

The European Conflict-of-Corporate-Laws Revolution: *Überseering*, *Inspire Art* and Beyond

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I. Introduction

The recent decisions of the European Court of Justice in *Überseering BV v. NCC Nordic Construction Baumanagement GmbH*¹ and *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art. Ltd.*² fundamentally changed conflicts of corporate laws within the European Union (EU). *Überseering* and *Inspire Art* aid in bringing to fruition the idea of jurisdictional and regulatory competition between and among the company laws of the now twenty-five Member States of the EU.³ In *Überseering*, the Court recognized the right of a corporation formed in an EU Member State to move its principal place of business or “real seat” (*siège réel* or *effektiver Verwaltungssitz*) from its state of incorporation to another EU Member State without losing its legal status as corporate entity under the law of its state of incorporation.⁴ In *Inspire Art*, the Court put an end to attempts by the legislature of the Netherlands to impose certain legal obligations on corporations that were incorporated in another Member State but carry on their business activities exclusively, or almost exclusively, in the Netherlands (pseudo-foreign corporations).⁵ Obviously, both judgments of the Eu-

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1. Case C-208/00, *Überseering BV v. NCC Nordic Construction Baumanagement GmbH*, 2002 E.C.R. I-9919 [2002].

2. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art. Ltd.*, 2003 E.C.R. ____ (forthcoming), [2003] 56 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3331 available at <http://www.curia.eu.int> (last visited July 29, 2004).

3. For a detailed exposition of jurisdictional and regulatory competition of company laws in the European Union, see KLAUS HEINE, *REGULIERUNGSWETTBEWERB DER GESELLSCHAFTSRECHTSORDNUNGEN* (2004); KONRAD KERN, *ÜBERSEERING—RECHTSANGLEICHUNG UND GEGENSEITIGE ANERKENNUNG* (2004); EVA-MARIA KIENINGER, *WETTBEWERB DER PRIVATRECHTSORDNUNGEN IM EUROPÄISCHEN BINNENMARKT* (2002); Christian Kirchner, *Zur Ökonomie des legislatorischen Wettbewerbs im europäischen Gesellschaftsrecht*, *FESTSCHRIFT FÜR ULRICH IMMENGA* 607 (Andreas Fuchs ed., 2004); Werner F. Ebke, *Unternehmensrecht und Binnenmarkt—E pluribus unum?*, 62 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* [RABELSZ] 195, 207–16 (1998).

4. Case C-208/00, 2002 E.C.R. at I-9919.

5. Case C-167/01, 56 NJW at 3331.

European Court of Justice will have far-reaching implications not only in the EU Member States that traditionally have applied the restrictive “real seat” doctrine,⁶ but also for corporations formed in countries other than EU Member States.

Thus, for example, the question arises whether and to what extent the principles established by the European Court of Justice in *Überseering*⁷ and *Inspire Art*⁸ are applicable to corporations formed in a Member State of the European Economic Area (EEA).⁹ Similarly, it is questionable whether the same or similar principles should also be applied to companies incorporated in a country, other than an EU or EEA Member State, that has concluded and ratified a Friendship Treaty, Treaty of Establishment, or similar international treaty with an EU Member State.¹⁰ International treaties of this nature often accord corporations that are formed in a contracting state the “right of establishment” or similar privileges, or they provide for “national treatment” or a “most-favored-nation treatment.”¹¹ Finally, one needs to address the question of whether the principles established by the European Court of Justice in *Überseering*¹² and *Inspire Art*¹³ should also be applied, as a matter of policy or for reasons of efficiency, to corporations from countries other than EU Member States, EEA Member States, and Treaty States.¹⁴

Within the EU, *Überseering*¹⁵ and *Inspire Art*¹⁶ give rise to a number of equally serious and largely unresolved questions. *Überseering* only dealt with the issue of whether a Member State is required, under articles 43 and 48 of the EC Treaty,¹⁷ to recognize a corporation that was incorporated in another Member State and that has transferred, or is considered by the former Member State to have transferred, its real seat, principal place of business, or center of administration (*centre d'administration*) to its territory (“immigration” or “entry” case).¹⁸ The Court did not have to address the question of whether the state of incorporation may impose restrictions on a domestic corporation that intends to move its real seat, principal place of business, or center of administration from its state of incorporation to another EU Member State (“emigration” or “exit” case).¹⁹ In this regard, the significance of the Court’s holdings in *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*²⁰ is still open to questions.²¹ Similarly, the Court has not

6. For details of the “real seat” doctrine, see *infra* notes 40–45 & 51–57.

7. *Case C-208/00*, 2002 E.C.R. at I-9919.

8. *Case C-167/01*, 56 NJW at 3331.

9. See *infra* note 256 and accompanying text.

10. See *infra* notes 258–274 and accompanying text.

11. See *infra* note 261 and accompanying text.

12. *Case C-208/00*, 2002 E.C.R. at I-9919.

13. *Case C-167/01*, 56 NJW at 3331.

14. See *infra* notes 290–301 and accompanying text.

15. *Case C-208/00*, 2002 E.C.R. at I-9919.

16. *Case C-167/01*, 56 NJW at 3331.

17. See TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, OCT. 2, 1997, O.J. EC (C 340) 43 [hereinafter EC TREATY]. For the text of EC Treaty articles 43 and 48, see *infra* notes 56 & 57.

18. See Werner F. Ebke, *Überseering: “Die wahre Liberalität ist Anerkennung,”* 58 JURISTEN-ZEITUNG [JZ] 927, 932 (2003); Harald Kallmeyer, *Tragweite des Überseering-Urteils des EuGH vom 5.11.2002 zur grenzüberschreitenden Sitzverlegung*, 55 DER BETRIEB [DB] 2521 (2002).

19. Ebke, *supra* note 18, at 932. For details, see *infra* notes 103–120 and accompanying text.

20. *Case C-81/87*, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*, 1988 E.C.R. 5483.

21. See *infra* notes 103–108 and accompanying text.

yet had the opportunity to rule on the cross-border transfer of a corporation's registered office (*Satzungssitz*).²²

Inspire Art., too, raises a number of difficult issues.²³ Thus, for instance, courts, legislators, and commentators are debating whether it may be justifiable, under the "four-factor test" of *Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano*²⁴ and *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*,²⁵ for an EU Member State to impose legal requirements of its domestic law (e.g., capitalization requirements, stakeholder laws, or rules concerning labor representation on the board of directors) on a corporation that was formed in another EU Member State but has its real seat, center of administration, or principal place of business in the former Member State.²⁶ Also, it is questionable what effects laws such as the English law on wrongful trading²⁷ and the Directors' Disqualification Act²⁸ may have in light of *Überseering*²⁹ and *Inspire Art.*³⁰

The present article does not intend to provide answers to all of these questions. Rather, the article focuses primarily upon the effects, both actual and potential, of the judgments of the European Court of Justice in *Überseering* and *Inspire Art.* For this purpose, the article first casts some light on the background and the holdings of the Court in *Überseering* and *Inspire Art.*³¹ In the next section, the article explores some of the legal and economic implications of the two decisions for corporations formed in countries other than EU Member States.³² Following the legal and economic exploration, the article addresses fundamental policy considerations to cope with the situation created by *Überseering* and *Inspire Art.*³³

II. Überseering

Überseering concerns the recognition by one Member State of a corporation incorporated under the law of another Member State.³⁴

22. For details of the cross-border transfer of the registered office, see *infra* notes 109–120 and accompanying text.

23. *Case C-167/01*, 56 NJW at 3331.

24. *Case C-55/94*, *Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano*, 1993 E.C.R. I-4165.

25. *Case C-212/97*, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459. For details of the four-factor test in the context of EC Treaty, see *infra* notes 194–197 and accompanying text.

26. See *infra* notes 218–251 and accompanying text.

27. See *infra* notes 162–163 and accompanying text.

28. See *infra* note 159 and accompanying text.

29. *Case C-208/00*, 2002 E.C.R. at I-9919.

30. *Case C-167/01*, 56 NJW at 3331.

31. See *infra* notes 34–213 and accompanying text.

32. See *infra* notes 214–251 and accompanying text.

33. See *infra* notes 252–301 and accompanying text.

34. *Case C-208/00*, 2002 E.C.R. at I-9919. For details of the *Überseering* decision in English, see, e.g., Kilian Baelz & Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Überseering of 5 November 2002 and Its Impact on German and European Company Law*, 3 GERMAN L.J. 1 (2002); Luca Cerioni, *The "Überseering" Ruling: The Eve of a "Revolution" for the Possibilities of Companies' Migration Throughout the European Community?*, 10 COLUM. J. EUR. L. 117 (2003); Peter Dyrberg, *Full Free Movement of Companies in the European Community at Last?*, 28 EUR. L. REV. 528 (2003); Eva Micheler, *Recognition of Companies Incorporated in Other EU Member States*, 52 I.C.L.Q. 521 (2003); Stephan Rammeloo, *The Long and Winding Road Towards Freedom of Establishment for Legal Persons in Europe*, 10 MAASTRICHT J. EUR. & COMP. L. 169 (2003); Wulf-Henning Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law*, 52 I.C.L.Q. 177 (2003); Frank Wooldridge, *Überseering: Freedom of Establishment of Companies Affirmed*, 14 EUR. BUS. L. REV. 227 (2003). For further references, see *infra* note 83.

A. FACTS

In October 1990, Überseering B.V., a closely-held corporation incorporated under the law of the Netherlands, acquired a piece of land in Düsseldorf, Germany, which it used for business purposes. By a project-management contract dated November 27, 1992, Überseering engaged Nordic Construction Company Baumanagement GmbH (NCC), a closely-held corporation formed in the Federal Republic of Germany, to refurbish a garage and a motel on the site. The contractual obligations were performed, but Überseering B.V. claimed that the paint work was defective. In December 1994, two German citizens residing in Düsseldorf, Germany, acquired all of the shares in Überseering B.V. Überseering B.V. unsuccessfully sought compensation from NCC for the defective work. In 1996, Überseering brought a lawsuit against NCC in the *Landgericht* (District Court) of Düsseldorf for actual and consequential damages, on the basis of the project-management contract with NCC.³⁵ The *Landgericht* dismissed the action as inadmissible. The *Oberlandesgericht* (Court of Appeals), Düsseldorf, upheld the decision to dismiss the action.³⁶ The Court held that Überseering B.V. had transferred its real seat (*effektiver Verwaltungssitz*) from the Netherlands to Düsseldorf once the shares had been acquired by the two German nationals.³⁷ In accordance with the settled case law of the *Bundesgerichtshof*,³⁸ Germany's highest court in civil matters, the Court of Appeals found that as a corporation incorporated under the law of the Netherlands but having its real seat in Germany, Überseering B.V. lacked legal personality (*Rechtsfähigkeit*) in Germany. Consequently, it did not have the capacity to bring a lawsuit (*Parteifähigkeit*), as a Dutch corporate entity, in a German court.³⁹ Überseering appealed to the *Bundesgerichtshof* against the judgment of the Court of Appeals, Düsseldorf.

B. THE "REAL SEAT" DOCTRINE

The holding of the Court of Appeals, Düsseldorf, is based on a conflict-of-corporate-laws principle commonly referred to as the real seat doctrine or *Sitztheorie*.⁴⁰

1. Background

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

35. See Judgment of Nov. 5, 1997 (Docket No. 5 O 132/96), Landgericht (District Court), Düsseldorf, Germany (unpublished).

36. See Judgment of Sept. 10, 1998, Oberlandesgericht (Court of Appeals), Düsseldorf, Germany, 55 JZ 203 (2000). For a detailed discussion of this decision, see Werner F. Ebke, *Anmerkung*, 55 JZ 203 (2000).

37. Judgment of Sept. 10, 1998, *supra* note 36, 55 JZ at 203 (2000).

38. For a comprehensive analysis of the pertinent case law, see Werner F. Ebke, *Das Internationale Gesellschaftsrecht und der Bundesgerichtshof*, 50 JAHRE BUNDESGERICHTSHOF: FESTGABE AUS DER WISSENSCHAFT 799, 806–20 (Claus-Wilhelm Canaris et al. eds., 2000).

39. Judgment of Sept. 10, 1998, *supra* note 36, 55 JZ at 203 (2000) (referring to section 50(1) of the German Rules of Civil Procedure [*Zivilprozessordnung*]). For further details of section 50(1), see *infra* note 75.

40. For a comparative analysis of the real seat doctrine, see Werner F. Ebke, *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, 36 INT'L LAW. 1015 (2002). See I Vanessa Edwards, *EC COMPANY LAW* 336 (1999).

(*effektiver Verwaltungssitz* or *siège réel*).⁴¹ The German Supreme Court construed the term real seat as the place where “the fundamental business decisions by the managers are being implemented effectively into day-to-day business activities.”⁴² 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 company, and therefore, should have the power to govern the internal affairs of that corporation.⁴³ The real seat doctrine stresses the importance of uniform treatment by requiring that all corporations having their real seat in a particular state be incorporated under that state’s law. Thereby, the real seat doctrine creates a level playing field and prevents companies from evading that state’s legal controls through incorporation in a jurisdiction that has less stringent laws.⁴⁴ As a result, under the *Sitztheorie*, all corporations concerned are subject to the same rules and principles of corporate law and related laws, including laws that aim specifically at protecting shareholders, creditors, employees, and other stakeholders.⁴⁵

2. State-of-Incorporation Doctrine by Comparison

Obviously, the approach of the real seat doctrine is fundamentally different from the one employed by English, Danish, Dutch, Italian, and Swiss courts, and, of course, by courts in the United States of America.⁴⁶ For example, under the laws of the Netherlands, Great Britain, and the fifty states of the United States of America, incorporators are free to choose the state of incorporation.⁴⁷ According to the choice-of-corporate-law principles of these countries, the existence of a company, as well as its subsequent dissolution, are governed by the law of the state of incorporation (state-of-incorporation doctrine or *Gründungstheorie*). The importance of the law of the state of incorporation is greatly enhanced by the fact that the law of the state of incorporation also applies, with rare exceptions, to the “internal affairs” of the corporation, that is, the relationship among a corporation and its officers, directors, and shareholders.⁴⁸ Obviously, the state-of-incorporation doctrine emphasizes, as a general rule, the incorporators’ freedom to choose the proper law of corporation.⁴⁹ Thus,

41. Ebke, *supra* note 40, at 1027.

42. See Judgment of Mar. 21, 1986, Bundesgerichtshof (Supreme Court), Germany, 97 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 269, 272 (1986). In determining the location of the real seat of a corporation, courts look at several factors. For details, see, e.g., Stephan Travers, DER BEWEIS DES ANKNÜPFUNGSKRITERIUMS “TATSÄCHLICHER SITZ DER HAUPTVERWALTUNG” IM INTERNATIONALEN GESellschaftsRECHT (1998); Rüdiger Werner, DER NACHWEIS DES VERWALTUNGSSITZES AUSLÄNDISCHER JURISTISCHER PERSONEN (1998); Markus Kieser, DIE TYPENVERMISCHUNG ÜBER DIE GRENZE 22–105 (1988); Daniel Zimmer, *Von Debraco bis DaimlerChrysler: Alte und neue Schwierigkeiten bei der internationalgesellschaftsrechtlichen Sitzbestimmung*, in Richard M. Buxbaum, CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW. LIBER AMICORUM, 654, 658–67 (Theodor Baums et al. eds., 2000); Christoph von der Seipen, *Zur Bestimmung des effektiven Verwaltungssitzes im internationalen Gesellschaftsrecht*, 6 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 91 (1986).

43. See Bernhard Grossfeld, PRAXIS DES INTERNATIONALEN PRIVAT- UND WIRTSCHAFTSRECHTS: RECHTSPROBLEME MULTINATIONALER UNTERNEHMEN 46 (1975); Ebke, *supra* note 40, at 1027.

44. Ebke, *supra* note 40, at 1027–28.

45. *Id.* at 1028.

46. *Id.* at 1016.

47. *Id.*

48. *Id.*

49. See FRANKLIN A. GEVURTZ, CORPORATION LAW 35–6 (2000); BERND VON HOFFMANN, INTERNATIONALES PRIVATRECHT 258–59 (6th ed., 2000).

the *lex societatis*, or in the language of English law the *lex domicilii*, is the result of the incorporators' own volition. Moreover, the state-of-incorporation doctrine grants corporations the right, in principle, to move their center of administration, or principal place of business, across state borders without any effect on their legal status as a corporate entity under the law of the state of incorporation; provided, the registered office (*Satzungssitz*) remains in the state of incorporation.⁵⁰

3. Policy

Clearly, states that apply the *Sitztheorie* aim at effectuating material legal, economic, and social values of the country having the most significant relationship with a particular company.⁵¹ 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, public corporations) will favor the real seat doctrine.⁵² In contrast, states that support the idea of party autonomy in corporate law matters will, at least in principle, favor the state-of-incorporation rule or similar choice-of-corporate-law principles.⁵³ 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, publicly-held) corporations. The function of the substantive and procedural rules of the law of corporations are to protect and further the multifarious, and sometimes hard to reconcile, interests of managers, shareholders, stakeholders, and affiliated companies.⁵⁴

For purposes of comparative analyses, it is important to keep in mind that conflict-of-corporate-laws rules, like other legal institutions of all legal systems, are shaped not only by efficiency, but also by history and politics.⁵⁵ Initial conditions, determined by the accident of history or the design of politics, influence the path that a conflict-of-laws rule will take. In the EU, path dependency, or institutional persistence, is, however, not the only force influencing the direction and objectives of a Member State's conflict-of-corporate-laws rules. Rather, the conflict-of-corporate-laws principles of a Member State, like complementary institutions (e.g., pseudo-foreign corporation laws, outreach laws, insolvency laws, or tort liability rules) that aim at enhancing the pre-existing conflict-of-corporate-laws rules, need to be in compliance with the supreme law

50. For details of the cross-border transfer of the registered office, *see infra* notes 109–120 and accompanying text.

51. Ebke, *supra* note 40, at 1028.

52. *See* BERNHARD GROSSFELD, INTERNATIONALES UND EUROPÄISCHES UNTERNEHMENSRECHT 51-3 (2nd ed. 1995); JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT 562-63 (5th ed., 2004); EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 1103 (3d ed., 2000); KURT SIEHR, INTERNATIONALES PRIVATRECHT 308 (2001).

53. Bernhard Grossfeld, *Commentary*, JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: INTERNATIONALES GESELLSCHAFTSRECHT 6 (13th ed., 1998); SIEHR, *supra* note 52, at 308.

54. For a more detailed exposition of this view, *see* BERNHARD GROSSFELD, ZAUBER DES RECHTS 15–26 (1999). *See generally*, 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).

55. For the historical and political background of the real seat doctrine and the “recognition” of foreign corporations, *see* Bernhard Grossfeld, *Zur Geschichte der Anerkennungproblematik bei Aktiengesellschaften*, 38 RABELSZ 344 (1974).

of the EU, especially with freedom of establishment guaranteed by articles 43⁵⁶ and 48⁵⁷ of the EC Treaty.

C. REFERENCE FOR A PRELIMINARY RULING

In the *Überseering* case, the German Supreme Court (*Bundesgerichtshof*) was uncertain about the impact of freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty on Germany's basic conflict-of-corporate-laws principle, the *Sitztheorie*.

1. Questions

While it considered it preferable, in view of the current state of community law in general, and of company law within the EU, in particular, to continue to follow the judge-made *Sitztheorie*, Germany's Supreme Court wondered whether the freedom of establishment granted by articles 43 and 48 of the EC Treaty precluded application of the *Sitztheorie* in the case at hand.⁵⁸ In light of the judgment of the European Court of Justice in *Daily Mail*,⁵⁹ some commentators had argued that articles 43 and 48 of the EC Treaty require that the real seat doctrine be put to rest.⁶⁰ To these authors, the "expulsion of the seat doctrine from Europe" seemed to be inevitable after *Daily Mail*.⁶¹ Other commentators, however, shared the then prevailing view among German legal scholars that *Daily Mail* did not deal with the impact of freedom of establishment on the factors used by the courts of EU Member

56. Article 43 of the EC Treaty 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 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 [a]rticle 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.

EC TREATY, *supra* note 17, art. 43.

57. Article 48 of the EC Treaty reads as follows:

Companies and 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 17, art. 48.

58. Cf. Decision (Beschluss) of Mar. 30, 2000, Bundesgerichtshof (Supreme Court), Germany, 46 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 555, 556 (2000).

59. Case C-81/87, (The Queen v. H.M. Treasury and Commissioners of Inland Revenue), *ex parte* Daily Mail and General Trust PLC, 1988 E.C.R. 5483. For details of the *Daily Mail* decision, see, e.g., EDWARDS, *supra* note 40, at 376–83; Werner F. Ebke & Markus Gockel, *European Corporate Law*, 24 INT'L LAW 239 (1990).

60. See, e.g., Brigitte Knobbe-Keuk, *Umzug von Gesellschaften in Europa*, 154 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 325, 356 (1990); Ulrich Drobnig, *Gemeinschaftsrecht und internationales Gesellschaftsrecht: "Daily Mail" und die Folgen*, EUROPÄISCHES GEMEINSCHAFTSRECHT UND INTERNATIONALES PRIVATRECHT 185, 195–96 & 206 (C. von Bar ed. 1991); C. VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT 140 (2003).

61. Knobbe-Keuk, *supra* note 60, at 356.

States to determine the law governing the existence, dissolution, and internal affairs of corporations (*lex societatis*).⁶² In *Daily Mail*, the European Court of Justice concluded that a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal status under the law of that State subject to restrictions on the transfer of the company's actual center of administration to another Member State.⁶³ The *Daily Mail* Court did not rule on the question of whether a Member State (Member State A) may refuse to recognize the legal personality which a company enjoys under the laws of another Member State (Member State B), its state of incorporation, where, as in *Überseering*, the company was found by the courts of Member State A to have transferred its real seat to its territory.⁶⁴

In the opinion of the German Supreme Court, the judgment of the European Court of Justice in *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*⁶⁵ was not on point either.⁶⁶ In *Centros*, the Court took exception to a Danish authority's refusal to register a branch of a company validly incorporated in the United Kingdom. In light of the then prevailing opinion among legal scholars in Germany,⁶⁷ the German Supreme Court noted, however, that the company in *Centros* had not transferred its seat to Denmark, since, from its incorporation, its registered office had been in the United Kingdom, while its principal place of business, or real seat, had been in Denmark.⁶⁸ Thus, the German Supreme Court seems to have been of the opinion that the European Court of Justice in *Centros* addressed an issue of a so-called *secondary* establishment, that is, the right, under article 43(1) of the EC Treaty, of a corporation formed in one Member State to set up an agency, a branch, or a subsidiary in another Member State, rather than the *primary* freedom of establishment, that is, the right to transfer the corporation's principal place of business or center of administration to another Member State without losing its legal status under the law of the state of incorporation.⁶⁹ Consequently, in a March 30, 2000 decision, the Seventh Chamber (*Zivilsenat*) of

62. See, e.g., UWE EYLES, DAS NIEDERLASSUNGSRECHT DER KAPITALGESELLSCHAFTEN IN DER EUROPÄISCHEN GEMEINSCHAFT 352 (1990); Wulf-Henning Roth, *Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht*, 55 RABELSZ 623, 650 (1991); GROSSFELD, *supra* note 52, at 122; Ebke & Gockel, *supra* note 59, at 250.

63. In *Daily Mail*, a company formed in accordance with the law of the United Kingdom and having both its registered office and actual center of administration there, wished to transfer its center of administration to the Netherlands without losing its legal personality or ceasing to be a company incorporated under English law. The transfer required the consent of the competent authorities of the United Kingdom, which they refused to give. The company initiated proceedings against the authorities before the High Court of Justice, Queen's Bench Division, seeking an order that articles 52 and 58 [now 43 and 48] of the EC Treaty gave it the right to transfer its actual center of administration to another Member State without prior consent and without loss of its legal personality.

64. Cf. *Case C-208/00*, 2002 E.C.R. at I-9968 ¶ 71.

65. *C-212/97*, 1999 E.C.R. at I-1459. For details of the *Centros* decision, see, e.g., Werner F. Ebke, *Centros—Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623 (2000); Eddy Wymeersch, *Centros: A Landmark Decision in European Company Law*, CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW. LIBER AMICORUM RICHARD M. BUXBAUM 629 (Theodor Baums et al. eds., 2000).

66. Decision (Beschluss) of Mar. 30, 2000, *supra* note 58, 46 RIW at 557 (2000).

67. See, e.g., VON BAR & MANKOWSKI, *supra* note 60, at 141; Werner F. Ebke, *Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH*, 54 JZ 656, 659 (1999). But see Note, *European Company Law After Centros: Is the EU on the Road to Delaware?*, 8 COLUM. J. EUR. L. 323, 329 (2002).

68. Decision (Beschluss) of Mar. 30, 2000, *supra* note 58, 46 RIW at 557 (2000).

69. For a thoughtful discussion of the case law of the European Court of Justice relating to secondary establishments, see EDWARDS, *supra* note 40, at 342–62.

the German Supreme Court referred two questions to the European Court of Justice for a preliminary ruling:⁷⁰

- (A) Are articles 43 and 48 of the EC Treaty to be interpreted to mean that the freedom of establishment of companies precludes the legal personality and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual center of administration, where, under the law of that second Member State, the company may no longer bring legal proceedings there in respect of claims under a contract?
- (B) If the Court's answer to that question is affirmative: Does the freedom of establishment of companies (articles 43 and 48 of the EC Treaty) require that a company's legal personality and the capacity to conduct litigation be determined according to the law of the State where the company is incorporated?

2. Criticism

The decision of the Seventh Chamber of the German Supreme Court to submit these questions to the European Court of Justice for a preliminary ruling met substantial opposition. Several German commentators criticized the reference to the European Court of Justice, which,⁷¹ as was pointed out by Justice Reinhold Thode at a conference in December 2002, the reference was necessary and correct.⁷² Other authors argued that the Seventh Chamber's request for a preliminary ruling became "superfluous"⁷³ after the German Su-

70. Cf. *Case C-208/00*, 2002 E.C.R. at I-9951 ¶ 21. The right of the European Court of Justice to give preliminary rulings is based on article 234 of the EC Treaty. This provision reads as follows:

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

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB [European Central Bank];
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

See EC TREATY, *supra* note 17, art. 234.

71. See, e.g., Peter Behrens, *Reaktionen mitgliedstaatlicher Gerichte auf das Centros-Urteil des EuGH*, 20 IPRAX 384, 388 (2000); see I Curt C. von Halen, *Der Streit um die Sitztheorie vor der Entscheidung?*, 13 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT [EWS] 107, 111-12 (2002).

72. Justice Thode's statements are reported in Markus Rehberg, *Internationales Gesellschaftsrecht im Wandel: Das Überseering-Urteil des EuGH und seine Folgen (Tagungsbericht)*, 23 IPRAX 230, 235-36 (2003).

73. See, e.g., Ulrich Forsthoff, *EuGH fördert Vielfalt im Gesellschaftsrecht: Traditionelle deutsche Sitztheorie verstößt gegen Niederlassungsfreiheit*, 55 DB 2471, 2471 (2002) (arguing that the Seventh Chamber of the German Supreme Court should have withdrawn its reference for a preliminary ruling of the European Court of Justice). See also Ulrich Forsthoff, *Abschied von der Sitztheorie: Anmerkungen zu den Schlussanträgen des GA Dámaso Ruiz-Jarabo Colomer in der Rs. Überseering*, 57 BETRIEBS-BERATER [BB] 318, 321 (2002); Holger Altmeppen, *Parteilichkeit, Sitztheorie und "Centros"*, 38 DEUTSCHES STEUERRECHT [DStR] 1061 (2000).

preme Court's *Jersey* decision of July 1, 2002.⁷⁴ In order to prevent the European Court of Justice from ruling in the *Überseering* case and to save the life of the German version of the real seat doctrine (*Sitztheorie*), the Second Chamber of the German Supreme Court (which generally hears corporate law cases) held in *Jersey* that a limited company incorporated under the law of the Channel Island of Jersey, having its real seat (*effektiver Verwaltungssitz*) in Germany, was to be recognized in Germany, not as a Jersey corporation, but as a German *Gesellschaft bürgerlichen Rechts* (*GbR*), an unincorporated private association.⁷⁵ According to recent case law of the Second Chamber of the German Supreme Court, a *GbR* has the capacity to sue and be sued in its own name.⁷⁶ The authors overlooked, however, the fact that companies formed under the law of the Channel Island of Jersey cannot invoke the benefits of the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty because of a reservation filed by the United Kingdom in connection with its accession to the EU.⁷⁷ Consequently, the Supreme Court's ruling in *Jersey* could not render the issue submitted by the Seventh Chamber to the European Court of Justice in *Überseering*, moot.

Furthermore, the commentators completely ignored the fact that if the *Jersey* rule, were applied to corporations that may invoke freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty, the rule would be incompatible with articles 43 and 48 of the EC Treaty. The *Jersey* rule makes the freedom of establishment less attractive without any

74. Judgment of July 1, 2002, Bundesgerichtshof (Supreme Court), Germany, 151 BGHZ 204 (2002). For details of the *Jersey* decision, see, e.g., Stefan Leible & Jochen Hoffmann, *Vom "Nullum" zur Personengesellschaft—Die Metamorphose der Scheinauslandsgesellschaft im deutschen Recht*, 55 DB 2203 (2002).

75. Members of the Second Chamber of the German Supreme Court, in particular Justices Hartwig Henze and Wulf Goette, have made no secret of the fact that the *Jersey* decision, *supra* note 74, was intended by the Second Chamber to render the freedom-of-establishment issue in *Überseering* moot in order to prevent the European Court of Justice from issuing a judgment in *Überseering* and thereby to save the life of the German real seat doctrine. See Hartwig Henze, *Europäisches Gesellschaftsrecht in der Rechtsprechung des Bundesgerichtshofs*, 56 DB 2159, 2164 (2003); Wulf Goette, *Anmerkung*, 40 DSrR 1679, 1680 (2002). The European Court of Justice has consistently refused to rule on issues that are technically moot. See Ebke, *supra* note 65, at 645. See also *infra* note 171 and accompanying text. Thus, the Second Chamber's idea seems to have been to render moot the issues submitted by the Seventh Chamber to the European Court of Justice for a preliminary ruling by according *Überseering* B.V., the Dutch corporation, the right to be a party to legal proceedings in Germany, albeit not as a Dutch corporation but as a German *GbR*. See Judgment of July 1, 2002, *supra* note 74. The dispute between the Second Chamber and the Seventh Chamber of the German Supreme Court arose because the Second Chamber, which normally hears corporate law cases, was apparently not willing to request a preliminary ruling from the European Court of Justice as to the compatibility of the real seat doctrine with articles 43 and 48 of the EC Treaty. Under the Supreme Court's rules, the Second Chamber could not demand, however, that the Seventh Chamber, which normally hears construction law cases, transfer the case to the Second Chamber. For, the issue of whether *Überseering* B.V., as a Dutch corporation, could be a party to legal proceedings in Germany was a question of procedural law rather than of the merits of *Überseering*'s case. See Ebke, *supra* note 65, at 654. Section 50(1) of the German Code of Civil Procedure (*Zivilprozessordnung*) provides that an action brought by a party who does not have the capacity to conduct litigation (*Parteifähigkeit*) must be dismissed as inadmissible. *Id.* A business association has the capacity to be a party to legal proceedings if it has legal personality (*Rechtsfähigkeit*). Legal personality is defined as the capacity to enjoy rights and to be the subject of obligations. Cf. Ebke, *supra* note 36, at 204. According to settled case law of the *Bundesgerichtshof*, Germany's highest court in civil law matters, a foreign company's legal personality is determined by reference to the real seat doctrine (*Sitztheorie*). According to this doctrine, a corporation that has been validly incorporated in another EU Member State but has subsequently transferred, or is considered under the German version of the real seat doctrine to have transferred, its actual center of administration or principal place of business (real seat or *effektiver Verwaltungssitz*) to Germany is not recognized as having legal personality (*Rechtsfähigkeit*). *Id.*

76. Ebke, *supra* note 18, at 928.

77. *Id.*

justification on the grounds set forth in both article 46 of the EC Treaty and the four-factor test of *Gebhard*⁷⁸ and *Centros*.⁷⁹ Specifically, under the *Jersey* rule, a foreign corporation is treated, for purposes of domestic law, as a *GbR*, which creates unforeseeable and unwarranted risks, including the risk of unlimited personal liability of its members.⁸⁰ In addition, the *Jersey* rule gives rise to numerous issues of substantive and procedural law. For example, it is unclear whether, as a defendant in a law suit before a court in Germany, the foreign corporation that is treated by German conflict-of-corporate-laws rules as a *GbR*, may bring a counter claim that the foreign corporation claims to have against the plaintiff.⁸¹ Finally, the recognition and enforcement of a judgment handed down by a German court against the foreign corporation would, of course, give rise to extremely complicated issues.⁸²

D. THE JUDGMENT

The European Court of Justice ignored the distraction efforts and the harassing fire from Germany. On November 5, 2002, the Court decided that *Überseering B.V.*, which was validly incorporated, and had its registered office in the Netherlands, was entitled, under articles 43 and 48 of the EC Treaty, to exercise its freedom of establishment in Germany as a company incorporated under the law of the Netherlands.⁸³

1. *Immigration*

According to the Court, the lower German courts' refusal to recognize the legal personality of *Überseering B.V.* as a corporate entity, incorporated under the law of the Netherlands, on the ground that the corporation had effectively transferred its real seat (*effektiver Verwaltungssitz*) to Germany following the acquisition of all of its shares by German citizens, constitutes a restriction on freedom of establishment which, in principle, is incompatible

78. See *Case C-55/94*, 1993 E.C.R. at I-4165.

79. See *Case C-212/97*, 1999 E.C.R. at I-1459. For details of the four-factor test in the context of EC Treaty, see *infra* notes 194–197 and accompanying text.

80. See Judgment of Mar. 13, 2003, Bundesgerichtshof (Supreme Court), Germany, 49 RIW 474, 475 (2003) (“... weil sie damit in eine andere Gesellschaftsform mit besonderen Risiken, wie z.B. Haftungsrisiken, gedrängt wird. Eine derartige Verweisung würde sich ebenfalls als Verstoß gegen die Niederlassungsfreiheit darstellen...”). Legal commentators share the Supreme Court's view. See *infra* note 86.

81. See, e.g., Sebastian Gronstedt, *BB-Kommentar*, 57 BB 2033, 2034 (2002).

82. For a thoughtful discussion of this issue and related problems, see Daniel Walden, *Niederlassungsfreiheit, Sitztheorie und der Vorlagebeschluss des VII. Zivilsenats des BGH vom 30.3.2000*, 12 EWS 256 (2001).

83. *Case C-208/00*, 2002 E.C.R. at I-9919. For details of the *Überseering* decision, see, e.g., Oliver Brand, *Das Kollisionsrecht und die Niederlassungsfreiheit von Gesellschaften*, 58 JURISTISCHE RUNDSCHAU [JR] 89 (2004); Ebke, *supra* note 18; Walter Frenz, *Die Rechtspersönlichkeit ausländischer Gesellschaften: Sitztheorie und Niederlassungsfreiheit*, 49 GEWERBE-ARCHIV [GEWARCH] 177 (2003); Harald Halbhuber, *Das Ende der Sitztheorie als Kompetenztheorie: Das Urteil des Europäischen Gerichtshofs in der Rechtssache C-208/00 (Überseering)*, 11 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEU] 418 (2003); Curt C. von Halen, *Das internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH*, 57 WERTPAPIER-MITTEILUNGEN [WM] 571 (2003); Karl von Hase, *Überseering und Inspire Art—EuGH formt das Gesellschaftsrecht der Zukunft*, 57 BETRIEB UND WIRTSCHAFT [BUW] 944 (2003); Helmut Heiss, “Überseering”: *Klarschiff im internationalen Gesellschaftsrecht?*, 44 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG [ZfRV] 90 (2003); Erich Schanze & Andreas Jüttner, *Anerkennung und Kontrolle ausländischer Gesellschaften: Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH*, 48 DIE AKTIENGESELLSCHAFT [AG] 30 (2003); GERALD SPINDLER & OLAF BERNER, *Inspire Art—Der europäische Wettbewerb um das Gesellschaftsrecht ist endgültig eröffnet*, 49 RIW 949 (2003); Martin Heidenhain, *Ausländische Kapitalgesellschaften mit Verwaltungssitz in Deutschland*, 5 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1141 (2002).

with articles 43 and 48 of the EC Treaty.⁸⁴ While the European Court of Justice made no reference to the *Jersey* decision of the German Supreme Court,⁸⁵ there can be no doubt that the *Jersey* rule, if applied to companies that can invoke freedom of establishment under articles 43 and 48 of the EC Treaty, would be equally incompatible with the corporation's freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.⁸⁶ Under articles 43 and 48 of the EC Treaty, a Member State is required to recognize the legal personality of a corporation incorporated in another Member State as provided for by the *lex societatis*.⁸⁷ The Member State in which the Sister State corporation has its real seat (establishment), may not disregard the legal personality of that corporation, as provided for by its *lex societatis*, and substitute it by resorting to local forms of business associations.⁸⁸ Although under the *Jersey* rule, a foreign corporation, while treated as a *Gesellschaft bürgerlichen Rechts*, may bring a lawsuit and may also be sued in a German court, the foreign corporation is effectively deprived of the legal status provided for by the law of its state of incorporation.⁸⁹

In light of the Court's holdings in *Centros*,⁹⁰ a corporation that is validly incorporated in an EU Member State enjoys the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty, even if it never intended to do any business in its state of incorporation, but was formed in one Member State only for the purpose of establishing itself in a second Member State where its main, or entire, business is to be conducted.⁹¹ The home state's requirement that the same company be reincorporated in the country of establishment (real seat), is tantamount to outright negation of freedom of establishment which, unlike a restriction, cannot be justified in any case under the four-factor test of *Gebhard* and *Centros*.⁹² Thus, the freedom of establishment is triggered by the valid incorporation in any of the twenty-five EU Member States; provided, the registered office (*Satzungssitz*) of the corporation is, and continues to be, in its state of incorporation.⁹³ In light of *Centros*⁹⁴ and *Inspire Art*,⁹⁵ the reasons that a company chooses to be incorporated in a particular Member State are irrelevant to application of the rules on freedom of establishment.⁹⁶

In *Überseering*, the European Court of Justice clarified that the exercise of the freedom of establishment is not dependent upon the adoption of a convention on the mutual rec-

84. *Case C-208/00*, 2002 E.C.R. at I-9919.

85. See Judgment of July 1, 2002, *supra* note 74.

86. See Judgment of Mar. 13, 2003, *supra* note 80, 49 RIW at 475 (2003). Accord Ebke, *supra* note 18, at 929; Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art*, 23 IPRAX 193, 199 (2003); Walter Bayer, *Die EuGH-Entscheidung "Inspire Art" und die deutsche GmbH im Wettbewerb der europäischen Rechtsordnungen*, 58 BB 2357, 2363 (2003); Marc-Philippe Weller, *Einschränkung der Gründungstheorie bei missbräuchlicher Auslandsgründung?*, 23 IPRAX 520 (2003); Hildegard Ziemons, *Freie Bahn für den Umzug von Gesellschaften nach Inspire Art?!*, 24 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1913, 1917 (2003); Daniel Zimmer, *Nach "Inspire Art": Grenzenlose Gestaltungsfreiheit für deutsche Unternehmen?*, 50 NJW 3585, 3586 (2003). For the opposite view, see Peter Kindler, *"Inspire Art"—Aus Luxemburg nichts Neues zum internationalen Gesellschaftsrecht*, 6 NZG 1086, 1089 (2003).

87. *Case C-208/00*, 2002 E.C.R. at I-9970 ¶ 80.

88. Ebke, *supra* note 18, at 929.

89. *Id.* at 928.

90. *Case C-212/97*, 1999 E.C.R. at I-1459.

91. *Case C-208/00*, 2002 E.C.R. at I-9919.

92. For details of the four-factor test, see *infra* notes 194–197.

93. For details of the cross-border transfer of the registered office, see *infra* notes 109–120.

94. *Case C-212/97*, 1999 E.C.R. at I-1459.

95. *Case C-167/01*, 56 NJW at 3331.

96. *Id.*

ognition of companies within the meaning of article 293 of the EC Treaty.⁹⁷ According to the Court, article 293 of the EC Treaty gives Member States the “opportunity” to enter into negotiations with a view, *inter alia*, toward facilitating the resolution of problems arising from the discrepancies between the laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one Member State to another.⁹⁸ Focusing on the “so far as is necessary” clause in article 293 of the EC Treaty and the Opinion of the Advocate General,⁹⁹ the Court concluded that article 293 of the EC Treaty does not constitute “a reserve of legislative competence vested in the Member States.”¹⁰⁰ The fact that no convention on the mutual recognition of companies has been adopted on the basis of article 293 of the EC Treaty cannot be used by Member States to justify limiting the full effect of freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.¹⁰¹ This holding puts pressure on the EU Council to increase efforts to harmonize the Member States’ laws to facilitate the attainment of freedom of establishment within the EU. In the words of the *Centros* Court, “it is always open to the Council, on the basis of the powers conferred upon it by article 54(3)(g) [now article 44(2)(g)] of the EC Treaty, to achieve complete harmonisation.”¹⁰²

2. Emigration

In regard to “emigration” or “exit” cases,¹⁰³ the European Court of Justice, distinguishing *Überseering* from *Daily Mail*, reiterated in *Überseering* its holding in *Daily Mail* that a Member State is “able, in the case of a company incorporated under its law, to make the com-

97. Article 293 of the EC Treaty provides:

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 . . .

See EC TREATY, *supra* note 17, art. 293.

The Convention on the Mutual Recognition of Companies and Bodies Corporate of Feb. 29, 1968, did not enter into force for lack of ratification by the Netherlands. See EDWARDS, *supra* note 40, at 384. It is highly unlikely that the Convention will be “revitalized” despite proposals for a “more positive reappraisal” of such a Convention. See Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome,”* 57 CAMBRIDGE L.J. 165, 194 (1998).

98. Case C-208/00, 2002 E.C.R. at I-9964 ¶ 54.

99. *Id.*

100. *Id.*

101. *Id.* at 9965 (para. 60).

102. Case C-212/97, 1999 E.C.R. at I-1493 ¶ 28. For a discussion of the difficulties of company law harmonization in the EU, see GOWER & DAVIES’ PRINCIPLES OF MODERN COMPANY LAW 111–14 (7th ed. 2003); Werner F. Ebke, *Company Law and the European Union: Centralized versus Decentralized Lawmaking*, 31 INT’L LAW 961, 975–84 (1997); Peter Behrens, *Krisensymptome in der Gesellschaftsrechtsangleichung*, in FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER 831 (Ulrich Immenga et al. eds., 1996); Tim Drygala, *Stand und Entwicklung des europäischen Gesellschaftsrechts*, 12 ZEuP 337 (2004); and Jan Wouters, *European Company Law: Quo Vadis?*, 37 COMMON MKT. L. REV. 257 (2000).

103. For a detailed analysis of the controversial subject of the cross-border transfer of a company’s seat in the European Union, see, e.g., Kurt Lipstein, *The Law Relating to the Movement of Companies in the European Community*, FESTSCHRIFT FÜR ERIK JAYME 527 (Heinz-Peter Mansel et al. eds., 2004); Eddy Wymeersch, *The Transfer of the Company’s Seat in European Company Law*, 40 COMMON MKT. L. REV. 661 (2003); Marcus Lutter, *The Cross-Border Transfer of a Company’s Seat in Europe*, 3 EUROPARÄTTSLIG TIDSKRIFT 60 (2000); Robert R. Drury, *Migrating Companies*, 24 EUR. L. REV. 354 (1999).

pany's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country."¹⁰⁴ Despite the general terms in which paragraph 70 of *Überseering* is cast, the Court's observation should not be interpreted as suggesting that the Court is prepared to recognize a Member State as having the power, *vis-à-vis* companies validly incorporated under its law, to impose restrictions on the cross-border transfer of the company's actual center of administration, central place of business, or real seat to another EU Member State. In light of *Centros*¹⁰⁵ and *Inspire Art*,¹⁰⁶ it is inconceivable that the Court would construe a corporation's freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty in the case of a cross-border transfer of the real seat, principal place of business, or actual center of administration (emigration or exit case) more restrictively than in an "immigration" or "entry" case such as *Überseering*.¹⁰⁷ Specifically, the negation by a Member State of the right of a cross-border transfer of the actual center of administration, principal place of business, or real seat, and the requirement to reincorporate in the other Member State (i.e., the state of establishment) would be tantamount to outright negation of freedom of establishment that articles 43 and 48 of the EC Treaty are intended to ensure.¹⁰⁸

The cross-border transfer of the registered office (*Satzungssitz*) is, of course, a different issue.¹⁰⁹ For such a transfer, a corporation needs to acquire legal personality in the host Member State and lose it in the home Member State in order to avoid any complications arising from its registration in two countries. In light of the holdings of the European Court of Justice in *Centros*, *Überseering* and *Inspire Art*, the cross-border transfer of the registered office is not yet possible within the EU unless secondary community legislation, such as a coordination Directive under article 44(2)(g) of the EC Treaty, is adopted.¹¹⁰ Such legislation would have to provide appropriate safeguards in the Member States to allow companies to exercise their freedom of establishment by transferring their registered office, thereby acquiring legal personality under the law of the host Member State in order to be governed by that law and without having to be wound-up in the home Member State. The objective of such a Directive should be to facilitate the cross-border transfer, by way of freedom of establishment, of the registered office of a corporation already formed under the law of a Member State.

104. See *Case C-208/00*, 2002 E.C.R. at I-9967 ¶ 70.

105. *Case C-212/97*, 1999 E.C.R. at I-1459.

106. *Case C-167/01*, 56 NJW at 3331.

107. Ebke, *supra* note 18, at 932.

108. *Id.*

109. Under the German version of the real seat doctrine, the cross-border transfer of the registered office of a corporation formed according to German law is not possible without dissolution in Germany; therefore, the resolution of the general meeting to transfer the registered office cannot be recorded in the home country's company register (*Handelsregister*). See Decision (Beschluss) of Feb. 11, 2004, Bayerisches Oberstes Landesgericht (Bavarian Supreme Court), Germany, 95 GMBH-RUNDSCHAU [GMBHR] 490 (2004). For a discussion of this decision, see Marc-Philippe Weller, *Zum identitätswahrenden Wegzug deutscher Gesellschaften*, 42 DStR 1218 (2004).

110. In *Centros*, *Überseering* and *Inspire Art*, the registered office of the respective company had remained in the company's state of incorporation. In its final report of November 4, 2002, the High-Level Group of Company Law Experts recommended that the EU Commission consider adopting a proposal for a Directive on the transfer of the registered office. See HIGH-LEVEL GROUP OF COMPANY LAW EXPERTS, REPORT ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE at 101 (Nov. 4, 2002), available at <http://www.europa.eu.int>.

Recently, the EU Commission outlined the planned proposal for a 14th Company Law Directive on the Cross-border Transfer of the Registered Office of Limited Companies in a public consultation.¹¹¹ According to the Commission, each Member State would have to recognize the right of a corporation governed by its own law to opt, by decision of the general meeting taken in accordance with the formalities and procedures for altering the articles of incorporation and the by-laws, to transfer its registered office to another Member State in order to acquire a new legal personality in place of its original one.¹¹² The decision of the general meeting would not, in itself, entail the removal of the company from its home Member State's register or the loss of its legal personality so long as the company has not, by virtue of registration in the host Member State, acquired legal personality there.¹¹³ To protect those who are particularly affected by the transfer, notably minority shareholders and creditors, the general meeting's decision to transfer the registered office would have to be disclosed publicly in advance, as must its consequences.¹¹⁴ The home Member State should also have the power to ensure special protection of the rights of certain categories of persons, particularly minority shareholders and creditors, in accordance with the principle of proportionality laid down by the European Court of Justice.¹¹⁵

Obviously, the host Member State could not refuse to register a company which, on the basis of the decision taken by its general meeting and in particular of the changes of its articles of incorporation and its by-laws, satisfies the essential substantive and formal requirements for the registration of domestic companies.¹¹⁶ As the EU Commission pointed out, the Directive should coordinate supervision by the home Member state of the validity of the decisions taken by the general meeting and supervision by the host Member State of the substantive and procedural requirements of its own law for the company to be given legal personality under its law and to be registered.¹¹⁷ Registration in the host Member State should result in the company losing its legal personality and being removed from the register of its home Member State.¹¹⁸ The transfer of the registered office should be recorded both in the home state and in the host state.¹¹⁹ The EU Commission emphasizes, correctly, that the cross-border transfer of a company's registered office should be "tax-

111. See EU Commission, Public Consultation relating to the outline of the planned proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies, *available at* <http://www.europa.eu.int> (last visited Sept. 9, 2004).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* Similar protection is already provided for in the context of mergers of corporations by the Third Company Law Directive (*see* Directive 78/855/EEC, O.J. EC [L 295] at 36 [Oct. 20, 1978]) and in the Statute for a European Company (*see* Regulation [EC] 2157/2001, O.J. EC [L 294] at 1 [Nov. 10, 2001] [hereinafter SE Statute]) for the transfer of registered office. As to employee participation rights, the EU Commission suggests that such rights should be governed by the legislation of the host Member State. *Id.* "Where they are more firmly enshrined in the home Member State," the Commission notes, "they should be maintained or negotiated." *Id.* According to the EU Commission, the home Member State "could adopt its own rules governing these negotiations where it deems this to be necessary." *Id.* Obviously, such rules would have to meet the four-factor test established in *Gebhard*, *supra* note 24, and adopted in *Centros*, *supra* note 25, for purposes of articles 48 of the EC Treaty. For the four-factor test, *see infra* notes 194–197.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

neutral” in accordance with the principles adopted for cross-border mergers by Directive 90/434/EEC.¹²⁰

E. JURISDICTIONAL AND REGULATORY COMPETITION

The significance of *Überseering* cannot be overestimated.¹²¹ *Überseering* fundamentally changes conflicts of corporate laws within the EU, especially in Member States such as Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal and Spain, that traditionally applied the real seat doctrine to create a level playing field for all corporations having a substantial nexus with the particular country.¹²² Under *Überseering*, the real seat doctrine can no longer be applied by a court of any EU Member State to determine the existence and the legal status of a corporation incorporated in another Member State. Rather, the legal personality (*Rechtsfähigkeit*) of a Sister State corporation is to be determined by way of the law of the state of incorporation.¹²³ Thus, the level playing field aimed

120. O.J. EC (L 225) at 1 (Aug. 20, 1990). For details of the corporate income tax consequences of a cross-border transfer of the principal place of business or the registered office, see, e.g., Wolfgang Schön, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 2004 TAX NOTES INTERNATIONAL 197; Dieter Birk, *Zuzug und Wegzug von Kapitalgesellschaften: Zu den körperschaftsteuerlichen Folgen der Überseeringentscheidung des EuGH*, 12 INTERNATIONALES STEUERRECHT [ISTR] 469 (2003); Rainer Deininger, *Körperschaftsteuerrechtliche Auswirkungen der Überseering-Entscheidung des EuGH*, 12 ISTR 214 (2003). For a discussion of the implications of the holdings of the European Court of Justice in *Hughes de Lasteyrie du Saillant* see Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, 2004 E.C.R. _____ (forthcoming), available at http://europa.eu.int/eur-lex/en/archive/2004/c_09420040417en.html (last visited Sept. 14, 2004), and reprinted in 57 DB 686 [2004]. For a discussion of corporations emigrating from their home Member State to another Member State, see Theresa Franz, *Berührt "Hughes de Lasteyrie du Saillant" die durch den Wegzug veranlasste Besteuerung von Kapitalgesellschaften in Deutschland?*, 15 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 270 (2004); Jens Kleinert, *Endgültiges Aus für steuerliche Wegzugsbeschränkungen bei natürlichen und juristischen Personen*, 57 DB 673 (2004); Gerhard Kraft & Marcus Müller, *Schlussfolgerungen aus der EuGH-Entscheidung zur französischen Wegzugsbesteuerung (Saillant) für die internationale Steuerberatungspraxis aus deutscher Sicht*, 50 RIW 366 (2004); Clemens P. Schindler, *Hughes de Lasteyrie du Saillant als Ende der (deutschen) Wegzugsbesteuerung?*, 13 ISTR 300 (2004); and Franz Wassermeyer, *Steuerliche Konsequenzen aus dem EuGH-Urteil "Hughes de Lasteyrie du Saillant."*, 95 GMBHR 613 (2004).

121. The Seventh Chamber of the German Supreme Court implemented the judgment of the European Court of Justice in the *Überseering* case in its final judgment of March 13, 2003. See Judgment of Mar. 13, 2003, *supra* note 80. For details of this judgment, see Elena Dubovizkaja, *"Überseering"-Rechtsprechung: Gerichtliche Klarstellung zur Niederlassungsfreiheit von Gesellschaften*, 94 GMBHR 694 (2003); Horst Eidenmüller, *Anmerkung*, 58 JZ 526 (2003); Stefan Leible & Jochen Hoffmann, *"Überseering" und das deutsche Gesellschaftskollisionsrecht*, 24 ZIP 925 (2003); Martin Schulz, *(Schein-)Auslandsgesellschaften in Europa—Ein Schein-Problem?*, 56 NJW 2705 (2003); Marc-Philippe Weller, *Das Internationale Gesellschaftsrecht in der neuesten BGH-Rechtsprechung*, 23 IPRAX 324 (2003); Johannes Wertenbruch, *Der Abschluss des "Überseering"-Verfahrens durch den BGH: Folgerungen*, 6 NZG 618 (2003).

122. Cf. Ebke, *supra* note 102, at 967 n. 38. The pertinent French principles of conflicts of corporate laws are thoroughly analyzed in MICHEL MENJUCQ, *DRIT INTERNATIONAL ET EUROPÉEN DES SOCIÉTÉS* 13–108 (2001).

123. This view is shared by the vast majority of commentators in Germany. See, e.g., UWE HÜFFER, *AKTIENGESETZ* 17 (6th ed. 2004); Ebke, *supra* note 18, at 928–29 (with a list of references); Hans Steffen Koch & Matthias Königeter, *Grenzüberschreitende Sitzverlegung von Gesellschaften innerhalb der EG—(k)ein Ende der Kontroverse?*, 25 JURISTISCHE AUSBILDUNG [JURA] 692, 699 (2003); Marcus Lutter, *"Überseering" und die Folgen*, 58 BB 7, 10 (2003); Micheler, *supra* note 34, at 523–25 & 529; Martin Schulz & Peter Sester, *Höchststrichterliche Harmonisierung der Kollisionsregeln im europäischen Gesellschaftsrecht: Durchbruch der Gründungstheorie nach "Überseering"*, 13 EWS 545 (2002); Spindler & Berner, *supra* note 82, at 950. But see also Peter Kindler, *Auf dem Weg zur Europäischen Briefkastengesellschaft?*, 56 NJW 1073, 1079 (2003) (arguing that, in spite of *Überseering*, EU Member States are free to apply either the state-of-incorporation principle [*Gründungstheorie*] or the real seat

at by the real seat doctrine has been replaced by the European Court of Justice in *Überseering*, with a jurisdictional competition among the Member States.¹²⁴

In the new competitive environment, markets will be making law and setting relevant standards¹²⁵ until the EU Council (or others)¹²⁶ succeeds in achieving what the European Court of Justice in *Centros* called “complete harmonization,” in particular of the rules relating to the structure and organization (“internal affairs”) of the corporation.¹²⁷ Whether a complete harmonization of the law of corporations is in fact, necessary or even desirable for the proper functioning of the European Single Market is, of course, a different question. Legislative or regulatory competition, which results from the differences of the laws within a multi-jurisdictional legal system, may have salutary effects in the market for corporate charters.¹²⁸ In addition, it is worth scrutinizing whether, within the EU, company law harmonization, if any, should be achieved exclusively by legislative fiat, or whether harmonization initiated by private actors, such as a European Law Institute, would be preferable.¹²⁹ After *Überseering*, the most important questions for legislatures and corporate law scholars, alike, are how much harmonized company law the EU needs and how much diversity would seem to be desirable for the proper functioning of the Single Market.¹³⁰

doctrine [*Sitztheorie*]); Peter Kindler, *supra* note 86 (arguing that *Inspire Art* did not address the question of how the proper law of corporations is to be determined). The *Bundesfinanzhof*, Germany’s highest tax court, has already responded to the holdings of the European Court of Justice in *Überseering* by abandoning the real seat theory for corporate tax purposes. See Judgment of Jan. 29, 2003, *Bundesfinanzhof* (Supreme Tax Court), Germany, 94 GMBHR 722 (2003). For a detailed analysis of this decision, see Wienand Meilicke, *Die Niederlassungsfreiheit nach “Überseering”: Rückblick und Ausblick nach Handelsrecht und Steuerrecht*, 94 GMBHR 793 (2003); Klaus-R. Wagner, “*Überseering*” und Folgen für das Steuerrecht, 94 GMBHR 684 (2003).

124. See Ebke, *supra* note 18, at 930–31; Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechtsordnungen in Europa*, 50 ZIP 2233 (2002). For an economic analysis of legislative competition in corporation law, see HEINE, *supra* note 3; Christian Kirchner, *Zur Ökonomie des legislatorischen Wettbewerbs im europäischen Gesellschaftsrecht*, in Festschrift für Ulrich Immenga 607 (Andreas Fuchs et al. eds., 2004).

125. See Werner F. Ebke, *Märkte machen Recht—auch Gesellschafts- und Unternehmensrecht!*, Festschrift für Marcus Lutter 17 (Uwe H. Schneider et al. eds., 2000).

126. For details, see *infra* note 130 and accompanying text.

127. See *Case C-212/97*, 1999 E.C.R. at I-1493 ¶ 28.

128. For the debate, in the United States, of whether or not states are racing, and whether they are racing to the top or to the bottom, see *infra* note 306.

129. For a critical analysis of the predominance of harmonization of private law by way of legislation in the EU, see JOCHEN TAUPITZ, *EUROPÄISCHE PRIVATRECHTSVEREINHEITLICHUNG HEUTE UND MORGEN* 39–54 (1993); Ebke, *supra* note 102, at 984–86; Werner F. Ebke, *Ein Gesellschaftsrecht für Europa?*, in *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* 197, 208–13 (Jürgen Basedow et al. eds., 2001). In the United States, private bodies such as the American Bar Association (ABA) and the American Law Institute (ALI) have had considerable influence on the approximation of state laws in general and the law of business associations in particular. See, e.g., TIM REHER, *GESELLSCHAFTSRECHT IN GEMEINSAMEN MÄRKTEN* 171 (1997). The ABA’s Revised Model Business Corporation Act (RMBCA) and the ALI’s Principles of Corporate Governance support the proposition that private actors may respond faster and more effectively than legislatures to changing needs of the business community, the financial markets, and society in general. See Ebke, *supra* note 3, at 222–23. The same can be said about the Uniform Limited Partnership Act and the Uniform Partnership Act drafted by the Conference of Commissioners on Uniform State Law. See *id.* at 238. In the European Union, there are no comparable private actors who could successfully launch similar projects in the areas of company law, securities regulation, and corporate taxation. To remedy the situation, it has been suggested that a European Law Institute (ELI) be founded to fulfil this task. See Werner F. Ebke, *Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute?*, Festschrift für Bernhard Grossfeld 189 (Ulrich Hübner & Werner F. Ebke eds., 1999). For the role of the High Level Group of Company Law Experts, see Hanno Merkt, *Die Pluralisierung des europäischen Gesellschaftsrechts*, 50 RIW 1, 3 (2004).

III. Inspire Art

Even though *Überseering* concerned “only” the right of a Dutch corporation to be recognized in Germany as a Dutch corporation and the consequential right to participate, as a Dutch corporation, in legal proceedings in German courts, *Überseering* laid the ground for a much broader application of the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.¹³¹ The recent judgment of the European Court of Justice in *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*¹³² supports this proposition.

A. PSEUDO-FOREIGN CORPORATIONS

The judgment deals with the Netherlands’ Law on Formally-foreign Corporations of 1997.¹³³

1. *The Netherlands’ Law on Formally-Foreign Companies*

According to article 1 *Wet op de Formeel Buitenlandse Vennootschappen (WBFV)*, the statute applies to “formally-foreign companies” that are corporations (“capital companies”) “formed under laws other than those of the Netherlands and having legal personality,” which carry on their activities “entirely or almost entirely” in the Netherlands and do not “have any real connection with the State within which the law under which the company was formed applies.”¹³⁴ Articles 2 through 5 *WBFV* impose on formally-foreign corporations various legal obligations concerning the company’s registration as a formally-foreign company in the commercial register, an indication of that status in all the documents produced by it, the minimum share capital and the drawing up, production, and publication of annual financial documents.¹³⁵ The *WBFV* also provides for penalties in case of non-compliance

130. See Ebke, *supra* note 3, at 207–41. See also Friedrich Kübler, “Legislative Competition” and Corporate Law Reform: Some Questions from a European Perspective—Comments, in HARMONIZATION OF LEGISLATION IN FEDERAL SYSTEMS: CONSTITUTIONAL, FEDERAL AND SUBSIDIARITY ASPECTS—THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA COMPARED 171 (Ingolf Pernice ed., 1996); Sebastian Mock, *Harmonization, Regulation and Legislative Competition in European Corporate Law*, 3 GERMAN L.J. 1 (2002). For an economic analysis of the subsidiarity principle of EC Treaty, see *supra* note 17, art. 5(2). See ULRICH BÖTTGER, ANSÄTZE FÜR EINE ÖKONOMISCHE ANALYSE DES SUBSIDIARITÄTSPRINZIPES DES EG ART. 5 ABS. 2 (2004).

131. See Volker Geyhalter & Peggy Gänßler, *Perspektiven nach “Überseering”—wie geht es weiter?*, 6 NZG 409 (2003).

132. *Case C-167/01*, 56 NJW at 3331. For a detailed analysis of the *Inspire Art* decision, see, e.g., Christian Kersting & Clemens P. Schindler, *The ECJ’s Inspire Art Decision of 30 September 2003 and Its Effects on Practice*, 4 GERMAN L.J. 1277 (2004); Peter Behrens, *Gemeinschaftsrechtliche Grenzen der Anwendung inländischen Gesellschaftsrechts auf Auslandsgesellschaften nach Inspire Art*, 24 IPRAX 20 (2004); Christoph Binge & Ulrich Thölke, “Everything goes?”—*Das deutsche Internationale Gesellschaftsrecht nach “Inspire Art.”* 2004 DEUTSCHE NOTARZEITSCHRIFT [DNOTZ] 21; Horst Eidenmüller & Gebhard M. Rehm, *Niederlassungsfreiheit versus Schutz des inländischen Rechtsverkehrs: Konturen des Europäischen Internationalen Gesellschaftsrechts*, 33 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 159 (2004); Bayer, *supra* note 86; Peter Behrens, *supra* note 86; Volker Geyhalter & Peggy Gänßler, “*Inspire Art*”—*Briefkastengesellschaften “on the Move,”* 41 DEUTSCHES STEUERRECHT [DSTR] 2167 (2003); Alexander Hirsch, *Artfully Inspired—Werden deutsche Gesellschaften englisch?*, 6 NZG 1100 (2003); Erich Schanze & Andreas Jüttner, *Die Entscheidung für Pluralität: Kollisionsrecht und Gesellschaftsrecht nach der Entscheidung “Inspire Art.”* 48 AG 661 (2003).

133. See *Wet op de Formeel Buitenlandse Vennootschappen* [Law on Formally-foreign Corporations], of December 17, 1997, 1997 STAATSBLED no. 697 [hereinafter *WFBV*].

134. See *WFBV*, *supra* note 133, at art. 1.

135. *Case C-167/01*, 56 NJW at 3331 ¶.23.

with those provisions.¹³⁶ Article 2 *WBFV* requires a pseudo-foreign corporation to be registered as such in the commercial register in the Netherlands.¹³⁷ The company is required to file a copies of the instrument constituting the company and the articles of association in Dutch, French, German, or English.¹³⁸ Article 4(4) *WBFV* provides that directors are jointly and severally liable with the company for legal acts carried out in the name of the company during their term as directors until the requirement of registration in the commercial register has been fulfilled.¹³⁹

Furthermore, according to article 4(1) *WBFV*, the subscribed capital of a formally-foreign corporation must be at least equal to the minimum amount required of limited liability companies incorporated under the law of the Netherlands.¹⁴⁰ The paid-up share capital must be at least equal to the minimum capital. In order to ensure that pseudo-foreign corporations fulfil the statutory requirements, an auditor's certificate must be filed with the commercial register.¹⁴¹ Until the requirements relating to capital and paid-up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their term as directors. Article 4(5) *WBFV* states, however, that the minimum capital provisions do not apply to a company governed by the law of an EU Member State or of a Member State of the EEA, to which the Second Directive is applicable.¹⁴²

2. *United States of America*

The formally-foreign corporation statute of the Netherlands is a classic example of a state's desire to create special legal obligations for, and to apply specific provisions of, its corporation law to foreign corporations carrying on most or all of their activities within its territory. Comparative research has long suggested that the desire of a state to apply specific local rules to foreign corporations; the business, shareholders, and personnel of which are predominantly identified with that state, is by no means limited to jurisdictions that have adopted the real seat doctrine.¹⁴³ Rather, even jurisdictions such as the fifty states in the United States of America,¹⁴⁴ that apply the liberal state-of-incorporation doctrine to con-

136. *Id.*

137. *Id.* at 3331 ¶ 24.

138. *Id.*

139. *Id.* ¶ 25.

140. *Id.* ¶ 27.

141. *Id.*

142. *Id.* at ¶ 29. According to article 1(1) of the Second Directive, the Directive is applicable to public companies limited by shares, but not to private limited companies. See Second Directive of Dec. 13, 1976, 1976 O.J. (L 26) 1.

143. GROSSFELD, *supra* note 43, at 46–50; Grossfeld, *supra* note 53, at 13; Otto Sandrock, *Ein amerikanisches Lehrstück für das Kollisionsrecht der Kapitalgesellschaften*, 42 RABELSZ 227 (1978). See also DANIEL ZIMMER, *INTERNATIONALES GESELLSCHAFTSRECHT* 219–40 (1996).

144. In the United States, the existence of a company, as well as its subsequent dissolution, are governed by the law of the state of incorporation. The same law applies, with rare exceptions, to the “internal affairs” of the corporation. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90 (1987) (holding that “[t]he free market system depends at its core upon the fact that a corporation—*except in the rarest situation*—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation”) (emphasis added). This rule, known as the “internal affairs rule,” means that the relationships between and among shareholders and managers (directors and officers) will be governed by the corporate law statutes and case law of the state where the corporation is incorporated. See SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 52, at 1105. If a suit raising issues of corporate internal affairs is brought

flicts of corporate laws sometimes feel a need to apply certain local internal affairs rules to foreign corporations carrying on most or all of their business within their territory (“pseudo-foreign corporations”).¹⁴⁵

California is the principal state that has sought to apply specific provisions of its corporation statutes to corporations formed in other states, but whose principal business activities are in California.¹⁴⁶ Section 2115 of California’s Corporation Code applies (to the exclusion of the law of the jurisdiction in which the corporation is incorporated) to corporations with “specified minimum contacts” in California to comply with designated provisions of the Code: among others, sections dealing with cumulative voting, directors’ standard of care, indemnification of directors, officers and others, limitations on distributions, inspection rights of shareholders, and dissenters’ rights.¹⁴⁷ However, section 2115 does not apply to corporations with outstanding shares listed on the New York Stock Exchange or the American Stock Exchange or NASDAQ.¹⁴⁸

New York also makes foreign corporations doing business in that state subject to specified provisions of its Business Corporation Law.¹⁴⁹ New York’s statute is less demanding than California’s statute concerning the required contacts with New York,¹⁵⁰ and also less aggressive in the extent to which New York statutory provisions will apply.¹⁵¹ Similar results as those under statutory regimes may be achieved by means of general principles of conflicts-of-laws, such as common law outreach rules that some jurisdictions in the United

in a state other than the state of incorporation, the incorporating state’s rules will apply and govern the outcome. See RMBCA § 15.05(c); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302. See generally Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29 (1987); Deborah DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161 (1985); Phaedon J. Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1 (1985). For a thoughtful analysis of the origins of the internal affairs doctrine in the United States of America, see Richard M. Buxbaum, *The Origins of the American “Internal Affairs” Rule in the Corporate Conflict of Laws*, Festschrift für Gerhard Kegel 75 (Hans-Joachim Musielak et al. eds., 1987). The “external affairs” of a corporation are generally governed by the law of the place where the activities occur and by federal and state regulatory statutes rather than by the law of the place of incorporation. See JEFFREY D. BAUMAN, ELLIOT J. WEISS & ALAN R. PALMITER, *CORPORATIONS: LAW AND POLICY* 53 (5th ed. 2003). For a comparative analysis of the law applicable to partnerships and their partners, see DANIEL WALDEN, *DAS KOLLISIONSRECHT DER PERSONENGESELLSCHAFTEN IM DEUTSCHEN, EUROPÄISCHEN UND US-AMERIKANISCHEN RECHT* (2001).

145. Ebke, *supra* note 40, at 1029–31.

146. See CAL. CORP. CODE § 2115 (West 2004).

147. See CAL. CORP. CODE § 2115 (West 2004). On January 1, 2003, California enacted a new law called the California Corporate Disclosure Act. The act requires companies incorporated in California, as well as companies qualified to do business in California, to make an annual filing of certain corporate information with the California Secretary of State. Among the information that must be filed is information beyond that contained in the quarterly and annual filings on Forms 10Q and 10K that public corporations must make with the Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934. See ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 249 (8th ed. 2003).

148. See CAL. CORP. CODE § 2115(c)(1)-(2) (West 2004). The section is not applicable if all of the voting shares of the corporation (other than directors’ qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to § 2115. See also CAL. CORP. CODE § 2115(c)(3) (West 2004).

149. See N.Y. BUS. CORP. LAW §§ 1317–1320 (McKinney 2002).

150. See N.Y. BUS. CORP. LAW §§ 1320(a)(2) (McKinney 2002). Section 1320(a)(1) N.Y. BUS. CORP. LAW exempts corporations the shares of which are listed on a national securities exchange from certain provision of the Law.

151. See N.Y. BUS. CORP. LAW §§ 1317–1319 (McKinney 2002).

States apply.¹⁵² Yet, under the Constitution of the United States, there are limitations on applying local law to the internal affairs of a foreign corporation.¹⁵³ The scope of such constitutional limitations, however, remains largely unsettled.¹⁵⁴

3. *England*

England, too, has laws that are explicitly outreaching in order to protect local interests.¹⁵⁵ Under English law, it is generally recognized today that promoters are free to incorporate their business in a country of their choice.¹⁵⁶ However, a foreign corporation having established a place of business in England (“overseas company”) is subject to certain obligations under part XXIII of the Companies Act of 1985.¹⁵⁷ Part XXIII of this act provides an effective method of exercising jurisdiction and control over overseas companies.¹⁵⁸ In addition, under section 453 of the Companies Act of 1985, foreign companies carrying on business in England are subject to the vigorous provisions of part XIV of the Act concerning the investigation of companies and their affairs (subject to certain exceptions). Furthermore, 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.¹⁵⁹

Furthermore, foreign companies may be wound-up under sections 220 and 221 of the Insolvency Act 1986.¹⁶⁰ Such winding-up triggers, *inter alia*, the Insolvency Act’s provisions

152. For details, see Norwood P. Beveridge, *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 *BUS. LAW.* 693 (1989).

153. SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 52, at 1112–13 & 1115–16.

154. *Wilson v. Louisiana-Pacific Res., Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982) (upholding the imposition of the California cumulative voting provisions upon a Utah corporation that was subject to § 2115). The California shareholders’ inspection statute was applied to a foreign corporation in *Valtz v. Penta Inv. Corp.*, 139 Cal. App. 3d 803, 188 Cal. Rptr. 922 (1983). *Cf. Nedlloyd Lines B.V. v. Superior Court of San Mateo County*, 3 Cal. 4th 459, 472 n. 13, 11 Cal. Rptr.2d 330, 351 n. 13, 834 P.2d 1148, 1169 n. 13 (1992) (Kennard, J., *concurring and dissenting*). *But see Arden-Mayfair, Inc. v. Louart Corp.*, 385 A.2d 3 (Del. Ch. 1978), *McDermott, Inc. v. Lewis*, 531 A.2d 206 (Del. 1987), and *Draper v. Gardner Defined Plan Trust*, 625 A.2d 859 (1993) (holding CAL.CORP. CODE § 2115 inapplicable under “generally recognized choice of law principles”).

155. For a detailed analysis of English conflict-of-corporate-laws principles, see BARBARA S. HÖFLING, *DAS ENGLISCHE INTERNATIONALE GESELLSCHAFTSRECHT* (2002).

156. DICEY & MORRIS ON THE CONFLICTS OF LAWS 1107 (12th ed., 1993); GOWER & DAVIES’, *supra* note 102, at 103; SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 52, at 1105; HÖFLING, *supra* note 155, at 122; VOLKER TRIEBEL, STEPHEN HODGSON, WOLFGANG KELLENTNER & GEORG MÜLLER, *ENGLISCHES HANDELS- UND WIRTSCHAFTSRECHT* 425 (2d ed., 1995).

157. For a comprehensive analysis, see, e.g., GOWER & DAVIES, *supra* note 102, at 105–11; HÖFLING, *supra* note 155, at 161–97.

158. Company law is presently under review in the United Kingdom. See The Company Law Review Steering Group, *Modern Company Law—For a Competitive Economy*, Final Report (July 26, 2001). See also Jonathan Rickford, *Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance*, 15 *EUR. BUS. L. REV.* (2004) (forthcoming).

159. See Company Directors Disqualification Act 1986 §§ 1, 6 and 10. For details of this Act, see, e.g., GOWER & DAVIES, *supra* note 102, at 212–24; HÖFLING, *supra* note 155, at 183–98; Mathias Habersack & Dirk A. Verse, *Wrongful Trading—Grundlage einer europäischen Insolvenzverschleppungshaftung?*, 168 *ZHR* 174, 198 (2004). For the territorial scope of the Company Directors Disqualification Act 1986 §§ 1, 6 and 10, see Ebke, *supra* note 40, at 1030 n. 110.

160. For details of the Insolvency Act 1986, see, e.g., HÖFLING, *supra* note 155, at 199–241.

concerning fraudulent¹⁶¹ or wrongful trading,¹⁶² which, in certain situations, may lead to personal liability of the directors.¹⁶³ By including business associations incorporated abroad into the ambit of creditor protection and insolvency laws, English law superimposes its respective laws on foreign corporations and their directors who have taken steps to avoid local legal controls.

161. See Insolvency Act 1986 § 213, which provides:

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

For details of Insolvency Act § 213, see, e.g., HÖFLING, *supra* note 155, at 222–24.

162. See Insolvency Act 1986 § 214, which provides:

- (1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to any person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the courts thinks proper.
- (2) This subsection applies in relation to a person if—
 - (a) the company has gone into insolvent liquidation,
 - (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
 - (c) that person was a director of that company at that time.
- (3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2) (b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.
- (4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonable diligent person having both—
 - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
 - (b) the general knowledge, skill and experience that that director has.
- (5) The reference in subsection (4) to the function carried out in relation to the company by a director of the company includes any functions which he does not carry out but which have been intrusted to him.
- (6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.
- (7) In this section "director" includes a shadow director.

A "shadow director," in relation to a company, is defined as meaning "a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)."

See Insolvency Act 1986 § 251. For details of Insolvency Act 1986 § 214, see, e.g., HÖFLING, *supra* note 155, at 225–35; Habersack & Verse, *supra* note 159, at 182–95.

163. See Insolvency Act 1986 § 213(2), § 214(1) ("contribution order"). For further details, see GOWER & DAVIES, *supra* note 102, at 222; Höfling, *supra* note 155, at 229–30; Habersack & Verse, *supra* note 159, at 195–98.

4. *The Netherlands*

In the EU, articles 43 and 48 of the EC Treaty impose limitations upon a Member State's power to apply some or all of its corporate law rules upon a corporation formed in another Member State. The exact scope of such limitations, however, was far from being certain in 1997 when the legislature of the Netherlands enacted the pseudo-foreign corporation statute.¹⁶⁴ To be sure, the Netherlands today follow the liberal state-of-incorporation doctrine.¹⁶⁵ Accordingly, under Dutch conflict-of-corporate-laws rules, the law of the state of incorporation governs, *inter alia*, the internal affairs of a corporation regardless of whether the corporation is a Dutch or a foreign corporation. It became apparent, however, that the accommodating conflict-of-corporate-laws rules led to increased use of foreign companies for ends which the Netherlands legislature had not covered, or even foreseen. More and more frequently, companies that carry on their business principally, or even exclusively, in the Netherlands were formed abroad (in particular in the United Kingdom and Delaware), often times with the aim of evading the legal requirements of the Netherlands' company law for functionally similar companies.¹⁶⁶ In response, the Netherlands adopted the law on pseudo-foreign corporations of December 17, 1997.¹⁶⁷

As early as October 1999, the *Kantongerecht* (District Court) of Groningen, in the matter of *Kamer van Koophandel en Fabrieken voor Groningen v. Challenger Trading Company Ltd.*, referred several questions to the European Court of Justice for a preliminary ruling.¹⁶⁸ The *Kantongerecht* inquired whether articles 2 through 5 of the Law of December 17, 1997, on formally-foreign corporations were compatible with articles 43 and 48 of the EC Treaty.¹⁶⁹ A couple of months after the reference for a preliminary ruling, however, Challenger Trading Company Ltd. was removed from the company register in England, its state of incorporation.¹⁷⁰ This change in circumstances technically rendered the questions referred to the European Court of Justice moot. As is well known from *Meilicke v. ADV/ORGA AG*,¹⁷¹ the European Court of Justice is not prepared to rule on hypothetical issues.¹⁷² As a result, *Inspire Art* was to become the seminal case regarding the right of an EU Member State to

164. See *supra* note 133. For details of this Law, see, e.g., Harm-Jan de Kluiver, *De Wet op de Formeel Buitenlandse Vennootschappen op de Tocht?*, 1999 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE [WPNR] 527; Levinus Timmerman, *Das niederländische Gesellschaftsrecht im Umbruch*, in Festschrift für Marcus Lutter 173, 184–85 (Uwe W. Schneider et al. eds., 2000).

165. See, e.g., Wolfgang Mincke, *Einführung in das niederländische Recht* 250 (2002); Paul Gotzen, *Niederländisches Handels- und Wirtschaftsrecht* 188 (2nd ed. 2000). See also the observation submitted by the government of the Netherlands to the European Court of Justice in *Inspire Art* (Case C-167/01, 49 NJW at 3333 ¶ 77, referring to article 2 of the Law Concerning the Rules on Conflict of Laws Applicable to Legal Persons [*Wet conflictenrecht corporaties*] of Dec. 17, 1997).

166. Case C-167/01, 49 NJW at 3333 ¶ 79.

167. For details of the *WFBV*, see *supra* notes 133–42.

168. See Decision of Oct. 19, 1999, *Kantongerecht* (District Court), Groningen, The Netherlands, 11 EWS 280 (2000) (concerning the request for a preliminary ruling by the European Court of Justice in Case C-410/99, *Kamer van Koophandel en Fabrieken voor Groningen v. Challenger Trading Company Ltd.*).

169. Decision of Oct. 19, 1999, at 280.

170. See Ebke, *supra* note 54, at 644–45.

171. See Case C-83/91, *Meilicke v. ADV/ORGA AG*, [1992] E.C.R. I-4871. For the background of this case, see Edwards, *supra* note 40, at 63–4.

172. From a comparativist's point of view it is interesting to note that the Supreme Court of Delaware decided the famous case of *McDermott, Inc. v. Lewis*, 531 A.2d 206 (Del. 1987), which involves, *inter alia*, the issue of the constitutionality of California's pseudo-foreign corporation statute, *supra* notes 146–48 and accompanying text, despite the fact that technically the appeal was moot.

impose on a pseudo-foreign corporation, incorporated in another Member State, some or all of its corporate law provisions designed to protect actual or perceived local interests. The legal, political and economic significance of the central issues in *Inspire Art* is demonstrated by the fact that the governments of Austria, Germany, Italy, the Netherlands, and the United Kingdom submitted lengthy Observations to the European Court of Justice.¹⁷³

B. THE DISPUTE AND THE REFERENCE FOR A PRELIMINARY RULING

The dispute in the main case arose because Inspire Art Ltd. was not registered in the Netherlands as a formally foreign corporation. Inspire Art Ltd. was formed on July 28, 2000, in the legal form of a private company limited by shares under the law of England and Wales.¹⁷⁴ Inspire Art has its registered office at Folkestone, United Kingdom.¹⁷⁵ It conducts business under the business name Inspire Art Ltd. in the sphere of dealing in *objets d'art*. The company began business in August of 2000, and has a branch in Amsterdam, the Netherlands.¹⁷⁶ Taking the view that Inspire Art Ltd. should be registered as a formally-foreign corporation, the Chamber of Commerce of Amsterdam applied to the *Kantongerecht* (District Court) of Amsterdam on October 30, 2000, for an order requiring Inspire Art Ltd. to supplement the commercial register with a statement identifying it as a formally-foreign corporation. On February 5, 2001, the *Kantongerecht* held that Inspire Art Ltd. was a formally-foreign corporation within the meaning of article 1 of the law.¹⁷⁷ As to the compatibility of the Law, the *Kantongerecht* stayed the proceedings and referred several questions to the European Court of Justice for a preliminary ruling.¹⁷⁸

C. THE JUDGMENT

The holdings of the European Court of Justice in *Inspire Art* are not surprising.

173. Cf. *Case C-167/01*, 56 NJW at 3331.

174. *Id.* at 3331 ¶ 34.

175. *Id.*

176. *Id.*

177. *Id.*, 56 NJW at 3331 (para. 38).

178. *Id.*, 56 NJW at 3331 (para. 39). The District Court referred the following questions to the European Court of Justice for a preliminary ruling:

1. Are articles 43 EC and 48 EC to be interpreted as precluding the Netherlands, pursuant to the *Wet op de formeel buitenlandse vennootschappen* of 17 December 1997, from attaching additional conditions, such as those laid down in articles 2 through 5 of that law, to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?
2. If, on a proper construction of those articles, it is held that the provisions of the *Wet op de formeel buitenlandse vennootschappen* are incompatible with them, must article 46 EC be interpreted as meaning that the said articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?

See id.

1. *Restriction*

In accordance with its holding in *Centros*,¹⁷⁹ the European Court of Justice noted that it is “immaterial,” with respect to the application of the rules on freedom of establishment, that Inspire Art Ltd. was formed in the United Kingdom only for the purpose of establishing itself in the Netherlands, where its main, or indeed, entire business is being conducted.¹⁸⁰ The Court also noted that the fact that Inspire Art Ltd. was formed in the United Kingdom for the sole purpose of enjoying the benefits of more favorable legislation regarding, in particular, minimum capital and the paying-up of shares, does not mean that a branch of Inspire Art Ltd. established in the Netherlands, is not covered by freedom of establishment as provided for by articles 43 and 48 of the EC Treaty.¹⁸¹ The Court acknowledged:

While in this case Inspire Art was formed under the company law of a Member State . . . for the purpose in particular of evading the application of Netherlands company law, which was considered to be more severe, the fact remains, that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies 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 to pursue activities in other Member States through an agency, branch or subsidiary.¹⁸²

The Court refused to accept that Inspire Art’s freedom of establishment was not in any way infringed by the Netherlands’ Law on Formally-Foreign Corporations.¹⁸³ The Netherlands argued that, under the Law on Formally-Foreign Corporations, foreign companies are fully recognized in the Netherlands and are not refused registration in the business register, and that the law simply imposed a number of additional obligations classified as “administrative.”¹⁸⁴ However, according to the European Court of Justice, the effect of the law is to apply the Dutch company law rules, in particular, minimum capital and directors’ liability rules, to foreign companies such as Inspire Art Ltd. that carry on their business activities exclusively, or almost exclusively, in the Netherlands.¹⁸⁵ The Court concluded that the law’s provisions relating to minimum capital (both at the time of formation and during the life of the company) and to directors’ liability constitute restrictions on freedom of establishment as guaranteed by articles 43 and 48 of the Treaty.¹⁸⁶ The reasons for forming the company in the other Member State, and the fact that it carries on its activities exclusively, or almost exclusively, in the Member State of establishment, do not deprive the company of the right to invoke the freedom of establishment guaranteed by the Treaty, “save where abuse is established on a case-by-case basis.”¹⁸⁷

2. *Justification*

Having concluded that the law’s provisions relating to minimum capital and directors’ liability constitute a restriction of the freedom of establishment of Inspire Art Ltd., the

179. *Case C-212/97*, 1999 E.C.R. at I-1459.

180. *Case C-167/01*, 56 NJW at 3331 ¶ 95.

181. 49 NJW at 3333 ¶ 96.

182. *Id.* at 3334 ¶ 137.

183. *Id.* at 3333 ¶ 99 (“The argument . . . cannot be accepted.”).

184. *Id.*

185. *Id.* ¶ 100.

186. *Id.* ¶ 101 (“The legislation at issue . . . has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty.”).

187. *Id.* at 3334 ¶ 105. For the question of abuse, circumvention and fraud, see *infra* note 211–13.

European Court of Justice addressed the question of whether there is any justification for such restriction.¹⁸⁸

a. Four-Factor-Test

At the outset, the Court noted that none of the arguments put forward by the Netherlands falls within the ambit of article 46(1) of the EC Treaty.¹⁸⁹ The Netherlands argued that the Law of December 17, 1997, focused on protecting creditors, combating improper recourse to freedom of establishment, and protecting both effective tax inspections and fairness in business dealings.¹⁹⁰ The Court's refusal to treat these arguments as falling within the public policy exception of article 46(1) of the EC Treaty is perfectly consistent with the Court's case law: article 46(1) has never been a powerful defense in the hands of the Member States because the Court has always construed the provision very narrowly.¹⁹¹ Therefore, the justifications put forward by the Netherlands were to be evaluated by reference to overriding reasons related to the public interest.¹⁹² In this context, it is important to note that the fundamental freedoms guaranteed by the EC Treaty, once viewed solely as safeguards against discrimination based upon nationality, have developed into solid prohibitions against national measures liable to hinder, or make less attractive, the exercise of fundamental freedoms provided for by the EC Treaty.¹⁹³ According to settled case law of the European Court of Justice, "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" must, if they are to be justified, fulfill four conditions: (1) they must be applied in a non-discriminatory manner; (2) they must be justified by imperative requirements in the public interest; (3) they must be suitable for securing the attainment of the objective which they pursue; and (4) they must not go beyond what is necessary, in order to attain it.¹⁹⁴ The four-factor test was first applied by the European Court of Justice in *Gebhard* in the context of article 43 of the EC Treaty.¹⁹⁵ In *Centros*,

188. *Id.* at 3334 ¶ 107.

189. *Id.* ¶ 131. Article 46(1) of the EC Treaty reads as follows:

"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." See EC TREATY, *supra* note 17, art. 46(1).

190. *Cf. Case C-167/01*, 49 NJW at 3334 ¶ 132.

191. See Ebke, *supra* note 65, at 643 n. 132. See also Peter-Christian Müller-Graff, *Article 46 EC Treaty, Commentary*, in VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 672 (Rudolf Streinz ed., 2003); Martin Schlag, *Article 46 EC Treaty, Commentary*, in EU-KOMMENTAR 723 (Jürgen Schwarze ed., 2000).

192. *Case C-167/01*, 49 NJW at 3334 ¶ 132.

193. For a detailed analysis of the development and its legal significance, see AXEL MÜHL, DISKRIMINIERUNG UND BESCHRÄNKUNG: GRUNDSÄTZE EINER EINHEITLICHEN DOGMATIK DER WIRTSCHAFTLICHEN GRUNDFREIHEITEN DES EG-VERTRAGES (Duncker & Humboldt) (2004). The idea that articles 43 and 48 of EC Treaty prohibit not only discrimination based upon nationality but also restrictions of freedom of establishment was advanced as early as 1987. Werner F. Ebke, *Die "ausländische Kapitalgesellschaft & Co. KG" und das europäische Gemeinschaftsrecht*, 16 ZGR 245, 256–59 (1987) (arguing that the four-factor test that was first adopted in the context of the EC Treaty provisions of free movement of goods and services should also be applied to articles 43 and 48 of the EC Treaty). See also Werner F. Ebke, *The Limited Partnership and Transnational Combinations of Business Forms: "Delaware Syndrome" versus European Community Law*, 22 INT'L LAW. 191, 200 (1988).

194. See *Case C-167/01*, 49 NJW at 3334 ¶ 133.

195. See *Case C-55/94*, 1993 E.C.R. I-4165 ¶ 37. See also *Case C-19/92*, Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-1663 (para. 32).

the Court extended the test to restrictions on companies' freedom of establishment guaranteed by article 48 of the EC Treaty,¹⁹⁶ and reconfirmed it in *Inspire Art*.¹⁹⁷

While the Court did not engage in a neat factor-by-factor analysis (which it rarely ever does), it made it clear in *Inspire Art* that the restriction of Inspire Art's freedom of establishment provided for by articles 43 and 48 of the EC Treaty could not survive scrutiny under the four-prong test of *Gebhard* and *Centros*.¹⁹⁸ The Court left open the question of whether the rules on minimum share capital constitute an appropriate protection measure.¹⁹⁹ The Court noted, however, that Inspire Art Ltd. held itself out as a company governed by the law of England and Wales and not as a Dutch company.²⁰⁰ Therefore, its potential creditors are put on sufficient notice that the company is covered by legislation other than that regulating the formation in the Netherlands of limited liability companies.²⁰¹ Referring to its holding in *Centros*,²⁰² the Court pointed to "certain rules of Community law which protect [potential creditors], such as the Fourth and Eleventh Directives."²⁰³ Thus, the Court in *Inspire Art* reiterated its conviction that creditors are best protected by information and financial disclosure rules. As has been pointed out elsewhere, this holding constitutes a substantial departure from traditional concepts of Continental legal traditions. Continental legal systems traditionally have relied heavily on institutional, structural, and organizational arrangements, rather than information and financial disclosure requirements, to protect the interests of creditors and other stakeholders.²⁰⁴ It was not until the adoption of the Fourth and Eleventh Directive that the idea of stakeholder protection by means of information and financial disclosure gained widespread acceptance in the EU regarding private companies.²⁰⁵

b. Information and Financial Disclosure

By referring potential creditors to information and financial disclosure rules as a means to protect their own interests, the European Court of Justice sent a strong message to the Continental EU Member States to reconsider the traditional approach of protecting the interests of creditors (and other stakeholders) by resorting to rules of corporation law as opposed to the law of financial disclosure. Relying more heavily on information and financial disclosure would in effect require creditors and other stakeholders to take some measure of responsibility for their own actions. Creditors in particular can either insist on additional security (e.g., personal or bank guarantees) or refuse to conclude contracts with a company governed by foreign law.²⁰⁶ Such a shift with respect to personal perceptions and expectations is essential if the EU is to achieve a body of functionally equivalent (albeit not nec-

196. See *Case C-212/97*, 1999 E.C.R. at I-1495 ¶ 34.

197. See *Case C-167/01*, 49 NJW at 3334 ¶ 133.

198. *Id.* ¶¶ 135–41.

199. *Id.* ¶ 135.

200. *Id.*

201. *Id.*

202. *Case C-212/97*, 1999 E.C.R. at I-1459.

203. See *Case C-167/01*, 49 NJW at 3334 ¶ 135.

204. Ebke, *supra* note 65, at 646–47. See also Werner F. Ebke, *The Impact of Transparency Regulation on Company Law*, in *CAPITAL MARKETS AND COMPANY LAW* 173 (Klaus J. Hopt & Eddy Wymeersch eds., 2003); Stefan Grundmann, *Ausbau des Informationsmodells im europäischen Gesellschaftsrecht*, 42 *DStR* 232 (2004).

205. For a comprehensive analysis of the Fourth and Eleventh Company Law Directives, see, e.g., EDWARDS, *supra* note 40, at 117–56 & 212–18; MATHIAS HABERSACK, *EUROPÄISCHES GESELLSCHAFTSRECHT* 168–83 (1999).

206. Cf. *Case C-167/01*, 49 NJW at 3334 ¶ 125.

essarily uniform) laws for public corporations, and thereby, to overcome the long stagnation of the process of company law harmonization.²⁰⁷ This stagnation is due, to a very large extent, to the fact the many EU Member States have entrusted the law of corporations with the task of protecting creditors and other stakeholders instead of creating necessary and appropriate protective measures for stakeholders outside the realm of the law of corporations.

In view of the history of company law harmonization in the EU, harmonization efforts would seem to be more promising if the law of business associations could be freed from the difficult and controversial task of protecting the interests of stakeholders, such as creditors and employees, and be confined to regulating matters relating to the relationship between and among the corporation, its managers, and its shareholders (i.e., internal corporate governance).²⁰⁸ The interests of stakeholders, in particular of creditors and employees, could be better served, it appears, by special legislation, which, of course, also needs to be in compliance with Community law, including the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.²⁰⁹ A functionally equivalent law of corporations at the Member State level would have to be supplemented, in regard to public corporations, by a set of European securities and capital market laws designed to enhance the external governance of corporations and their managers.²¹⁰

c. Abuse

Like in *Centros*,²¹¹ the European Court of Justice pointed out in *Inspire Art* that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the EC Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community Law.²¹² However, according to the Court, the fact that a corporation does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established, is not sufficient to show the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefits of the provisions of Community law relating to the right of establishment.²¹³ Hence, in light of

207. Werner F. Ebke, *Die Zukunft der Rechtsetzung in multijurisdiktionalen Rechtsordnungen: Wettbewerb der Rechtsordnungen oder zentrale Regelvorgabe—am Beispiel des Gesellschafts- und Unternehmensrechts*, 118 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT [ZSR] 106, 126 (Spec. Issue no. 28, 1999).

208. Ebke, *supra* note 65, at 647–48.

209. For further details, *see infra* notes 220–51.

210. *See* Werner F. Ebke, *Unternehmenskontrolle durch Gesellschafter und Markt*, in INTERNATIONALE UNTERNEHMENSKONTROLLE UND UNTERNEHMENSKULTUR 7, 28–33 (Otto Sandrock & Wilhelm Jäger eds., 1994).

211. *Case C-212/97*, 1999 E.C.R. at I-1459.

212. *Case C-167/01*, 49 NJW at 3334 ¶ 136. For details of the doctrine of abuse of Community rights, *see*, for example, Holger Fleischer, *Der Rechtsmissbrauch zwischen Gemeinschaftsrecht und Gemeinschaftsprivatrecht*, 58 JZ 865 (2003); Otto Sandrock, *Die Schrumpfung der Überlagerungstheorie: Zu den zwingenden Vorschriften des deutschen Sitzrechts, die ein fremdes Gründungsstatut überlagern können*, 102 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [ZVGLRWISS] 447, 461–64 (2003); Wolfgang Schön, *Der “Rechtsmissbrauch” im Europäischen Gesellschaftsrecht*, in Festschrift für Herbert Wiedemann 1271 (Rolf Wank et al. eds., 2002); and Anders Kjellgren, *On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law*, 11 EUR. BUS. L. REV. 179 (2000).

213. *Case C-167/01*, 49 NJW at 3334 ¶ 139. The Court also stated “that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State . . .”. *Id.* at 3333 ¶ 96.

Centros, *Überseering*, and *Inspire Art*, it is virtually impossible to imagine a factual scenario that would amount to abuse or fraudulent conduct which would entitle a Member State to deny a company the benefits of the freedom of establishment. According to the Court, taking advantage of regulatory arbitrage in a single market, is inherent in the exercise of the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.

IV. Implications

The immediate lesson one can learn from *Inspire Art* is that, within the EU, both capital requirements and directors' liability are governed by the law of the corporation's state of incorporation.²¹⁴ Capital requirements and directors' liability are classic matters of a corporation's internal affairs. In light of *Überseering* and *Inspire Art*, it is fair to conclude that all other internal affairs of a corporation that is incorporated in one Member State but carries on business in another Member State are also governed by the law of the state of incorporation, its *lex societatis*. Thus, within the EU, the real seat doctrine has been put to rest by the European Court of Justice in regard to corporations formed in any of the twenty-five Member States.²¹⁵ Yet, even after *Inspire Art*, the question remains whether, and to what extent, a Member State can take measures to prevent certain of its nationals from attempting, under cover of the rights created by the EC Treaty, to improperly circumvent their national legislation, or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.²¹⁶ As the Court noted in *Überseering*, "[i]t is not inconceivable that overriding requirements relating to the general interest, such as protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment."²¹⁷

A. PUBLIC INTEREST

The question just mentioned is of particular interest to many legal scholars in Germany where the debate between the proponents of the real seat doctrine and the supporters of the state-of-incorporation doctrine, and the variations thereof, has been particularly passionate and controversial since the 1970s with the rise of brass-plate or mail box companies (*Briefkastengesellschaften*), domiciled in the Principality of Liechtenstein,²¹⁸ and with the rapid increase in the number of English private limited companies that entered, as the sole

214. Werner F. Ebke, *Überseering und Inspire Art: Auswirkungen auf das Internationale Gesellschaftsrecht aus der Sicht von Drittstaaten*, DEUTSCHES GESELLSCHAFTSRECHT IM WETTBEWERB DER RECHTSORDNUNGEN NACH CENTROS, ÜBERSEERING UND INSPIRE ART 101, 108 (Otto Sandrock & Christoph F. Wetzler eds., 2004).

215. *Id.* at 107. See generally Christian Kersting, *Rechtswahlfreiheit im europäischen Gesellschaftsrecht nach Überseering*, 6 NZG 9 (2003).

216. See *Case C-167/01*, 49 NJW at 3334 ¶ 136.

217. See *Case C-208/00*, 2002 E.C.R. at I-9974 ¶ 92.

218. See, e.g., GROSSFELD, *supra* note 43, at 64–7; Werner F. Ebke & Renate Neumann, *Anmerkung*, 35 JZ 652 (1980); Hein Kötz, *Zur Anerkennung der Rechtsfähigkeit nach liechtensteinischem Recht gegründeter juristischer Personen*, 56 GMBHR 69 (1965).

corporate general partner, into a limited partnership (*Kommanditgesellschaft*) formed under German law.²¹⁹

1. *Creditor Protection*

In light of *Überseering* and *Inspire Art*, several commentators in Germany recently raised the question of whether the Member State of establishment is entitled to apply its creditor protection laws to a corporation incorporated in another Member State if the law of the state of incorporation provides less stringent rules than the law of the Member State of establishment.²²⁰ Obviously, in most, if not all EU Member States, there is a broad range of rules that are designed to protect the interests of creditors. Such rules include, but are by no means limited to, rules relating to the formation and maintenance of a corporation's capital,²²¹ piercing the corporate veil,²²² directors' liability for wrongful trading,²²³ and the disqualification of directors.²²⁴ Such rules may be statutory or judge-made. They may be part of the law of corporations, the law of insolvency, or even the law of torts. However, irrespective of how they are treated as a matter of substantive law or for purposes of conflicts-of-laws,²²⁵ such rules are compatible with freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty only inasmuch as the restriction of the freedom of establishment resulting from such rules in a given case can be justified on the grounds set forth in article 46 of the EC Treaty²²⁶ or under the four-factor test of *Gebhard* and *Centros*.²²⁷ The European Court of Justice has made it clear, both in *Inspire Art*²²⁸ and in *Centros*,²²⁹ that the answer to the question raised depends on the existence of overriding requirements relating to the public interest.²³⁰

In view of the holdings of the European Court of Justice in *Inspire Art*, it is difficult, if not impossible, to suggest that the restriction of the freedom of establishment resulting

219. For comments in English, see Werner F. Ebke, *supra* note 193. See also MICHAEL HAIDINGER, DIE "AUSLÄNDISCHE KAPITALGESELLSCHAFT & CO. KG" (1990); HELMUT GROTHE, DIE "AUSLÄNDISCHE KAPITALGESELLSCHAFT & CO.": ZULÄSSIGKEIT GRENZÜBERSCHREITENDER GRUNDTYPENVERMISCHUNG UND ANKNÜPFUNG DES GESELLSCHAFTSSTATUTS UNTER BESONDERER BERÜCKSICHTIGUNG DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS (1989); MARKUS KIESER, DIE TYPENVERMISCHUNG ÜBER DIE GRENZE (1988); JOACHIM SCHMIDT-HERMESDORF, AUSLÄNDISCHE GESELLSCHAFTER INLÄNDISCHER PERSONENGESELLSCHAFTEN (1987).

220. See, e.g., Holger Altmeppen, *Schutz vor "europäischen" Kapitalgesellschaften*, 57 NJW 97 (2004); Georg Borges, *Gläubigerschutz bei ausländischen Gesellschaften mit inländischem Sitz*, 25 ZIP 733 (2004); Gerald Spindler & Olaf Berner, *Der Gläubigerschutz im Gesellschaftsrecht nach Inspire Art*, 50 RIW 7 (2004); Nikolaus Adensamer & Cécile Bervoets, *Nationaler Gläubigerschutz auf dem Prüfstand*, 2003 RECHT DER WIRTSCHAFT [RDW] 617.

221. Jan Wilhelm, *Umgebungsverbote im Recht der Kapitalaufbringung*, 167 ZHR 520 (2003).

222. See, e.g., GOWER & DAVIES, *supra* note 102, at 184–90; HÖFLING, *supra* note 155, at 173–83; Habersack & Verse, *supra* note 159, at 199. But see Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J.CORP.L. 479 (2001).

223. See *supra* note 159, and accompanying text.

224. See *supra* notes 162–63, and accompanying text.

225. But see Peter Ulmer, *Gläubigerschutz bei Scheinauslandsgesellschaften: Zum Verhältnis zwischen gläubigerschützenden nationalem Gesellschafts-, Delikts- und Insolvenzrecht und der EG-Niederlassungsfreiheit*, 57 NJW 1201, 1207–09 (2004); Peter Kindler, *Die "Aschenputtel"-Limited und andere Fälle der Mehrfachqualifikation im Schnittfeld des internationalen Gesellschafts-, Delikts- und Insolvenzrecht*, Festschrift für Erik Jayme 409 (Heinz-Peter Mansel et al. eds., 2004).

226. EC TREATY, *supra* note 17, art. 46. See also *supra* note 189.

227. For details of the four-factor test, see *supra* notes 194–197.

228. See *Case C-167/01*, 49 NJW at 3334 ¶ 132.

229. See *Case C-212/97*, 1999 E.C.R. at I-1495 ¶ 34.

230. Cf. *Case C-208/00*, 2002 E.C.R. at I-9974 ¶ 93.

from the imposition by the Member State of establishment of its more stringent creditor protection laws on a corporation incorporated in another Member State, can be justified on the grounds stated in article 46 of the EC Treaty. In *Inspire Art*, the government of the Netherlands tried hard to persuade the European Court of Justice that it could invoke article 46 of the EC Treaty,²³¹ but it did not succeed. The Court opined that “none of the arguments put forward by the Netherlands Government with a view to justifying the legislation at issue in the main proceedings falls within the ambit of [a]rticle 46 EC.”²³² Similarly, in light of the Court’s holdings in *Inspire Art*, one can hardly argue that the imposition by the Member State of establishment of its own creditor protection laws on a Sister State corporation can be justified by “imperative requirements in the public interest” within the meaning of the four-factor test of *Gebhard* and *Centros*.²³³ The same is true of the penalties attached to non-compliance, “that is to say, the personal joint and several liability of directors where the amount of capital does not reach the minimum provided for by the national legislation or where during the company’s activities it falls below that amount.”²³⁴

2. Labor Representation on the Board

As one should expect, there is an equally controversial debate in Germany relating to the power of the Member State of establishment to require a corporation that is incorporated in another Member State, but does most or all of its business in the former Member State, to adopt certain corporate governance measures, such as the representation of labor on the board of outside directors (*unternehmerische Mitbestimmung* or Co-Determination), that would be applicable if the corporation had been formed in the Member State of establishment.²³⁵ Under current German law, the law on labor representation on boards of outside directors (Supervisory Board or *Aufsichtsrat*) of certain large corporations does not apply to companies incorporated abroad.²³⁶ According to section 1(1) of the Co-determination Statute of 1976, labor representation on boards of outside directors is required only of certain companies formed under German law, such as public corporations (*Aktiengesellschaften*) and limited liability companies (*Gesellschaften mit beschränkter Haftung*) that meet certain thresh-

231. Cf. *Case C-167/01*, 49 NJW at 3333–34 ¶¶ 106–30.

232. *Id.*, at 3334 ¶ 131.

233. For the four-factor test, see *supra* notes 194–197.

234. *Case C-167/01*, 49 NJW at 3334 ¶ 141.

235. For details of the current debate, see, for example, Franz J. Säcker, *Corporate Governance und europäisches Gesellschaftsrecht: Neue Wege in der Mitbestimmung*, 59 BB 1462 (2004); Otto Sandrock, *Gebören die deutschen Regelungen über die Mitbestimmung auf Unternehmensebene wirklich zum deutschen Ordre Public?*, 49 AG 57 (2004); Eberhard Schwark, *Globalisierung, Europarecht und Unternehmensmitbestimmung im Konflikt*, 49 AG 173 (2004); Gregor Thüsing, *Die Unternehmensmitbestimmung und europäische Niederlassungsfreiheit*, 25 ZIP 381 (2004); Martin Veit & Joachim Wichert, *Unternehmerische Mitbestimmung bei europäischen Kapitalgesellschaften mit Verwaltungssitz in Deutschland nach “Überseering” und “Inspire Art.”*, 49 AG 14 (2004); Jens C. Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607 (2003); Abbo Junker, *Sechundsiebzig verweht—Die deutsche Mitbestimmung endet in Europa*, 57 NJW 728 (2004); and Thomas Müller-Bonanni, *Unternehmensmitbestimmung nach “Überseering” und “Inspire Art.”*, 93 GMBHR 1235 (2003). The most prominent German proponent of the proposition that Germany’s model of labor representation on the board of outside directors of large, public companies is an “outmoded” concept, is Professor Peter Ulmer of the University of Heidelberg School of Law. See Peter Ulmer, *Paritätische Arbeitnehmermitbestimmung im Aufsichtsrat von Großunternehmen—noch zeitgemäß?*, 166 ZHR 271 (2002).

236. Ebke, *Überseering und Inspire Art: Die Revolution im Internationalen Gesellschaftsrecht und ihre Folgen*, in Festschrift für Reinhold Thode 595, 607 (Rolf Kniffka et al. eds., 2005) (forthcoming); Junker, *supra* note 235, at 729.

old requirements.²³⁷ Sections 76 and 77 of the Act on Work Councils (*Betriebsverfassungsgesetz*) of 1972 take a similar view.²³⁸ It is clear from the legislative history of the Co-determination Act of 1976 that the legislature did not wish to apply the principles of labor representation on supervisory boards to the boards of foreign corporations²³⁹ (leaving aside the “technical” problems that such a requirement would cause if the company in question had an American-style unitary board of directors rather than a German-style dual-board structure).²⁴⁰ Under traditional German conflict-of-laws principles, a mandatory rule of substantive corporation law, which is not intended to be applicable to foreign corporations, cannot be given effect *vis-à-vis* out-of-state corporations.²⁴¹

Consequently, a number of commentators in Germany have argued strongly in favor of amending the present German Co-determination Act to include corporations incorporated in another EU Member State that carry on all, or most, of their activities in Germany.²⁴² In order to be legally enforceable, such a rule would have to meet the requirements of articles 43 and 48 of the EC Treaty. Clearly, imposing Germany’s model of labor representation on a corporation incorporated in another EU Member State would constitute a restriction of that corporation’s freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty because such imposition would hinder the exercise of the freedom of establishment, or make it less attractive.²⁴³ It is highly questionable whether application of Germany’s model of labor representation on the board of outside directors of public corporations could be justified on either the grounds set forth in article 46 of the EC Treaty, or under the four-factor test of *Gebhard* and *Centros*, respectively. As co-determination does not seem to fall within the ambit of article 46 of the EC Treaty, the model would have to be justifiable by “imperative requirements in the public interest.”²⁴⁴

While some commentators suggest that, in Germany, co-determination is an imperative requirement in the public interest, with constitutional underpinnings,²⁴⁵ it is clear that the German way of ensuring labor participation in the supervision and decision-making processes of public corporations is not necessarily a reflection of a *European* public policy.²⁴⁶

237. For details of the German law of labor representation on the board, see, for example, Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT’L REV. L. & ECON. 203 (1994).

238. Thüsing, *supra* note 235, at 382.

239. *Id.*; Junker, *supra* note 235, at 729.

240. For an early comparative analysis of various board structures, see Grossfeld & Ebke, *supra* note 54, at 398–409.

241. WERNER F. EBKE, INTERNATIONALES DEVISENRECHT 135 (1990).

242. Thüsing, *supra* note 235, at 382–87; Marcus Kamp, *Die unternehmerische Mitbestimmung nach “Überseering” und “Inspire Art.”* 59 BB 1496, 1499–1500 (2004).

243. Ebke, *supra* note 18, at 931.

244. See *supra* notes 194–197 (“four-factor test”).

245. Dammann, *supra* note 235, at 641–70; Thüsing, *supra* note 235, at 386–87. But see, Christine Windbichler, *Arbeitnehmerinteressen im Unternehmen und gegenüber dem Unternehmen—Eine Zwischenbilanz*, 49 AG 190, 191 (2004) (arguing that labor representation is not an imperative requirement in the public interest); HÜFFER, *supra* note 123, at 17 (arguing that co-determination is a matter of the *national ordre public*) (emphasis added). For the view of the Bundesverfassungsgericht, Germany’s Constitutional Court, see Judgment of Mar. 1, 1979, Bundesverfassungsgericht (Constitutional Court), Germany, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 290, 351 (1979) (the Court accepts the argument that labor representation on the board reflects German public policy “irrespective of its conceptual details”).

246. Ebke, *supra* note 18, at 931. Although several scholars have argued that employees have a moral right to participate in corporate decisionmaking, others have demonstrated that those claims are untenable. See Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741 (1998).

The recent Directive supplementing the Statute of a European Company (*Societas Europaea*—SE)²⁴⁷ regarding the participation of employees²⁴⁸ seems to support this proposition.²⁴⁹ If it is accurate to assume that the justification put forward by proponents of a broader application of Germany's Co-determination Act is to be evaluated by reference to overriding reasons related to the European, as opposed to a Member State's, public interest, application of the requirements of Germany's Co-determination Act to corporations that are incorporated in another EU Member State but do most or even all of their business in Germany, cannot be justified by "imperative requirements in the public interest" within the meaning of the four-prong test of *Gebhard*²⁵⁰ and *Centros*.²⁵¹

B. NON-EU COUNTRIES

The question of whether the principles established in *Centros*,²⁵² *Überseering*,²⁵³ and *Inspire Art*²⁵⁴ apply, or should be applied, to companies incorporated in countries other than EU Member States is equally controversial.²⁵⁵ While it has been accepted that freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty can also be invoked by corporations formed in any of the Member States of the European Economic Area (i.e., Iceland, Liechtenstein, and Norway),²⁵⁶ the legal situation regarding corporations incorporated in other countries is far from being certain.²⁵⁷ This is particularly true regarding EU Member States that have traditionally applied the real seat doctrine (e.g., Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal, and Spain). These countries need to decide whether they wish to continue to apply the real seat doctrine *vis-à-vis* companies formed in countries other than EU or EEA Member States, or whether they should turn to the state-of-incorporation doctrine, possibly subject to overriding principles of their own law in the case of pseudo-foreign corporations.

1. *United States of America*

As to corporations incorporated in one of the fifty-four jurisdictions in the United States, a recent decision of the Eighth Chamber (*Zivilsenat*) of Germany's Supreme Court (*Bundesgerichtshof*) provides some interesting guidance.

247. See SE Statute, *supra* note 115. For details of the SE Statute in English, see, for example, EDWARDS, *supra* note 115, at 399–404; Christoph Teichmann, *The European Company—A Challenge to Academics, Legislatures and Practitioners*, 4 German L.J. 309 (2003). See also CLEMENS P. SCHINDLER, DIE EUROPÄISCHE AKTIENGESELLSCHAFT (2002); GÜNTER C. SCHWARZ, EUROPÄISCHES GESELLSCHAFTSRECHT 640–704 (2000).

248. Council Directive 2001/86/E, 2001 O.J. (L 294) 22.).

249. See Horst Hammen, *Zweigniederlassungsfreiheit europäischer Gesellschaften und Mitbestimmung der Arbeitnehmer auf Unternehmensebene*, 53 WM 2487, 2494 (1999); Ebke, *supra* note 18, at 931.

250. *Case C-55/94*, 1993 E.C.R. at I-4165.

251. *Case C-212/97*, 1999 E.C.R. at I-1459.

252. *Id.*

253. *Case C-208/00*, 2002 E.C.R. at I-9919.

254. *Case C-167/01*.

255. For details, see Ebke, *supra* note 214, at 109–28.

256. See Judgment of May 28, 2003, Oberlandesgericht (Court of Appeals), Frankfurt am Main, Germany, 24 IPRax 56 (2004). For details of this decision, see Carl Baudenbacher & Dirk Buschle, *Niederlassungsfreiheit für EWR-Gesellschaften nach Überseering*, 24 IPRax 26 (2004). See also Peter Mankowski, *Entwicklungen im Internationalen Privat- und Prozessrecht 2003/2004 (Teil I)*, 50 RIW 481, 483 (2004).

257. Ebke, *supra* note 214, at 122–28.

a. Judgment of January 29, 2003

In its judgment of January 29, 2003,²⁵⁸ the Court held that under the Treaty of Friendship, Commerce and Navigation of October 29, 1954, between the United States and the Federal Republic of Germany,²⁵⁹ a corporation that is validly incorporated in the state of Florida and continues to exist under the law of Florida, enjoys the status of a legal person in accordance with Florida's law as its *lex societatis* regardless of where its real seat (*effektiver Verwaltungssitz*) is located.²⁶⁰ In the opinion of the German Supreme Court, the Florida corporation could not be deprived of its "legal personality" because, under its Friendship Treaty with the United States, Germany had assumed the obligation to accord "national treatment" (*Inländerbehandlung*), "most-favored-nation treatment" (*Meistbegünstigung*), and "the right of establishment" (*Niederlassungsfreiheit*) to companies validly formed in the United States.²⁶¹ The German Supreme Court relied primarily upon the second sentence of article XXV subsection 5 of the Friendship Treaty between Germany and the United States, which provides: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." According to the Court, this provision requires German courts to apply the state-of-incorporation doctrine (*Gründungstheorie*), rather than the traditional real seat doctrine (*Sitztheorie*), to corporations validly formed in the territory of the United States.²⁶² However, at the end of its decision, the German Supreme Court made a reference to the decision of the European Court of Justice in *Überseering* and pointed out that "the freedom of establishment in particular" implies the "full recognition of the [corporation's status as a] legal person [*Rechtsfähigkeit*] and the [corporation's] right to sue and be sued [*Parteifähigkeit*]." ²⁶³

There is substantial doubt as to whether the language, the history, the textual position and the objective of the second sentence of article XXV subsection 5 of the Friendship Treaty between Germany and the United States sufficiently support the Court's holding.²⁶⁴ It has been suggested that, because of uncertainties as to the true meaning of article XXV subsection 5 of the Friendship Treaty, the provision should be interpreted as adhering to the real seat doctrine.²⁶⁵ The government of the United States of America may not even have had the power to alter such rules because the conflict-of-corporate-laws rules are rules

258. Judgment of Jan. 29, 2003, Bundesgerichtshof (Supreme Court), Germany, 57 WM 699 (2003). For a thoughtful analysis of this judgment, see Guido Jestädt, *Anmerkung*, 2003 ENTSCHEIDUNGSAMMLUNG ZUM WIRTSCHAFTS- UND BANKRECHT [WuB] 635. The same view was expressed by the Eleventh Chamber of the German Supreme Court in a case involving a New York limited partnership. See Judgment of Apr. 23, 2002, Bundesgerichtshof (Supreme Court), Germany, 57 WM 2286 (2002).

259. See 1956 Bundesgesetzblatt (Official Gazette, Germany) II at 487.

260. *Judgment of Jan. 29, 2003*, 57 WM at 700.

261. *Id.*

262. *Id.*

263. *Id.*

264. Ebke, *supra* note 3, at 930; Jestädt, *supra* note 258, at 636–37. See generally, Herman Walker, *Provisions on Companies in United States Commercial Treaties*, 5 AM. J. COMP. L. 229 (1956). See also Herman Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958).

265. See Bernhard Grossfeld, *Commentary*, in JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: INTERNATIONALES GESELLSCHAFTSRECHT 353 (12th ed. 1981). See also Bernhard Grossfeld & Dorothee Piesbergen, *Internationales Gesellschaftsrecht in der Diskussion*, in FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER 881, 886–88 (Ulrich Immenga et al. eds., 1996).

of state law rather than federal law.²⁶⁶ It is equally questionable whether the freedom of establishment provided for in article XXV subsection 5 of the Friendship Treaty of 1954 can be construed as having the same meaning and effects as the freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty, and construed as recently as 2002 by the European Court of Justice.²⁶⁷ Nevertheless, following the German Supreme Court's judgment in the case of the Florida corporation, lower courts in Germany are likely to adopt the principle that a corporation validly incorporated in any of the states or territories of the United States will be recognized in Germany as a corporate entity in accordance with its *lex societatis*. Thus, unlike corporations formed in certain tax havens (e.g., Cayman Islands, Channel Islands, Panama, or St. Kitts and Nevis), corporations that are validly incorporated in the USA are not likely to be subject to the *Jersey* rule.²⁶⁸

b. Judgment of July 5, 2004

The Second Chamber (*Zivilsenat*) of the German Supreme Court recently confirmed the view expressed by the Eighth Chamber. The Second Chamber which generally hears corporate law cases, held in its judgment of July 5, 2004, that the Friendship Treaty between Germany and the United States requires German courts to recognize the existence and the legal personality (*Rechtsfähigkeit*) of a corporation that is validly incorporated in one of the fifty states in the United States and continues to exist under the law of its state of incorporation.²⁶⁹ Accordingly, the corporation in question which was duly formed in Delaware but had its principal place of business in Germany was held to have the capacity to participate in legal proceedings (*Parteifähigkeit*) before German courts.²⁷⁰ In addition, the Court applied Delaware law to the issue of whether and to what extent shareholders of the corporation are liable for obligations of their corporation.²⁷¹ However, the Court expressly left open the question of whether, under the Friendship Treaty between Germany and the United States, the recognition of an American corporation in Germany depends on existence of a "genuine link" between the corporation and its state of incorporation or other jurisdictions in the United States.²⁷² Prior to the Court's decision, several German commentators had suggested that the recognition of an American company in Germany depend on the existence of an effective nexus of the corporation with its state of incorporation or at least with other jurisdictions in the United States.²⁷³ Such a nexus was considered by these authors to be essential to avoid the rise of pseudo-foreign corporations in Germany. The Court noted that the proponents of a "genuine link" requirement did not go so far as to require that the corporation have its principal place of business (*effektiver Verwaltungssitz*)

266. For a discussion of the question of whether the federal treaty-making power (U.S. Const. art. VI, cl. 2) and the general federal power over "foreign affairs" may place limits on state conflicts-of-laws rules or supersede it with rules of federal law, see SCOLES, ET AL., *supra* note 52, at 218–27.

267. *Judgment of Jan. 29, 2003*, 57 WM at 700.

268. For details of the *Jersey* rule, see *Judgment of Jul. 1, 2002*, 151 BGHZ at 204 and accompanying text.

269. *Judgment of July 5, 2004*, Bundesgerichtshof (Supreme Court), Germany, 59 BB 1868 (2004). For a detailed analysis of this decision, see Werner F. Ebke, *Gesellschaften aus Delaware auf dem Vormarsch: Der BGH macht es möglich*, 50 RIW ____ (2004) (forthcoming).

270. *Judgment of July 5, 2004*, 59 BB at 1868.

271. *Id.*

272. *Id.*

273. See, e.g., Peter Kindler, Annotation, in 11 MÜNCHENER KOMMENTAR ZUM BGB 83 (Kurt Rebmann et al. eds., 1999); Carsten T. Ebenroth & Birgit Bippus, *Die Anerkennungsproblematik im Internationalen Gesellschaftsrecht*, 41 NJW 2136 (1988).

in its state of incorporation.²⁷⁴ Rather, according to the Court, the majority of the proponents required only that the corporation be engaged “in some kind of business activities” in the United States, albeit not necessarily in its state of incorporation.²⁷⁵ In the case at hand the Court held that a “genuine link” with the United States “could not be denied” because the corporation was entrusted with the administration of shares of stock deposited in Florida.²⁷⁶ It would have been better if the Court had flatly denied the need for a “genuine link” under the Friendship Treaty.

c. German Corporations in the United States of America

It is reasonable to assume that the German Supreme Court’s ruling in its decision of January 29, 2003, relating to the Florida corporation that had its real seat in Germany, is equally applicable to a corporation that is incorporated under German law, but has its real seat in the United States of America.²⁷⁷ The requirement that such a corporation reincorporate in the United States would be tantamount to outright negation of freedom of establishment which, according to the German Supreme Court, the second sentence of article XXV subsection 5 of the Friendship Treaty was designed to guarantee as to corporations incorporated in either contracting states. From the perspective of conflict-of-corporate-laws rules in the United States, such a corporation would most likely be recognized in the United States as a corporation and be allowed to do business, subject, of course, to registration requirements of the state or states in which it wants to do business.²⁷⁸

In light of the German Supreme Court’s interpretation of article XXV subsection 5 of the Friendship Treaty, and the Court’s reliance upon the interpretation of freedom of establishment by the European Court of Justice, it is not entirely clear; however, whether and to what extent freedom of establishment as provided for by article XXV subsection 5 of the Friendship Treaty would prevent jurisdictions such as California²⁷⁹ or New York²⁸⁰ from applying their pseudo-foreign corporation laws to corporations incorporated in Germany but having the required contacts with the respective state. As construed by the European Court of Justice in *Inspire Art*, freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty provides more far-reaching and more restrictive limitations on a state’s right to apply its pseudo-foreign corporation laws to out-of-state corporations, than does the Constitution of the United States as construed by courts in California.²⁸¹ If it is true, as was assumed by the German Supreme Court, that freedom of establishment provided for by article XXV subsection 5 of the Friendship Treaty between Germany and the United States is to be construed essentially along the lines of the interpretation by the European Court of Justice of freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty, pseudo-foreign corporation laws such as section 2115 of California’s General Corporation Law or sections 1317–1320 of the New York Business Corporation Act would not seem to be applicable to German companies carrying on all or most of the business in California.²⁸²

274. Judgment of July 5, 2004, *supra* note 269, at 1869.

275. *Id.*

276. *Id.*

277. Ebke, *supra* note 214, at 110–11.

278. *Id.* at 111–12.

279. See *supra* notes 146–48 and accompanying text.

280. See *supra* notes 149–51 and accompanying text.

281. See *supra* note 154.

282. Ebke, *supra* note 214, at 113.

2. Switzerland

The legal situation regarding corporations incorporated under the law of other major trading partners of EU Member States is even less certain. This is particularly true for Switzerland, which is not a Member of the EU or the EEA.²⁸³ There is no bilateral treaty between Switzerland and, for example, Germany that guarantees Swiss companies national treatment, most-favored-nation treatment, or freedom of establishment in Germany (and *vice versa*).²⁸⁴ The impact of the new Bilateral Agreements (Bilaterals I and II) between the EU and Switzerland on conflicts of corporate laws has not been tested in EU Member States or Swiss courts.²⁸⁵ The relevance of the European Human Rights Convention in this regard is unclear.²⁸⁶ Article 6(1) of the Convention would seem to require a Convention State to recognize the right of a corporation validly incorporated in another Convention State, to have disputes over its contractual and other rights and obligations *vis-à-vis* other individuals or companies be heard by an independent court in fair proceedings.²⁸⁷ However, the Convention does not seem to require Member States to go beyond the recognition of the legal status of the corporation in accordance with its *lex societatis* so as to apply the law of the state of incorporation to the internal affairs of that corporation.²⁸⁸ Under article 6(1) of the Convention, it is sufficient for a court to recognize the right of the corporation in question to bring a law suit or be sued in its own name as a corporate entity, if the law of the corporation's state of incorporation so provides.²⁸⁹ German constitutional law would not seem to require that a German court apply the same corporate conflict-of-laws rules to Swiss corporations as it would if the corporation had been incorporated in an EU or an EEA Member State, or in the territory of a state with which Germany has a bilateral international treaty according corporations of either contracting state freedom of establishment, national treatment, or most-favored-nation treatment.²⁹⁰

The *Jersey* rule established by the German Supreme Court²⁹¹ would not seem to be compatible with article 6(1) of the European Human Rights Convention because it does not recognize a foreign corporation's legal status as such.²⁹² Rather, it treats the foreign corporation as an unincorporated private association (*Gesellschaft bürgerlichen Rechts*) that, under German law, is deemed to have the right to be a party to legal proceedings.²⁹³ In any

283. *Id.*

284. *Id.*

285. *Id.*; Wolfgang Wiegand, *Die Konsequenzen der Entscheidungen "Überseering" und "Inspire Art" aus der Sicht der Schweiz*, 28 MITTEILUNGSBLATT DAV INTERNATIONALER RECHTSVERKEHR [MITTBL. DAV] 43 (Issue 2/2003). See generally Anton K. Schnyder, *Europäisierung des Internationalen Privat- und Zivilverfahrensrechts: Herausforderung auch für die Schweiz*, Festschrift für Erik Jayme 822, 832–34 (Heinz-Peter Mansel et al. eds., 2004).

286. See Ebke, *supra* note 214, at 114–15.

287. *Id.* For a thoughtful discussion of Article 6 of the European Human Rights Convention, see Burkhard Hess, *EMRK, Grundrechte-Charta und Europäisches Zivilverfahrensrecht*, Festschrift für Erik Jayme 339 (Heinz-Peter Mansel et al. eds., 2004).

288. Ebke, *supra* note 214, at 115 (with further references). But see Wienand Meilicke, *Zur Vereinbarkeit der Sitztheorie mit der Europäischen Menschenrechtskonvention und anderem höherrangigem Recht*, 50 BB 1, 8–14 (Supp. 9, 1995) (arguing that art. 6(1) of the European Human Rights Convention requires Member State courts to apply the state-of-incorporation rule not only to the question of the existence of a corporation but also to the corporation's internal affairs). See also Wienand Meilicke, *supra* note 123, at 799.

289. Ebke, *supra* note 214, at 115.

290. *Id.* at 115.

291. See Judgment of July 1, 2002, *supra* note 74.

292. Accord Meilicke, *supra* note 123, at 799.

293. See *supra* notes 74–75 and accompanying text.

event, application of the *Jersey* rule would have devastating effects on a great number of Swiss corporations that carry on most, or even all, of their activity in Germany. In particular, it would detrimentally affect the hundreds of Swiss corporations whose only purpose is to serve as the sole corporate general partner of a limited partnership (*Kommanditgesellschaften*) formed under German law, doing all or most of its business in Germany.²⁹⁴ Such corporate general partners would be deemed, under the German version of the real seat doctrine, to have their real seat or principal place of business in Germany, and therefore, would be treated as an unincorporated private association (*Gesellschaft bürgerlichen Rechts*) the members of which are personally liable for the association's liabilities.²⁹⁵ Consequently, the members would lose the privilege of limited liability that, as a general rule, they would enjoy if they were treated as shareholders of a Swiss corporation rather than an unincorporated *Gesellschaft bürgerlichen Rechts*.²⁹⁶ From a Swiss perspective, such a solution would be extremely unfortunate, in particular, because companies incorporated in the neighboring Principality of Liechtenstein (which is known to be home of many brass-plate or mail box companies) enjoy the privilege of freedom of establishment as Liechtenstein is an EEA Member State.²⁹⁷ The recent Bilateral Agreements I and II between the EU and Switzerland, arguably will put Switzerland on a par with the Member States of both the EU and the EEA as far as the freedom of establishment of Swiss companies is concerned.

3. *The Future of the Jersey Rule*

The future of the *Jersey* rule is unclear.²⁹⁸ One should keep in mind that the *Jersey* rule was established by the German Supreme Court in an attempt to render the issue in *Überseering* moot, and to prevent the European Court of Justice to rule on the politically and economically controversial issue of whether the real seat doctrine is compatible with freedom of establishment guaranteed by articles 43 and 48 of the EC Treaty.²⁹⁹ Thus, it is uncertain whether the German Supreme Court will continue to apply the *Jersey* rule, even though other German courts, including the *Bayerisches Oberlandesgericht*, Bavaria's highest court in civil matters,³⁰⁰ and the *Amtsgericht* (Local Court) *Hamburg*³⁰¹ have already applied the *Jersey* rule to corporations incorporated abroad, but have their real seat in Germany. The question remains: What, if anything, should replace the *Jersey* rule?

294. Such combinations of business forms have a long tradition. See, e.g., Herbert Kronke, *KG—jüngste Variante der "ausländischen Kapitalgesellschaft & Co."*, 36 RIW 799 (1990); Ralf M. Straub, *Beteiligungsverbot aus Artt. 552, 594 OR für eine schweizerische Kapitalgesellschaft als Komplementär an einer deutschen Kommanditgesellschaft?*, 17 IPRAX 58 (1997). See generally *supra* note 219.

295. See Mark Binz & Gerd Mayer, *Die ausländische Kapitalgesellschaft & Co. KG im Aufwind?*, 94 GMBHR 249 (2003).

296. *Id.*

297. See *supra* note 256 and accompanying text.

298. See Judgment of July 1, 2002, *supra* note 74.

299. See *supra* note 75.

300. Decision (Beschluss) of Feb. 20, 2003, Bayerisches Oberstes Landesgericht (Bavarian Supreme Court), Germany, 56 DB 819 (2003) (applying the *Jersey* rule to a corporation having its registered office in Zambia, Africa, and its real seat in Germany).

301. Decision (Beschluss) of May 14, 2003, *Amtsgericht* (Local Court), Hamburg, Germany, 23 IPRAX 543 (2003) (applying the *Jersey* rule to a private limited company incorporated in Cardiff, Wales, that was attempting to move its registered office to Germany without losing its corporate status as an English company). For details of this decision, see Weller, *supra* note 86, at 521–24.

In particular, should the principles established by the European Court of Justice in *Centros*,³⁰² *Überseering*,³⁰³ and *Inspire Art*³⁰⁴ also be applied to corporations incorporated in a country other than an EU Member State, an EEA Member State, or a privileged Treaty State, as a matter of policy or for reasons of economic efficiency or transparency? A growing number of commentators in Germany argue strongly in favor of such an approach,³⁰⁵ although there is also some opposition to such a solution.³⁰⁶ One author suggests that the problem be solved by legislation.³⁰⁷ Those who favor application of the state-of-incorporation doctrine to the internal affairs of corporations incorporated outside the EU, the EEA, or the territory covered by an international treaty, argue that market transparency requires that all corporations be treated alike as far as basic corporate conflict-of-law rules are concerned.³⁰⁸ Some authors have suggested, however, that as a matter of last resort, courts could apply overriding principles of domestic law, to pseudo-foreign corporations incorporated outside the EU, the EEA, or the territory of a Treaty State.³⁰⁹ Under Continental conflicts rules, such an approach would only work in practice if the domestic laws in question (e.g., stakeholder protection laws) are designed by the legislature to be applicable not only to domestic companies, but also to foreign companies.

V. Final Observations

This article illustrates that the European Court of Justice has fundamentally changed corporate conflicts-of-laws in the EU. The Court's judgments in *Centros*,³¹⁰ *Überseering*,³¹¹ and *Inspire Art*³¹² are not revolutionary, but they have revolutionary effects. The judgments have created not only jurisdictional competition, but also regulatory competition among the corporation laws of the now twenty-five EU Member States. The three EEA Member States (Iceland, Liechtenstein, and Norway) are very likely to become an integral part of the new competitive marketplace for corporation laws. Other countries, including the United States, will follow under certain international treaties. The lack of a comprehensive body of harmonized laws relating to the structure and organization ("internal affairs") of corporations and other business enterprises in the EU will increase the competition. Several Member States are in the process of responding to the new challenges caused by *Überseering*

302. *Case C-212/97*, 1999 E.C.R. at I-1459.

303. *Case C-208/00*, 2002 E.C.R. at I-9919.

304. *Case C-167/01*, 56 NJW at 3331.

305. See, e.g., Eidenmüller, *supra* note 124, 23 ZIP 2233, 2244 (2002); Leible & Hoffmann, "Überseering" und das (vermeintliche) Ende der Sitztheorie, 48 RIW 925, 935 (2002); Daniel Zimmer, *Grenzüberschreitende Rechtspersönlichkeit*, 168 ZHR 355, 365 (2004) (arguing in favor of "simple and clear rules").

306. See, e.g., Helge Großerichter, *Ausländische Kapitalgesellschaften im deutschen Rechtsraum: Das deutsche Internationale Gesellschaftsrecht und seine Perspektiven nach der Entscheidung "Überseering"*, 41 DStR 159, 168 (2003) (arguing that for the time being, German courts should continue to apply the real seat doctrine *vis-à-vis* companies incorporated in a country other than Member States of the EU or the European Economic Area).

307. Mankowski, *supra* note 256, at 485.

308. See, e.g., Zimmer, *supra* note 297, at 364.

309. *Id.*; Behrens, *supra* note 86, at 205.

310. *Case C-212/97*, 1999 E.C.R. at I-1459.

311. *Case C-208/00*, 2002 E.C.R. at I-9919.

312. *C-167/01*, 56 NJW at 3331.

and *Inspire Art.*³¹³ England, once thought by many to be a natural candidate for the position of Europe's "Delaware,"³¹⁴ is facing substantial competition. The English law on wrongful trading³¹⁵ and the Directors Disqualification Act,³¹⁶ are beginning to cause foreign individuals who wish to carry on their activity outside of the United Kingdom to decide against incorporating their business in England.³¹⁷ Equally or even more accommodating laws such as the law of Luxembourg, the Netherlands, and maybe even Spain³¹⁸ and Italy³¹⁹ are, for many, equally or even more appealing than English company law. Small and medium-sized companies and their legal and tax advisors have also come to realize that incorporating in another EU Member State can be a costly adventure, leaving aside language, cultural, and other barriers that continue to exist in the EU.³²⁰ Large corporations, in contrast, have thus far been rather reluctant to reincorporate in another EU Member State even though there

313. For France, see Patricia Becker, *Baldiges neues Gründungsverfahren in Frankreich: Die französische "Blitz-S.A.R.L."*, 94 GMBHR 706 (2003). See also Christian Klein, *Die Europäische Aktiengesellschaft "à la française"*, 50 RIW 435 (2004).

314. The current role of Delaware in the American market of corporate charters continues to be a subject of intense scholarly debate in the United States. Some authors argue that Delaware no longer competes, but has a monopoly. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748 (2002); cf. Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law*, 90 CAL. L. REV. 1775, 1820–21 (2002). And, of course, the question remains whether states, if they compete, are racing to the top or to the bottom. See, e.g., Ralph K. Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 289–92 (1977); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–24 (1993) ("race to the top"); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 559 (2001) (yes); cf. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1509 (1992) ("race to the bottom"). Mark Roe suggests that the debate of whether or not states are racing, and whether they are racing to the top or to the bottom is misconceived. He argues convincingly that the United States has never had a "pure interstate race" because of the impact of federal legislation (e.g., federal securities regulation). See Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

315. See *supra* notes 160–62 and accompanying text.

316. See *supra* note 159 and accompanying text.

317. For the advantages and disadvantages of incorporating in the United Kingdom, see Christoph von Bernstorff, *Das Betreiben einer englischen Limited in Deutschland*, 50 RIW 498 (2004); Jürgen Götz, *Multinationale Konzernstrukturen nach Überseering und Inspire Art.*, 2 DER KONZERN 449, 450 (2004); Harald Kallmeyer, *Vor- und Nachteile der englischen Limited im Vergleich zur GmbH oder GmbH & Co. KG*, 57 DB 636 (2004); Alexander Schumann, *Die englische Limited mit Verwaltungssitz in Deutschland: Kapitalaufbringung, Kapitalerhaltung und Haftung bei Insolvenz*, 57 DB 743 (2004); and Thomas Wachter, *Auswirkungen des EuGH-Urteils in Sachen Inspire Art Ltd. auf Beratungspraxis und Gesetzgebung: Deutsche GmbH vs. Englische private limited Company*, 95 GMBHR 88 (2004). For the legal consequences if a corporation formed in an EU Member State becomes insolvent in its host Member State, see Sebastian Mock & Charlotte Schildt, *Insolvenz ausländischer Kapitalgesellschaften mit Sitz in Deutschland*, 6 ZEITSCHRIFT FÜR INSOLVENZORDNUNG [ZINSO] 396 (2003); HANS-FRIEDRICH MÜLLER, *Insolvenz ausländischer Kapitalgesellschaften mit inländischem Verwaltungssitz*, 6 NZG 414 (2003).

318. See, e.g., Nadja Vietz, *Die neue "Blitz-GmbH" in Spanien*, 94 GMBHR 26 (2003); Nadja Vietz, *Verabschiedung des Gesetzes über die neue "Blitz-GmbH" in Spanien*, 94 GMBHR 523 (2003). See also Jens Wagner, *Corporate Governance in Spanien*, 50 RIW 258 (2004).

319. See, e.g., Umberto Tombari, *The New Italian Company Law: An Emerging European Model?*, Festschrift für ERIK JAYME 1589 (Heinz-Peter Mansel et al. eds., 2004); Florian Buenger, *Die Reform des italienischen Gesellschaftsrechts*, 50 RIW 249 (2004). See generally FRANCESCO G. R. GALGANO, *IL NUOVO DIRITTO SOCIETARIO* (2003).

320. See, e.g., Wilhelm Happ & Lorenz Holler, *"Limited" statt GmbH?*, 42 DStR 730, 734 (2004); Sabine Ebert, *Die zugezogene "private company limited by shares (Ltd.)" nach dem Recht von England und Wales als Rechtsformalternative für in- und ausländische Investoren in Deutschland*, 94 GMBHR 1337 (2003).

may be some advantages or even incentives for managers to do so. It seems that the legal issues to which *Überseering*³²¹ and *Inspire Art*³²² give rise, and the opportunities that these judgments seem to offer, are still far from being certain.

Legal uncertainty is not healthy for an economy like the European Single Market that depends to a very large extent on private investment, private businesses, and cross-border transactions. It is therefore necessary for all concerned, without delay, to shape the future law of business associations in the new “right-to-choose-the-proper-law-of-corporation” era in the EU.³²³ In this context, it is essential to explore the fundamental question of how much supranational harmonization of law one needs, and how much legal diversity (and thus, regulatory competition) one wants in the European Single Market for corporations and other business associations.³²⁴ The debate must be comparative in nature and should include not only lawyers from European countries, but also American lawyers, as the United States has a long tradition in dealing with corporate, securities, and tax matters in a multi-jurisdictional setting. This is not to suggest that one might find final solutions in the United States for the EU’s internal problems, even though the EU and the United States share many of the same values.³²⁵ Comparative analysis will nevertheless be able to assist in providing possible alternatives and ideas for evolutionary developments of the law of business associations, securities regulation, and taxation in the EU.

321. *Case C-208/00*, 2002 E.C.R. at I-9919.

322. *Case C-167/01*, 56 NJW at 3331.

323. Cf. Ebke, *supra* note 65, at 660.

324. See *supra* note 130 and accompanying text.

325. See generally BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* (1984). See also AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT: IMPRESSIONEN AUS DER NEUEN WELT (Reinhard Zimmermann ed., 1995).

