its "shares" or "interests" publicly in the stock market. The restrictions mentioned and the unlimited liability of the partners of such an enterprise would not seem to make this form of business association very appealing to big businesses. It may be adequate for consumer protection associations, professional associations, or similar organizations. Another ambitious attempt to harmonize the company laws of the EC Member States on the basis of article 235 of the EEC Treaty has been the proposal of a "European Corporation" (*societas europea*),<sup>30</sup> which would "federalize" the law of corporations to a very large extent. Even though efforts have been made since 1959<sup>31</sup> to give effect to the proposal, the Member States have not agreed on its implementation. Thus, the efforts of the Council to prod "federal" incorporation of businesses involved in interstate transactions within the EC have not yet come to fruition. The main obstacles are the disagreement of the Member States on the participation of employee representatives in the decision-making processes of corporations and problems of taxation of the *societas europea*.

In light of the developments stated, it is fair to conclude that the various efforts of the EC to harmonize the laws of business associations of its Member States thus far have been successful, yet limited. The national laws remain far from being uniform throughout the Community. Differences continue to exist, especially with respect to the representation of employees on the corporate boards, the structure of corporate boards, creditor protection, shareholder protection, capitalization requirements, and securities regulation.

## II. The *Daily Mail* Decision

Of similar importance are, of course, tax implications, as is evidenced by the *Daily Mail* case.

### A. FACTS

Daily Mail and General Trust PLC (Daily Mail) is a limited investment holding company with its registered office in London. Daily Mail intended to sell a substantial part of its investment portfolio. The proceeds of this sale were to be used to repurchase Daily Mail's own shares. To escape the United Kingdom's capital gains tax, Daily Mail decided to transfer its central management and control from London to The Netherlands while maintaining its status as an English private limited company. According to section 482(1)(a) of the English

30. See Grossfeld & Ebke, *supra* note 24, at 405-06.

31. For details, see Schmitthoff, *The Effect of Entry into the EEC upon English Company Law*, in *BRITISH INDUSTRY AND EUROPEAN LAW* 44-47 (G. W. Keeton & S. N. Frommel eds. 1974). For details of the "societas europea" see, e.g., Sanders, *The European Company*, 6 *GA. J. INT'L & COMP. L.* 367 (1976); Sanders, *Structure and Progress of the European Company*, in *THE HARMONIZATION OF EUROPEAN COMPANY LAW* 83 (C. Schmitthoff ed. 1973); Sanders, *The European Company*, 1968 *J. BUS. L.* 184.

Income and Corporation Taxes Act 1970,<sup>32</sup> such a transaction was permissible only if the company had obtained the Treasury's consent. In 1984, *Daily Mail* applied to the Treasury for consent. The Treasury refused. *Daily Mail* filed suit with the English High Court of Justice, Queen's Bench Division, alleging, inter alia, a violation of its rights under article 58<sup>33</sup> of the EEC Treaty. The High Court referred to the Court of Justice of the European Communities under article 177 of the EEC Treaty<sup>34</sup> for a preliminary ruling, submitting a number of questions for the Court's consideration. The Court of Justice ruled on two of the four issues submitted; as a result of the Court's holdings, the remaining two became moot.

At first glance, the decision of the Court does not give an answer to the question of whether the "seat rule" accords with the freedom of establishment provisions of the EEC Treaty.<sup>35</sup> The Court referred, generally, however, to the different "connecting factors" applied by the Member States with respect to the choice of corporate law and to the legal consequences of a transfer of a company's management and control ("seat") from one Member State to another. Concluding that the differing connecting factors, as applied by the Member States, do not contravene articles 52 and 58 of the EEC Treaty, the Court indirectly upheld the validity of the "seat rule."

## B. ANALYSIS

Prior to the *Daily Mail* decision the Court of Justice had ruled several times on the freedom of establishment of natural persons of the EC Member States. The law that has developed in this ad hoc fashion is quite substantial. The Court, however, has never had an opportunity to address the question of whether the same principles apply to companies under article 58, which refers to article 52.<sup>36</sup>

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32. The pertinent part of the English Income and Corporation Taxes Act 1970, § 482(1)(a) reads as follows:

Subject to the provisions of this section, all transactions of the following classes shall be unlawful unless carried out with the consent of the Treasury, that is to say (a) for a body corporate resident in the United Kingdom to cease to be so resident; . . .

Section 482(1)(a) is no longer in force.

33. EEC Treaty, *supra* note 2, art. 58. For the text of art. 58, see *supra* note 8.

34. EEC Treaty, *supra* note 2, art. 177. Article 177 reads, in its pertinent part, as follows:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

and

(c) the interpretation of the statutes of bodies set up by an act of the Council, where those statutes so provide.

35. EEC Treaty, *supra* note 2, arts. 52, 58. For the text of arts. 52 and 58, see *supra* notes 7 and 8.

36. For an analysis of previous cases involving art. 58 of the EEC Treaty, see Ebke, *supra* note 3, at 197.



The problem focuses on whether a corporate entity has a right of action under the EEC Treaty. Individuals may invoke EEC Treaty provisions provided the pertinent provisions are directly applicable. As to natural persons, the Court of Justice has held in *Reyners v. Belgium*<sup>37</sup> that article 52 is directly applicable. Thus, a natural person can directly claim rights under article 52 in proceedings before a Member State court or in administrative proceedings. In the *Klopp*<sup>38</sup> case, the Court decided that article 52 is directly applicable despite the lack of Council directives within the meaning of article 54. According to the Court, directives are aimed at aiding and facilitating the process of harmonization, but they are not a condition precedent to the enforcement of the right of free establishment under article 52. In *Gullung v. Colmar & Zabern Bar*<sup>39</sup> the Court went one step further. The Court ruled that a national law imposing restrictions on the admission of lawyers to the bar is not in and of itself a violation of article 52 provided it is not applied in a discriminating fashion with respect to foreign applicants. The holding implies that, as a general rule, a host country is required to grant applicants freedom of establishment irrespective of domestic laws so as not to discriminate against nationals of other Member States.

According to the three decisions referred to, natural persons enjoy freedom of establishment within certain limits, the principle of nondiscrimination being the single most important limitation on the Member States' right to restrict that freedom. Whether the same principles apply to companies was not clear until recently. If the same principles were applicable, one could argue that the Member States are required, under article 58, mutually to recognize companies organized under the laws of any EC Member State regardless of the existence of secondary Community law, such as a directive or a convention within the meaning of article 220(3). Under those circumstances, the "seat rule" would arguably be inconsistent with the EEC Treaty.

Under the "seat rule," a corporation is recognized as a legal entity only if it is incorporated under the law of the state where its principal place of business is situated. Thus, for instance, under German choice of corporate laws, a company that is formed under English law but carries on its business activities exclusively in Germany, lacks corporate status in Germany. As a result, the shareholders of that company are personally liable for the entity's debts. Also, such a company cannot sue because of lack of corporate status, nor can it enter as a general or limited partner into a German limited partnership.<sup>40</sup>

37. *Reyners v. Belgian State*, Case 2/74, 1974 E. COMM. CT. J. REP. 631, 649-53, [1974] Common Mkt. Rep. (CCH) ¶ 8256.

38. *Paris Bar Ass'n v. Klopp*, Case 107/83, 1984 E. COMM. CT. J. REP. 2971, [1984] Common Mkt. Rep. (CCH) ¶ 14,116.

39. *Gullung v. Colmar & Zabern Bar*, Case 292/86 (1988), reprinted in 35 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 134, 136 (1989).

40. *Ebke*, *supra* note 3, at 195.

Obviously, the "seat rule" somewhat limits the freedom of establishment guaranteed in articles 52 and 58 of the EEC Treaty. In effect, it fails to recognize companies that are organized under the law of one EC Member State but have their management and control ("seat") in another Member State. Some European commentators who favor the more liberal "state-of-incorporation" principle ("internal affairs doctrine") have indeed taken the view that the "seat rule" can no longer be applied to corporations organized under the laws of an EC Member State.<sup>41</sup> Some authors, including those who have traditionally favored the "seat principle," would apply the "state-of-incorporation" principle at least to the transfer of a corporation from one EC Member State to another.<sup>42</sup> The proponents of the "seat rule," by contrast, are of the opinion that the rule is necessary and appropriate as a control device so long as the corporation laws of the Member States are far from being uniform.<sup>43</sup> The proponents of the "seat rule" point to the fact that the freedom of establishment does not include an obligation mutually to recognize companies organized under the law of another EC Member State in the absence of secondary Community law such as a directive or an agreement under article 220(3) of the EEC Treaty. It is also argued that the abolition of the "seat rule" would result in a situation where the corporation law with the lowest requirements as to capitalization, financial disclosure, creditor protection or employee representation would, in effect, become *the* principal corporation law within the European Community. More stringent local rules would, to a large extent, become obsolete since incorporators would typically favor jurisdictions with more permissive laws without being subject to "pseudo-foreign corporation statutes."<sup>44</sup>

As has been pointed out earlier, the Court of Justice has implied, in the *Daily Mail* case, that a conflict-of-laws provision that requires corporations to be a resident of the state of incorporation does not in and of itself constitute a violation of the freedom-of-establishment provisions of the EEC Treaty. The Court made it perfectly clear that the freedom-of-establishment provisions of the EEC Treaty are directly applicable and that the provisions may be invoked not

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41. See, e.g., Behrens, *Niederlassungsfreiheit und Internationales Gesellschaftsrecht*, 52 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 498 (1988). For further references, see Ebke, *supra* note 3, at 196 n.20.

42. Grossfeld & Jasper, *Identitätswahrende Sitzverlegung und Fusion von Kapitalgesellschaften in der Bundesrepublik Deutschland*, 53 RABELSZ 52, 57 (1989); see also Behrens, *Identitätswahrende Sitzverlegung einer Kapitalgesellschaft von Luxemburg in die Bundesrepublik Deutschland*, 32 RIW 590 (1986).

43. See, e.g., Grossfeld, *Die "ausländische juristische Person & Co. KG,"* 6 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPrax] 351-55 (1986); see also Ebenroth & Eyles, *Die inner europäische Verlegung des Gesellschaftssitzes als Ausfluss der Niederlassungsfreiheit?*, 42 DB 363, 413 (1989); Ebke, *supra* note 3, at 192 (1988); Ebke, *supra* note 27, at 246-63 (1987).

44. For a discussion of the origins of the pseudo-corporation statutes in the United States, see Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 138-43 (1955).

only by nationals of the Member States, but also by companies referred to in article 58.<sup>45</sup> Furthermore, the Court pointed out that article 52 and article 58 are aimed at preventing any discrimination against EC nationals and companies organized under the laws of one Member State in another Member State. The Court approved the view that articles 52 and 58 are directed mainly to ensuring that foreign companies are treated in the host Member State in the same manner as companies organized under the law of that state. Most importantly, however, the Court also held that articles 52 and 58 prohibit a Member State from hindering the establishment in another Member State of a company incorporated under its laws and which falls within the ambit of article 58. As the Court correctly observed, companies within the meaning of article 58 generally exercise their right of establishment by setting up agencies, branches, or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of article 52, to which article 58 refers.

Section 482(1)(a) of the English Income and Corporation Taxes Act 1970<sup>46</sup> does not impose any restriction on the right of an English company to set up a branch, agency, or subsidiary. It requires Treasury consent only where an English company seeks to transfer its central management and control from the United Kingdom to another EC Member State while maintaining its legal personality and its status as a United Kingdom company.<sup>47</sup> Pointing to the fact that companies are creatures of the law of the Member State under which they are organized, the Court emphasized that the Member States have the right to regulate the affairs of the company. Most importantly, it recognized the Member States' right under article 58 to require that a domestic company have its central administration in its territory. Because of the lack of secondary Community law within the meaning of articles 54(3)(g) and 220(3), the Court was of the opinion that articles 52 and 58 do not confer on companies that are incorporated under the laws of a Member State a right to transfer their management and control to another Member State while retaining their status as companies under the laws of the state of incorporation. Conversely, the Court's holding can be cited in support of the proposition that, if secondary Community law provides for the mutual recognition of companies within the meaning of article 58(2) and the transferability of their seat from one country to another, neither the state of incorporation nor the host country have the right to impose limitations on the recognition of foreign companies or the transfer of a company's seat.

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45. The Queen and H.M. Treasury and Commissioners of Inland Revenue *ex parte* Daily Mail and General Trust PLC, *supra* note 1, ¶ 15.

46. English Income and Corporation Taxes Act 1970, § 482(1)(a). For the text of § 482(1)(a), see *supra* note 32.

47. The Queen and H.M. Treasury and Commissioners of Inland Revenue *ex parte* Daily Mail and General Trust PLC, *supra* note 1, ¶ 18.

### III. Conclusion

The foregoing article illustrates that the European Court of Justice has upheld the validity of the "seat rule," which prior to the *Daily Mail* case was controversial. The Court has been criticized for missing the chance to abolish the "seat rule" and thus hindering the process of harmonization with respect to company laws within the EC.<sup>48</sup> The Court indirectly put some pressure on the Community, however, to harmonize the Member States' law of business associations by means of either a directive under article 54(3)(g) or a convention within the meaning of article 220(3). It remains to be seen whether or not the numerous efforts to harmonize the substantive law of business associations of the EC Member States will come to fruition. In view of the internal market, it would seem to be not only desirable but also necessary to have a fairly uniform body of law concerning business associations, even though it is to be admitted that some competition between and among corporation laws may be healthy in a multistate system such as the EC.<sup>49</sup> Experience demonstrates, however, that competition among and between corporation laws is acceptable only if there is a body of countervailing law that assures the protection of shareholders, creditors, and other third parties. Thus far the body of law that has developed on the EC level over the past two decades is by no means comparable to, for example, the Federal Securities Regulations in the United States. Consequently there may be a tendency on the part of the EC Member States to apply, at least partially, their own law of business associations to pseudo-foreign corporations, following the example of the pseudo-foreign corporation statutes of California<sup>50</sup> and New York.<sup>51</sup> It is questionable whether such development would accord with the EEC Treaty. Therefore, a harmonization of fundamental rules and principles of the law of business associations would be preferable. It remains to be seen what effects the Court's holding in the *Daily Mail* case will have on the Member States' efforts to harmonize their company laws which thus far have been rather limited and without a prospect of further success. It would be salutary if the *Daily Mail* case would revitalize the process of company law harmonization within the EC, which may be considered to be a prerequisite of a functional internal market as envisioned by the Community in 1993.

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48. Sandrock & Austmann, *Das Internationale Gesellschaftsrecht nach der Daily Mail-Entscheidung des Europäischen Gerichtshofs: Quo vadis?*, 35 RIW 249 (1989); see also Grossfeld & Lutterman, *Zur Verlegung des Gesellschaftssitzes von einem Mitgliedsstaat in den anderen*, 44 JURISTENZEITUNG 384, 387 (1989).

49. For further details, see Ebke, *In Search of Alternatives: Comparative Reflections on Corporate Governance and the Independent Auditor's Responsibilities*, 79 NW. U.L. REV. 663, 697 (1984). For a statistical study on investors' reactions to changes in corporate law, see Weiss & White, *Of Econometrics and Indeterminacy: A Study of Investors' Reactions to "Changes" in Corporate Law*, 75 CAL. L. REV. 551 (1987).

50. CAL. CORP. CODE § 2115 (West 1977).

51. N.Y. BUS. CORP. LAW §§ 1317-1320 (West 1977).