GERMAN CONFLICT RULES AND THE MULTINATIONAL ENTERPRISE

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I. INTRODUCTION

The phenomenal growth of multinational enterprises raises—in addition to economic, social, and political problems—the question of the applicable law. The answer is to be drawn from private international law—or conflict of laws as it is called in the United States. Especially during the last few years, approaches to problems of conflict of laws have changed substantially; private international law is in a state of flux and uncertainty. This applies to the United States as well as to European countries.¹ The traditional idea of formalistic jurisdiction-selecting rules, as proposed by Savigny, is challenged by recent developments.² Europeans tend to show greater interest in these approaches, most of which have been created in the United States.³ These changes are beginning to have an


impact on the treatment of corporate problems.4

As far as German law is concerned, this impact is more evident with regard to the question of what law governs the relation between a parent company and a subsidiary. First, however, a threshold problem of which conflict rule should be applied to determine the nationality of a corporation will be dealt with.

II. CONFLICT RULES GOVERNING THE NATIONALITY OF A CORPORATION

A. Different Conflict Rules

1. Recognition and Personal Law

In determining which conflict rule controls the nationality of a corporation the problem arises as to whether the same conflict rule should be used for the purpose of recognizing a foreign national company as for the purpose of searching the law applicable to the internal affairs of the company (usually called the personal law).

a. Definition of Recognition. Recognition in this context means the acknowledgement by one country of the corporate “capacity” of an association given corporate capacity by another country.5 This problem must be distinguished from the problems of doing business in and having access to a national market; the latter are problems of the law of aliens, while recognition is one of private international

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The recognition of a foreign corporation in Germany and most other European states is obtained today *ipso jure*; i.e., without the need of any further step such as filing for registration, paying of fees, or applying for a decree. Nor is it necessary that the type of company be known under German law or be similar to corresponding German institutions. The business trust of American law, therefore, will be recognized in Germany, although there is no corresponding institution known under German law. The only limitation on this principle is public policy which might prevent recognition in particular cases. This sounds very liberal, but one must keep in mind that in German law a foreign corporation is recognized as a legal entity only if it is incorporated under that law which, according to the German conflict rule, is competent to govern the incorporation.

b. **Determining the Conflict Rule.** The question now is whether, in determining the competent law, aspects must be taken into account other than those used in finding the personal law. The traditional view on this point is that different conflict rules may be applied for the two purposes. In order to justify this rule, the argument has been put forward that the question of recognition presents a special problem which is totally unrelated to the personal law.

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1 G. Beitzke, *Die juristische Person im internationalen Privatrecht und Fremdenrecht* 46 (1938) [hereinafter cited as Beitzke]; Koppensteiner, *supra* note 4, at 107; Grossfeld, *Die Anerkennung der Rechtspflichtigkeit juristischer Personen*, 31 Rabels Z. 1, 3 (1967) [hereinafter cited as Grossfeld].


Other considerations should possibly be taken into account in determining the conflict rule. This argument loses weight if one considers the impact which acceptable regulations concerning the liability of the corporation and the security of creditors and shareholders (questions of personal law) have on the question of recognition. In addition, a corporation recognized under one law but governed by another law seems to be a "dead institution" under the recognizing law. Therefore, practically the same arguments are used in determining the conflict rule for recognition as are used in determining the personal law, and authors theoretically stressing the independence of these problems ultimately apply the same conflict rule for both purposes.

Today the prevailing view in German law seems to be that only one conflict rule governs these issues. This attitude gives due respect to the fact that two different conflict rules are neither desirable nor logically necessary, since the question of whether one recognizes an institution might be determined by the same law which governs the existence of that institution. The law governing the existence of a corporation (personal law) controls the formation of the company, its right to continue in existence, and the permissibility of its operations. The question of recognition is in fact only part of this complex and therefore should be governed by the same law.

11 Grossfeld, supra note 6, at 3.
14 See Grossfeld, supra note 6, at 22.
15 KOPPENSTEINER, supra note 4, at 109.
17 KOPPENSTEINER, supra note 4, at 108.
18 Drobnig, EWG, supra note 16, at 93.
Due to the equality of the results, the different views never gained much importance. However, the problem may gain more consideration in connection with the European Convention on the Mutual Recognition of Companies and Legal Persons\(^9\) which will be discussed later.

2. Conflict Rules for Internal and External Affairs

Having decided that the same conflict rule should govern the recognition of a corporation and the determination of the personal law, one must then face the second question of whether the applicable personal law should include the relation between a corporation and its creditors or whether different connecting factors should be determinative for these affairs. The idea of different conflict rules was put forward in 1970 by Grasmann, a German author.\(^{20}\) He argues that there are different interests between wholly internal regulations and those of creditors. Accordingly, different conflict rules should govern under which each takes into consideration the special facts and interests of that relation.\(^{21}\) Grasmann suggests, for example, that a German stock corporation is liable to an American creditor under section 114 of the Stock Corporation Act,\(^{22}\) if the assessment of the assets, though correct under German law, does not meet the requirements of New York law. The example itself shows how complicated matters would become if this doctrine were to be applied. Considering that there may be not only different, but also contrary provisions in the laws governing the different "external" affairs, it would become completely impossible for a company to act in accordance with the law.\(^{23}\) In addition, this would lead to different treatment of foreign and domestic creditors. Grasmann justifies this by citing advantages for international commerce\(^{24}\) which are supposed to be of some value to domestic creditors also. However, this argument lacks plausibility because creditors in international

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\(^{21}\) Grasmann, *supra* note 20, at 343, 392; Prühs, *supra* note 4, at 397.


\(^{23}\) Koppenstein, *supra* note 4, at 111.

\(^{24}\) Grasmann, *supra* note 20, at 90, 479.
commerce are accustomed to having foreign law govern their affairs, especially when dealing with a foreign corporation, and because it seems very doubtful whether domestic creditors gain advantages from additional liabilities to foreigners.

Besides these more practical considerations one must keep in mind that the often very detailed rules embodied in a corporation law constitute a uniform system. In this system questions of organization and of internal affairs correspond to provisions regulating "external" affairs. Some of the former are only there because of the latter and vice versa; they balance each other, and one should avoid breaking up this system. Therefore, Grasmann's approach, which has been dealt with in a number of treatises, has not found many friends.

Of course, applying only one conflict rule does not mean that all corporate matters are controlled by the same law. For instance, there are different conflict rules in questions of taxation, currency, and antitrust law; there may even be some questions which concern the "personal" affairs of a company and which, nevertheless, are governed by a law other than personal law. Thus, two different sets of law might be applied anyway. However, these cases are exceptions which are justified by very special circumstances, such as when there is a statutory conflict rule for one special issue or when the application of the foreign law would violate public policy.

B. Determination of the Conflict Rule

Having reached the conclusion that the question of recognition as well as the internal and external relations of a corporation are governed by the same law, the problem remains of how this law should be determined.

1. Possible Connecting Factors

In looking for the appropriate conflict rules two theories prevail.

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25 This view, with respect to shareholders of a foreign company, is expressly stated in 80-II BGE 53, 58 (Schweizerisches Bundesgericht). See also Broderick v. Rosner, 294 U.S. 629 (1935); Modern Woodmen of America v. Mixer, 267 U.S. 544, 551 (1925).
26 KOPPENSTEINER, supra note 4, at 112 n.60; M. LUTTER, KAPITAL, SICHERUNG DER KAPITALLAUFBRINGUNG UND KAPITALERHALTUNG IN DEN AKTIEN-UND GMBH-RECHTEN DER EWG 16 (1935) [hereinafter cited as LUTTER].
27 Nial, supra note 20, at 372 (criticizing his own suggestions).
28 KOPPENSTEINER, supra note 4, at 110, 112.
29 See, e.g., 1896 RGBI. 604, BGBl. III 400-01.
The first theory refers to the country where the formalities of registration or publicity have been complied with and where the registered office is situated. This theory is called the incorporation doctrine and its prevails in the United States, Great Britain, Austria, the Netherlands, and in some socialistic countries. On the other side there is the theory of the "real seat." According to this doctrine the company is governed by the law of the state in which it maintains its real seat. The real seat (siège social) is the country in which the company has its head office (Verwaltungssitz). In order to avoid confusion it should be mentioned that, in principle, this doctrine requires incorporation according to the law of the seat.

Aside from these two main approaches there are other theories which have little acceptance. One of these is the law of the statutory seat rule. This theory has no practical difference from the incorporation doctrine, since the state of incorporation usually requires that the statutory seat of the company be within its borders. The theory of the law of the place where most of the exploitation is done (Betriebsstätte, or lieu d'exploitation) is generally rejected, because the "place" does not seem to have enough significance. Finally, sometimes one will find mentioned a doctrine that the national law of the majority of the natural persons who have the economic power

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32 Koppensteiner, supra note 4, at 105 n.37; 2 RABEL, supra note 7, at 38; Grossfeld, supra note 6, at 32.


34 Koppensteiner, supra note 4, at 105; Niederer, supra note 33, at 114; Wolff, Personalstatut für Gesellschaften, Vereine und Stiftungen, in Festschrift für Martin WOLFF 375, 384 (E. von Caammerer, W. Hallstein, F. Mann, & L. Raiser eds. 1982); Fikentscher, supra note 10, at 72; Vischer, Bemerkungen zur Aktiengesellschaft im internationalen Privatrecht, 17 SCHW. JB. INT'L. RECHT 49, 53 (1960).

35 KEGEL, supra note 16, at 232; RAAPE, supra note 16, at 196; Grossfeld, supra note 6, at 7, 11.
over the corporation, or who are its founders, should govern.\textsuperscript{38} However, this doctrine never really plays any important role in determining the personal law,\textsuperscript{37} though it might be important in some other respects, for instance in public international law.\textsuperscript{38}

As only the law of the real seat and the law of incorporation doctrines are of significance today, it seems worthwhile to examine them closely, comparing their particular advantages and disadvantages, especially since recent legal articles indicate a trend in Europe to favor the incorporation doctrine and a trend in the United States to favor the rule of the real seat.\textsuperscript{30}

2. The Incorporation Doctrine—Arguments Pro and Con

a. Logical Reasons. The doctrine of incorporation has its origin in the theory that a legal person is a fiction.\textsuperscript{40} From this the conclusion has been drawn that logically the law which has created the legal personality must govern the question of recognition, etc.\textsuperscript{41} This argument is only true, however, insofar as the applicable law is concerned, when the legal person is recognized. It has no logical bearing on the question of whether courts should recognize a legal person as properly incorporated.\textsuperscript{42} In addition, this argument cannot be asserted against the law of the seat doctrine, since that theory also requires incorporation according to the law of the seat.

b. Certainty. The most favorable argument for the incorporation rule is that it provides certainty and maximum uniformity in the choice of law.\textsuperscript{43} It is easy and clear to ascertain the state of incorporation.

\textsuperscript{38} SOERGEL, supra note 16, art. 7 Vorbemerkung 147; Fikentischer, supra note 10, at 72.

\textsuperscript{37} Fikentischer, supra note 10, at 72.

\textsuperscript{39} For the purpose of determining the nationality of an expropriated corporation see Bockstiegel, Enteignungs- oder Nationalisierungsmaßnahmen gegen ausländische Kapitalgesellschaften, volkerrechtliche Aspekte, in BERICHT DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, HEFT 13, 35 (Deutsche Gesellschaft fur Völkerrecht 1974). For the purpose of determining diplomatic protection rights see Barcelona Traction, Light and Power Co. Case, [1973] I.C.J. 2, where the International Court of Justice rejected an attempt to “pierce the corporate veil.” See also Metzger, Nationality of Corporate Guarantee Schemes, 65 AM. J. INT’L L. 532 (1971).

\textsuperscript{40} GRASMANN, supra note 20, at 320; 2 RABEL, supra note 7, at 31.

\textsuperscript{41} Fikentischer, supra note 10, at 72.

\textsuperscript{42} KOPPENSTEINER, supra note 4, at 121; Grossfeld, supra note 6, at 31.

\textsuperscript{43} BEITZKE, supra note 6, at 21; GRASMANN, supra note 20, at 273; KOPPENSTEINER, supra note 4, at 121; Niederer, supra note 33, at 124; Hadari, supra note 4, at 13; Stein, Conflict-of-Laws
ration. Each forum concerned with the applicable law will arrive at the same result.44

c. Practicability. Furthermore, it has been stressed that this rule enables the corporation to move its seat freely without legal consequences, thus guaranteeing great practicability which is a necessity in international commerce.45

d. Liberal Recognition Practice. The liberal recognition practice which is facilitated by this rule is another point which the representatives of this theory emphasize, because this is said to be a desirable contribution to international economic relations.46

e. Party Autonomy. The next argument is closely connected with the practicability and liberal recognition practice arguments. It is said that only the incorporation doctrine gives due respect to the principle of party autonomy, by enabling the founders to choose the state of incorporation.47

f. Multilateral Conflict Rule. Finally, it has been stressed that this conflict rule is not only a clear one but is also desirable because it is a multilateral rule (allseitige Kollisionsnorm).48 A multilateral rule is always more desirable than a unilateral rule, since it will lead to uniformity of results and will prevent the case in which two or more national laws are claimed to be applicable.

g. Economic Risks. On the other hand, the opponents of this theory emphasize that these advantages are achieved by a far too costly price.49 They especially point out that the incorporation doctrine opens the doors for abuse and fraud.50 The founders of the corporation are enabled to choose the law which is most favorable and liberal to them and which imposes less liability. If they so desire, they can avoid the application of the provisions enacted by

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45 Grasmann, supra note 20, at 235; Koppensteiner, supra note 4, at 122; Beitzke, Anerkennung, supra note 7, at 24; Drobnig, supra note 13, at 115.

46 Koppensteiner, supra note 4, at 123; Grossfeld, supra note 6, at 23; Kötz, Anmerkung zum OLG Frankfurt vom 3.6.1964, 56 GmbH Rundschau 69, 70 (1965) [hereinafter cited as Kötz].


48 Koppensteiner, supra note 4, at 135.

49 Grossfeld, supra note 6, at 46.

50 Koppensteiner, supra note 4, at 123, 131; Grossfeld, supra note 6, at 24, 27, 29.
the state of the real seat to protect its creditors or shareholders. The incorporation of a company is deemed to be something different from a contract; the principle of party autonomy cannot be applied to it in the same way, because a corporation is an institution which bases lasting influence on the social situation and circumstances of a country and which affects more people than those directly concerned. Furthermore, it has been argued that where there is an objective connecting point (objektiver Anknupfungspunkt), the subjective element and the will of the parties must give way to the state whose law is interested in governing the affair, and the law of a state which has no real connecting factor cannot prevail.

3. The Real Seat Doctrine—Arguments Pro and Con

a. Favorable Arguments. As may be imagined, most of the arguments used against the incorporation doctrine are asserted in favor of the real seat theory; namely, that this rule prevents fraud on, or abuse of, the law. The strongest argument is the intimate connection of the corporation with the economic, political, social, and cultural life of the state of the real seat. The offices are located in the state, the shareholders meet there, most of the managers, shareholders, and creditors live there, and all the workers live there. Thus, only the real seat doctrine is said to reflect economic reality. Furthermore, it meets the general principle of private international law that the law of that state which is mostly concerned with the matter should control.

b. Unfavorable Arguments. Since the objections against the real seat rule usually are identical with the advantages praised in favor of the incorporation rule, they should be mentioned here only very briefly. It is said that the task of determining the location of the

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51 KOPPENSTEINER, supra note 4, at 123; SOERGEL, supra note 16, art. 7 Vorbemerkung; 6 J. STAUDINGER, Kommentar zum bürgerlichen Gesetzbuch 128, by Raape (9th ed. 1931) [hereinafter cited as STAUDINGER]; Grossfeld, supra note 6, at 24; Stein, supra note 43, at 133.
52 2 P. ARMINJON, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ 455 (1958); Grossfeld, supra note 6, at 30; Kessler, Das für die Aktiengesellschaft massgebende Recht, 3 RABELS Z. 758, 767 (1929).
53 See 1 RABEL, supra note 7, at 48.
54 6 STAUDINGER, supra note 51, at 128.
55 KEDEL, supra note 16, at 232.
56 H. BATIFFOL, TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ No. 194 (3d ed. 1959); EHRENZWEIG, supra note 2, at 411; E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 32 (1971) [hereinafter cited as STEIN, HARMONIZATION]; Hadari, supra note 4, at 10.
57 KEDEL, supra note 16, at 232; 2 RABEL, supra note 7, at 131; 6 STAUDINGER, supra note 51, at 128; Grossfeld, supra note 6, at 24.
58 KOPPENSTEINER, supra note 4, at 133 (for the last point especially); 2 RABEL, supra note 7, at 41; SOERGEL, supra note 16, art. 7 Vorbemerkung 151; Grossfeld, supra note 6, at 22, 33.
company's real seat is often difficult and even impossible if the corporation has two headquarters. This produces, at the very least, uncertainty about the applicable law. In addition, this theory hinders the transmission of the seat from one state to another and therefore does not meet the requirements of international trade. Finally, it is emphasized that today the real seat is not always the center of the economic relations, since a large number of the shareholders and even of the directors live outside the state of the headquarters.

4. Statutory Guidelines

German statutory rules (not including rules established by treaty) determining the personal law of a corporation are lacking. There is no provision concerning legal entities in the Introductory Law to the German Civil Code (EGBGB). Sometimes section 5 of the 1965 German Stock Corporation Act is interpreted as laying down the real seat doctrine. This provision has only internal significance, however, and is irrelevant as far as conflict of laws is concerned.

5. Attitude of German Courts

a. Early Courts and the Reichsgericht. The first known decision of a German court concerning conflict rules as applied to a legal entity dates back to 1849 and applies the seat rule. In general, one can say that the pre-1945 German Supreme Court (Reichsgericht)

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59 Koppensteiner, supra note 4, at 124; Reese & Kaufman, supra note 31, at 1127; Stein, supra note 43, at 1333.
60 Grasmann, supra note 20, at 227; Koppensteiner, supra note 4, at 121. See also Hadari, supra note 4, at 10; Van Hecke, Nationality of Companies Analysed, 8 Nederland Tijdschrift voor Internationaal Recht 223 (1961).
61 Koppensteiner, supra note 4, at 124.
62 The question of the effect of section 12a of Gewerbeordnung will be dealt with, therefore, in connection with the EEC Treaty and Conventions.
63 Articles 7 to 31 of the Introductory Law to the German Civil Code contain rules on conflict of laws. Article 10, which made a foreign fraternity not automatically recognized, has been abolished.
64 Law of Sept. 6, 1965, [1965] BGBI., I 1089; see R. Godin & H. Wilhelmi, Kommentar zum Aktiengesetz 3rd Ed., sec. 5 Anmerkung 5 (1967); 2 Rabel, supra note 7, at 34. Section 5 of the former Aktiengesetz (1937) was nearly identical with 1965 Aktiengesetz § 5. 1965 Aktiengesetz § 5 reads: The domicile of the company shall be the place specified in the articles of incorporation. As a rule, the articles of incorporation shall designate as the domicile the place where the company is engaged in business, or the place from which the company is managed or administered.
65 L. von Bar, Das internationale Privat- und Strafrecht 135 n.1 (1862) (mentioning the August 8, 1849 decision of the Prussian Obertribunal in Berlin).
also followed the seat doctrine and usually applied the law of the state of the head office. The best known decision is the “Mexican Case” in which a corporation, incorporated in Washington, D.C., doing business in Mexico, but having its head office in Hamburg, was held to be subject to German law and accordingly not to be a validly incorporated company. But there are other decisions—though only a few—in which the incorporation doctrine is favored. The reason for this might be that in these cases the conflicting states were parts or former parts of the German territory (or became such parts) and that nonrecognition would have caused undesirable economic results.

But besides these side steps, two modified attitudes of the older decisions might be mentioned. The first such attitude appears in a case in which a company was incorporated in Germany but later moved its head office to Hungary. The corporation was held to be a German corporation and subject to German law. Some authors regard this decision as one not simply following the incorporation doctrine, but establishing the principle that German law governs (1) when the real seat is in Germany and (2) when the company is incorporated under German law, wherever the real seat might be. This would mean that the German conflict rule is at least partly unilateral. Though such unilateral rules are neither inadmissible nor unusual, the extension of the applicability of the internal law, thereby repelling the application of foreign law, is not desirable from a conflict of laws viewpoint, since according to the principle of private international justice, a state should apply foreign law as well as the domestic law. However, it does not seem useful to delve deeper into this matter, as it is quite doubtful that the Reichsgericht did in fact develop such a rule. It might just as easily be true that

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66 159 RGZ 34; 83 RGZ 367; 77 RGZ 366; 7 RGZ 68; 1934 Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts [D.R.G.I.P.] nos. 10, 11 (Reichsgericht); 1904 Juristische Wochenschrift [JUR. Woch.] 231 (Reichsgericht).
67 1904 Jur. Woch. 231 (Reichsgericht). For a criticism of this decision see H. Kronstein, The Legal Relationship between American Parent Corporations and Their Foreign Subsidiaries 52 (1940) [hereinafter cited as Kronstein]. See note 146 infra and accompanying text for Kronstein’s critical point.
68 100 RGZ 210; 99 RGZ 218; 6 RGZ 138; 1920 Jur. Woch. 50 (Reichsgericht); 1918 Jur. Woch. 305 (Reichsgericht); see H. Lewald, Das deutsche internationale Privatrecht auf Grundlage der Rechtsprechung 1949 (1931).
69 1934 Jur. Woch. 2969 (Reichsgericht).
70 Beitzke, supra note 6, at 88, 106; Koppensteiner, supra note 4, at 127, 129, 135.
71 Koppensteiner, supra note 4, at 135; 1 Rabel, supra note 7, at 61. The opposite attitude is said to be justified by the principle of sovereignty. Kegel, supra note 16, at 105-06.
72 Kegel, supra note 16, at 42.
73 Id. at 42-56, 106.
this decision is one where the court applied the incorporation rule and did not look especially at the fact that Germany was the state of incorporation.\textsuperscript{74}

The second modification of the real seat rule relates to the question of renvoi. The only decision concerning this problem seems to be one from 1927 involving the “Eskimo Pie Corporation,” which incorporated in Delaware but had its head office in Kentucky. The Reichsgericht held that this company was a validly incorporated entity despite the fact that the real seat was not in the state of incorporation.\textsuperscript{75} The court did not mention the principle of renvoi expressly and seemed not to be very clear on that point. However, the decision was interpreted in legal articles as containing the principle that where the state of the real seat and the state of the incorporation follow the incorporation doctrine, a company validly incorporated according to the incorporation doctrine will be recognized in Germany.\textsuperscript{76} This basis for the conclusion may be somewhat thin, but the interpretation presently seems to be undisputed.

b. Jurisdiction after World War II. The post-1945 German Supreme Court (Bundesgerichtshof) dealt with many problems concerning expropriated companies, especially “Spaltgesellschaften,” but from these decisions little can be said about the conflict of the incorporation and the real seat doctrines.\textsuperscript{77} Besides these decisions there are a number of others which emphasize that the personal law is determined by the law of the real seat.\textsuperscript{78} However, it should be mentioned that in these decisions the state of the real seat was also the state of incorporation and that there was not really a conflict to decide. Cases in which the real seat was in a different state than in that of incorporation mostly involved trust companies incorporated in Liechtenstein and having the real seat in Germany. Some of these decisions resolve the problem by applying the ordre public restriction, denying recognition because the limitations of liability violate public policy.\textsuperscript{79} Logically, this method implies the application of the

\textsuperscript{74} As interpreted by Luchterhand, supra note 4, at 13.
\textsuperscript{76} Koppensteiner, supra note 4, at 106, 136; Raape, supra note 16, at 199; 2 Rabel, supra note 7, at 50; Grossfeld, supra note 6, at 12, 13; Stein, supra note 43, at 1330.
\textsuperscript{77} Luchterhand, supra note 4, at 17, 18.
\textsuperscript{79} 1965 Aussen W. 175 (Oberlandesgericht Stuttgart); 1965 Aussen W. 177 (Oberlandesgericht Hamburg).
incorporation rule, because otherwise ordre public would not have become relevant. But the two courts did not mention this principle and possibly neither wanted to apply it. There are other decisions in which the rule of the real seat is applied and accordingly the company is held to be invalid under German law.

6. Experiences with the American Approach

a. Development. In the United States the application of the incorporation doctrine originally led from strict company laws in the different states to a "race of laxity" in state legislation. Smaller and sparsely industrialized states, especially, enacted laws very favorable to the founders. The risk they took by this was small, because it was unlikely that there would be much business or many creditors or shareholders within their state. Thus, they gained taxes and fees without the fear of a possible disadvantageous impact on their entire economic system. Of course, this development could not remain without some reaction. The reaction came from four different directions: the courts, the federal legislature, the state legislature, and authorities within the legal profession.

b. Reaction of the Federal Legislature. The federal legislature has intervened only in a few respects; namely, by enacting the Securities Act of 1933 and the Securities Exchange Act of 1934. It is impossible to discuss these matters more deeply here, but it might be mentioned that this type of legislation is sometimes called the "federal law of corporations."

c. Reaction of State Legislatures. A similar but even stronger development is to be noticed in state legislatures. California and

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80 70 DER BETRIEB 441 (Bundesgerichtshof); 1965 AUSSEN W. 175 (Oberlandesgericht Frankfurt); Judgment of July 11, 1967 (Landgericht Aurich), cited in GRASMANN supra note 20, at 177 n.23a.
81 "The race was one not of diligence but of laxity." Ligget Co. v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).
83 Id. § 78a et seq. Sections 1331, 1332, and 1445(c) of the Federal Jurisdictional Statute, 28 U.S.C. §§ 1331-61 (1970), touch a different matter as their purpose is to reduce the cases in the federal courts by denying diversity of citizenship jurisdiction if the grounds for asserting such jurisdiction are only that the corporation is incorporated in a different state than that of the adverse party. See Note, New Federal Jurisdictional Statute Achieves Early Success in Reducing Number of District Court Case Filings but Presents Interpretive Difficulties, 58 COLUM. L. REV. 1287 (1958). The effect of these statutes is also important for foreign (i.e., non-United States) corporations because the Securities Exchange Act of 1934 might have extraterritorial application if it is necessary to protect American investors. See Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968). See also Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1972), cert. denied, 409 U.S. 874 (1972).
New York, especially, have adopted several statutes concerning the internal relations of a corporation which also apply to foreign corporations (corporations incorporated outside of the United States) doing business in the state.\textsuperscript{85}

d. Reaction of the Courts. The strongest reaction against the abuse of the incorporation rule has come, however, from the courts. Although it must be noted that some courts still follow the incorporation rule in all cases,\textsuperscript{86} other courts began quite early to distinguish between truly foreign corporations and those which were "pseudo-foreign,"\textsuperscript{87} or "migratory or tramp"\textsuperscript{88} corporations. The courts pay much attention to the fact that a company is only "nominally a corporation of the other state,"\textsuperscript{89} that "its residence outside the forum state is a merest fiction,"\textsuperscript{90} or that "its existence in the state of incorporation is an illusory mirage, more atmospheric, than real."\textsuperscript{91} But besides these cases where the question in issue can be resolved quite easily by the principle of fraus legis—though it might sometimes be difficult to draw the line—there are other cases involving no obvious abuse of law. In these cases the courts have nevertheless applied domestic provisions for the protection of the shareholders of foreign corporations.\textsuperscript{92} This is usually done if the provision in question is protective of persons having a close connection with the forum\textsuperscript{93} or if application of the provision is required to protect other domestic interests.\textsuperscript{94} Here, the modern choice of law

\textsuperscript{85} See, e.g., CAL. CORP. CODE §§ 25008, 25103(b) (West pamphlet 1975). A similar result was achieved by the courts in Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961); see N.Y. BUS. CORP. LAW §§ 1316-20 (McKinney 1963). See also Baade, supra note 4, at 26; Peterson, supra note 1, at 183; Dodd, Statutory Developments in Business Corporation Law, 50 Harv. L. Rev. 27 (1936) [hereinafter cited as Dodd]; Hadari, supra note 4, at 48; Reese & Kaufman, supra note 31, at 1129.

\textsuperscript{86} See e.g., Hausman v. Buckley, 299 F.2d 696 (2d Cir. 1962); Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971); Levien v. Sinclair Oil Corp., 261 A.2d 911 (Del. 1969).

\textsuperscript{87} Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

\textsuperscript{88} Toklan Royalty Corp. v. Tiffany, 193 Okla. 120, 141 P.2d 571 (1943).

\textsuperscript{89} Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

\textsuperscript{90} Wait v. Kern River Mining, Milling, and Dev. Co., 157 Cal. 16, 21, 106 P. 98, 100 (1909).

\textsuperscript{91} State ex rel. Weede v. Iowa Southern Utilities Co., 231 Iowa 784, 807, 2 N.W.2d 372, 386, modified, 232 Iowa 139, 4 N.W.2d 869 (1942). See also Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (in which the corporation was originally a California corporation but reincorporated in Delaware); State ex rel. Weede v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948), cert. denied, 337 U.S. 918 (1949); Latty, supra note 4, at 150; Reese & Kaufman, supra note 31, at 1018-19.

\textsuperscript{92} Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir. 1959), cert. denied, 361 U.S. 885 (1959); Peterson, supra note 1, at 189.

\textsuperscript{93} Latty, supra note 4, at 137; Peterson, supra note 1, at 183.

\textsuperscript{94} Baade, supra note 4, at 27-28.
theories—particularly Currie's interest analysis—have great impact on the courts.

e. Opinion in Legal Writings. This leads to the fourth element, the legal literature. From the modern choice of law approaches, Brainerd Currie's interest analysis is probably the one which has had the most significant impact on the conflict rules here in question. Currie analyzes the interest of the concerned states according to the purpose of the substantial law in question and thus obtains a possibly wide range for the application of domestic law. Much more reluctant in this respect is the Second Restatement which allows deviation from the incorporation rule only in unusual cases where there is a special interest of the state in regulating the concrete problem. The Restatement, although not as far-reaching as the 1969 Proposed Official Draft, requires a "most significant relationship," thus softening the "hard and fast" rule. Besides these flexible case-by-case approaches, other authors concerned about the uncertainty which has resulted from the restriction of the incorporation rule think that the real seat rule would resolve these problems in the best way.

7. International Treaties

a. International Law Association Draft Convention. The Draft Convention on Conflicts of Laws Relating to Companies, issued by the International Law Association in 1960, provides in article 2 for the application of the law of the state of incorporation, but contains a restriction insofar as an "effective connection" with, or "effective link" to, that state is necessary.

b. Draft Resolution of the Institut de Droit International. Similarly, the Draft Resolution of the Institut de droit international, concerning conflict rules for stock corporations, favors the incorporation doctrine in article 1, though limitations on this doctrine are

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95 CURRIE, supra note 2.
96 RESTATEMENT 2D, supra note 4, §§ 302, 304, 306; Reese, supra note 1, at 203.
97 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (Proposed Official Draft 1969), which included an example for the case in which a most significant relationship was missing. This example was struck out at the 1969 meeting of the American Law Institute. However, the Institute did not return to the "pure" incorporation rule. See Baade, supra note 4, at 21.
98 Reese, supra note 1, at 201; Peterson, supra note 1, at 191 (view similar to that of Reese).
99 EHRENZWEIG, supra note 2, at 411; Peterson, supra note 1, at 179; Baraf, supra note 4, at 224; Dodd, supra note 85, at 59; Kaplan, supra note 4, at 433; Latty, supra note 4, at 169.
101 Id. art. 2.
102 51 ANNuaIRE DE L'INSTITUT DE DROIT INTERNATIONAL 319 (1965).
found in articles 3 and 4.

c. 1951 Hague Convention. The Hague Convention Concerning the Recognition of Foreign Companies, Associations, and Foundations,\textsuperscript{105} which has been signed only by three states and is unlikely to come into effect, also applies, in principle, the incorporation rule, but leaves the issue to the concerned state in such a way that a state following the real seat rule may apply that rule as long as the corporation has its seat in the state's jurisdiction.\textsuperscript{104}

d. Treaty of Rome. The Treaty of Rome\textsuperscript{105} is of more practical significance. Article 58, paragraph 1 of the Treaty reads:

Companies and firms [sociétés] 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 purpose of applying the provisions of this chapter, be treated in the same way as individual Members.\textsuperscript{106}

The chapter in question (chapter 2 of title 3 of part 2) regulates the right of establishment within the Common Market. Granting the right of establishment implies the recognition of the legal entity\textsuperscript{107} and thus involves a conflict of laws problem. Since—according to the wording of article 58, paragraph 1—a registered office in one Member State is sufficient, this provision expresses the incorporation doctrine.\textsuperscript{108} It has been argued that the provision contains an editorial mistake and that it should be read "registered office and central administration or principal place of business,"\textsuperscript{109} because the recognition of a company with neither the central administration nor the principal place of business in one of the Member State's territory would not be in the interest of any member. This view has been rejected, however, due to the clear wording of the article.\textsuperscript{110}

\textsuperscript{103} Done Oct. 31, 1951, reprinted in 1 Am. J. Comp. L. 277 (1951).

\textsuperscript{104} Id. art. 2; see Kegel, supra note 16, at 237; Raape, supra note 16, at 210.

\textsuperscript{105} Treaty Establishing the European Economic Community, done, Mar. 25, 1957, 298 U.N.T.S. 11 (unofficial English version) [hereinafter cited as Rome Treaty].

\textsuperscript{106} Emphasis added; translation by the author. For an interpretation of the terms "companies" and "firms" (sociétés) see Stein, Harmonization, supra note 56, at 28.

\textsuperscript{107} U. Everling, Das Niederlassungsrecht im Gemeinsamen Markt 35 (1963) [hereinafter cited as Everling]; Goldman, supra note 10, at 184; Beitzke, Anerkennung, supra note 7, at 2; Drobnig, EWG, supra note 16, at 90, 92; Fikentscher & Grossfeld, supra note 7, at 259; Grossfeld, supra note 6, at 17.

\textsuperscript{108} Grossfeld, supra note 6, at 17; Stein, supra note 43, at 1336.

\textsuperscript{109} Stein, Harmonization, supra note 56, at 29; Goldman, Bericht über den Entwurf eines Übereinkommens über die gegenseitige Anerkennung von Gesellschaften und juristischen Personen, in Drucksache der Kommission der EWG 8106/IV/65 - D 15; Goldman, Le projet, supra note 30, at 29; Grossfeld, supra note 6, at 18.
Nevertheless, the impact of this provision is not as great as one is inclined to think prima facie, because this provision has significance only in connection with article 52 of the Rome Treaty, which provides for freedom of establishment and which requires in addition that the corporation in question be "established" in the Common Market as a prerequisite for the exercise of the freedom to set up "agencies, branches or subsidiaries." Accordingly the General Program provides that a company which wants to profit from the freedom of establishment under article 58, paragraph 1 of the Rome Treaty must show that its business activity constitutes "a continuous and effective link with the economy of the Member States." Furthermore, it has been stressed that the liberal posture of article 58 is obviously related to the harmonization of the national company laws required by the treaty. As long as the harmonization is only in process, article 58 merely remains as a prospectus.

As far as Germany is concerned, however, this provision has already had an influence on German law, since the text of article 58, paragraph 1, together with the said wording of the General Program, has been enacted in section 12a of the German Business Regulations. But from this it does not thereby follow that the incorporation doctrine is adopted. Section 12a provides that a foreign corporation similar to one mentioned by article 58, paragraph 1, is not compelled to obtain permission for establishing a trade otherwise required by section 12 of the regulations. Though—as it was said before—the granting of the right of establishment implies the recognition, it was not intended to create a conflict rule for recognition. This is shown by Gewerbeordnung section 12a, which deals with the problem of a foreign corporation which has established a trade, but is not recognized as a legal entity in Germany.

e. 1968 EEC Convention. Article 220 of the Rome Treaty re-
quests the Member States to enter into negotiations with each other to ensure "for the benefit of their nationals ... the mutual recognition of companies within the meaning of Article 58, second paragraph, the maintenance of their legal personality in cases where the registered office is transferred from one country to another ...." On this background the Member States contracted the Convention on the Mutual Recognition of Companies and Legal Persons. An enormous number of legal articles have been written on the Convention. As it is not even possible to list all authors here, it is even less possible to take into account everything which has been said about the Convention. Thus, only a short overview of the main controversies can be given.

The Convention contains conflict rules on the recognition of corporations. The scope of the Convention is limited to commercial and private companies which are capable of having rights and obligations under the law of incorporation, but which need not be regarded as full-fledged legal entities under that law. Furthermore, the Convention is restricted to corporations, organized under the law of a Member State, which have their registered seats in the territories to which the Convention applies. If these prerequisites are fulfilled, the corporation is recognized by every Member State with the effect that it shall have the same capacity accorded to it by the law under which it was formed. This is clearly the adoption of the incorporation doctrine. However, it must be mentioned that besides other restrictions on the application of the law of incorporation, the Convention makes important concessions to advocates of the real seat doctrine in articles 3 and 4. Thus, each state may declare that it will deny recognition to any company whose real seat

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117 1968 Convention, supra note 19.

118 See, e.g., Stein, supra note 43, at 1337 (including references to these articles). See also Conard, supra note 39, at 57; Beitzke, Zur Anerkennung von Handelsgesellschaften im EWG-Bereich, 14 AUSSEN W. 91 (1968) [hereinafter cited as Beitzke, Zur Anerkennung]; Beitzke, Anerkennung, supra note 7; Drobnig, EWG, supra note 16, at 91 & n.14; Goldman, Le projet, supra note 30, at 201.

119 1968 Convention, supra note 19, arts. 1, 8 (thus the German Offene Handelsgesellschaft is included); see STEIN, HARMONIZATION supra note 56, at 406; Drobnig, Das EWG, supra note 16, at 92. The Convention also includes legal persons of public and private law other than companies engaged in economic activities. 1968 Convention, supra note 19, art. 2.

120 1968 Convention, supra note 19, art. 1.

121 Id. arts. 1, 6.

122 STEIN, HARMONIZATION, supra note 56, at 409; Drobnig, EWG, supra note 16, at 92.

123 The recognizing state may deny rights which it does not accord to companies of a corresponding type which are subject to its own law. 1968 Convention, supra note 19, art. 7. A state may not apply the Convention if its ordre public international would be violated. Id. art. 9.
is outside the said territories and which does not have a genuine link with the economy of one of these territories.\textsuperscript{124} Besides the problem of what is required to come within the meaning of the term "genuine link,"\textsuperscript{125} this provision does not really produce any significant advantages for the contracting parties.\textsuperscript{126} The underlying theory seems to be that, otherwise, a noncommunity enterprise, on the basis of a "post office box" address,\textsuperscript{127} could establish branches within the Common Market and would have to be recognized. This, however, is merely a question of the right of access and not one of recognition.\textsuperscript{128} Therefore, it would seem a better idea to deal with this question only where the right of establishment is in issue. Nevertheless, the provision will not have a great impact, since other more favorable principles on recognition are not affected.\textsuperscript{129} Thus, the \textit{renvoi} principle of the \textit{Eskimo Pie Corp. Case}\textsuperscript{130} may still remain good law,\textsuperscript{131} although Germany has made the reservation under article 3.\textsuperscript{132}

The second, more important, concession to the real seat doctrine is the troublesome provision of article 4 of the Convention, which provides that a state is left free to declare its own mandatory law applicable to a corporation formed elsewhere but having its real seat within the territory of that state. Even the nonmandatory provisions may be applied unless the charter of the corporation provides otherwise or unless the company can prove that it has actually exercised its activity for a reasonable time in the state of incorporation. At first glance this provision seems to meet the reasonable interests of the state of the real seat, but upon closer examination, it appears to give rise to a number of problems. First, there will be the uncer-

\textsuperscript{124} \textit{Id.} art. 3.
\textsuperscript{125} See B. \textsc{Goldman}, \textsc{Précis de droit commercial européen} 567, 572 (1970); F. \textsc{Caruso}, \textsc{Le Société nella Community economica europa} 217 (1969); \textsc{Stein}, \textsc{Harmonization}, \textit{supra} note 56, at 409; Cereixhe, \textit{La reconnaissance mutuelle des sociétés et personnes morales dans la Communauté économique européenne}, 1968 \textsc{Revue de Marché Commun} 578, 586 (1968).
\textsuperscript{126} Drobnig, \textit{EWG}, \textit{supra} note 16, at 96 & nn. 54-56; Drobnig, \textit{Conflict of Laws and the European Economic Community}, 15 \textsc{Am. J. Comp. L.} 204, 208 (1966-1967).
\textsuperscript{127} \textsc{Stein}, \textsc{Harmonization}, \textit{supra} note 56, at 409.
\textsuperscript{128} While the granting of a right to access implies the recognition of the company, recognition on its own does not grant automatically a right to access. Drobnig, \textit{EWG}, \textit{supra} note 16, at 92.
\textsuperscript{129} 1968 Convention, \textit{supra} note 19, art. 11, para. 2.
\textsuperscript{125} 117 RGZ 215 (1927). See notes 75-76 \textit{supra} and accompanying text.
\textsuperscript{131} Drobnig, \textit{EWG}, \textit{supra} note 16, at 96.
\textsuperscript{132} [1972] \textsc{BGBl.} II 369, art. 2, para. 1. \textit{See also} \textsc{Denkschrift der Bundesregierung BT Drucksache VI/1976}, at 21-35. The reservation is also made by France (\textsc{Exposé des motifs}, \textsc{Journal officiel}, \textsc{documents de l'assemblée nationale}, \textsc{Annexes} 1232-33 (1969)) and Italy (Note, 1971 \textsc{Rivista di diritto internazionale privato e processuale} 356).
certainty about what are mandatory and nonmandatory provisions. A uniform interpretation could not be agreed upon, and this question will have to be resolved on a case-by-case basis. However, this problem will only be a minor one, at least in Germany, because it is common to divide the law into these two complexes. The more serious effect of this provision is that it leads to different recognition in different states. A company incorporated under Dutch law having its real seat in Germany will be subject to Dutch law in all other member states (even if they have made the reservation under article 3) except in Germany, which will apply (at least) its mandatory provisions. Though the Convention does not expressly stress this point, the prevailing view is that in such a case Germany could not deny the existence of the corporation but that it can regulate the internal affairs of the corporation by its own laws. Thus, there will be a corporation living in one state under two different legal systems. It is not hard to imagine that this will lead to immense difficulties. Nevertheless, the reservation under article 4 has been made by Germany, Belgium, France, and Italy.

At this point one might be inclined to ask whether the Convention does determine the personal law after all, or whether it only sets out rules for recognizing the capacity according to article 6. As has been indicated, it is not the unanimous view that personal law and recognition are governed by one conflict rule. Though that attitude is prevailing in Germany, the contrary view is taken in Belgium, Italy, Luxembourg, and France. The rationale of article 4 may be thought to indicate that the conflict rule in the normal case applies to all questions; however, this conclusion is heavily disputed. The prevailing view seems to be that, in Germany, at least the capacity under article 6 and the personal law will be determined in

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133 Stein, Harmonization, supra note 56, at 411.
136 Stein, Harmonization, supra note 56, at 411-12; Drobnig, EWG, supra note 16, at 97-98.
137 1972 BGBl. II 369, art. 2, para. 2 (Germany); Chambre des représentants session 1968-1969 No. 428, Exposé de motifs 2 (Belgium); note 132 supra (France and Italy).
138 See notes 5-19 supra and accompanying text.
139 Stein, Harmonization, supra note 56, at 410.
140 A. Santa Maria, Le Societa nell diritto internazionale privato 212 (1970); Beitzke, Zur Anerkennung, supra note 118, at 95.
141 Stein, Harmonization, supra note 56, at 411; Drobnig, EWG, supra note 16, at 127-28.
the same way.\footnote{Beitzke, \textit{Zur Anerkennung}, supra note 118, at 95; Gessler, \textit{supra} note 135, at 325; Goldman, \textit{Le projet}, supra note 30, at 206. Gessler and Goldman arrive at this result not by extending the scope of the Convention to the personal law, but by applying in principle the same conflict rule. Drobnig also takes a very limited view. Drobnig, \textit{EWG}, \textit{supra} note 16, at 128-29.} Notwithstanding these problems it seems to be impossible to regard the Convention either as favoring the real seat rule or—especially with regard to articles 3 and 4—the law of incorporation.

f. 1956 \textit{German-American Treaty}. Finally, the Treaty of Friendship, Commerce and Navigation between the United States and Germany should be mentioned.\footnote{Koppensteiner, \textit{supra} note 4, at 113; Hadari, \textit{supra} note 4, at 15.} The Treaty provides in article XXV, paragraph 5, that “[c]ompanies 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.” This does not mean,\footnote{See notes 5-10 \textit{supra} and accompanying text.} however, that Germany adheres to the rule of incorporation. It only repeats the well-recognized principle of German law\footnote{This may be the reason why the Treaty usually is not cited in articles on conflict law of corporations and why an article on the Treaty does not even mention this provision. Schwenk, \textit{Der neue Freundschafts-, Handels- und Schifffahrts-Vertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika}, 12 \textit{Juristen-Zeitung} 197 (1956). Koppensteiner takes a contrary view (Koppensteiner, \textit{supra} note 4, at 113), as does Kronstein with regard to the former treaty (Kronstein \textit{supra} note 67, at 52).} that a foreign corporation is automatically recognized and is not compelled to file special papers. The question of what law is applicable to a company is left open by the Treaty. Thus, this provision does not give any guidance for the question here in issue.\footnote{See notes 85-99 \textit{supra} and accompanying text.}

8. \textit{Résumé}

As it appears that in the United States a movement has begun to restrict more and more the application of the incorporation rule and even to favor the application of the law of the place of business,\footnote{The incorporation doctrine is favored by the following German authors: 1 E. Frankenstei\textit{nn}, \textit{Internationales Privatrecht} 459 (1926); Koppensteiner, \textit{supra} note 4, at 133, 136; A. Nussbaum, \textit{Deutsches internationales Privatrecht} 185 (1932); 1 A. Düringer & M. Hachenburg, \textit{Handelsgesetzbuch} 1929, at 49 (by Geller); Mann, \textit{Zum Problem der Staatsangehörigkeit der juristischen Person}, in \textit{Festschrift für Martin Wolff} 271, 281 (E. von} which mostly coincides with the law of the real seat, and that in Europe the demand for the incorporation theory is much stronger than before,\footnote{See notes 85-99 \textit{supra} and accompanying text.} one wonders which of these theories is more satisfac-
tory. Certainly there are obvious advantages to the incorporation rule: certainty, flexibility, practicability. But the opinion that the incorporation theory belongs to the era in which economic borderlines are struck down and that the theory represents the future, should not be emphasized without due consideration being given to the experiences of the United States. Some problems caused by the incorporation rule might be resolved, however, by applying the principles of fraus legis and of public policy. But by this, of course, the theory loses one of its advantages, that of certainty.

The real seat doctrine, on the other hand, does not provide for certainty either, as it may be difficult to determine the real seat. A few words in this regard should be said about the real seat of the subsidiary controlled by a foreign parent. Here the control—which is regarded as an important element for the determination of the real seat—is exercised at the place of the foreign parent. Thus, a controlled subsidiary would be subject to the laws of the parent company. This conclusion, however, is misleading. The real seat remains at the principal center in which the affairs are governed even if this results mostly in the reception of orders from the parent company. A similar problem arises if the enterprise consists only of one legal entity, but is doing business in several countries. In these cases multinationals usually have avoided the uncertainties by incorporating subsidiaries in the host country rather than having a branch there. The difficulty of determining the real seat does not appear to be insurmountable, and the enterprises interested in certainty as to the applicable law have usually attempted to establish clear facts.

Similarly, the disadvantage of the real seat rule involved when the seat is transferred from the state of incorporation to another state might be avoided by applying a theory according to which the moving company loses its identity as a company of the incorpora-
tion state, but gains a new identity in the state of its new seat when it complies with the requirements of that state. This approach fulfills the interests of the “new” state and avoids at the same time the disadvantages of the strictly logical method according to which the existence of the corporation had ceased. Besides these difficulties, there is the disadvantage of the real seat rule that nonrecognition does not always meet the interests of the state concerned, and may cause hardship on those persons whom the nonrecognizing state pretends to protect. Some of these disadvantages are met by the application of renvoi, but one has to keep in mind that the principle of renvoi has disadvantages, too; namely, that it causes the problem of when to interrupt the international “ping pong.” Generally, however, the principle of renvoi is accepted in German conflict of laws.

Furthermore, today the important impact of the corporation’s affairs on the host country’s economy seems to stem mainly from investment, tax, and currency problems, questions of antitrust law and foreign regulations expressing a particular policy. These prob-

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156 2 RABEL, supra note 7, at 39.

157 GRASMANN, supra note 20, at 177; see note 80 supra.

158 For discussions of these problems see 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 55 (1935); W. COOK, THE LOGICAL AND LEGAL BASIS OF CONFLICT OF LAWS ch. IX (1942); E. LORENZEN, SELECTED ARTICLES ON CONFLICT OF LAWS 19 (1947); 1 RABEL, supra note 7, at 75; Griswold, Renvoi Revisited, 51 HARV. L. REV. 1165 (1938).

159 EGBGB art. 27.

lems fall outside the scope of the personal law and they have separate connecting factors (Anknupfungopunkte). As it appears that the problems have shifted from the protection of creditors and shareholders to the protection of the whole economy, one might be inclined to think that the determination of the personal law is not such an important issue anymore and, especially, that the real seat's concern has vastly diminished. But though there is a great change in the economic situation and though the capital relations are more intertwined than they used to be, there is in fact still a reasonable concern of the state of the real seat regarding the applicable personal law. First, there are still a great many creditors and shareholders within the state of the real seat. They need to be protected not only for the sake of themselves but because their loss—especially in the extreme case of bankruptcy—might have an immense impact on the whole economic and social situation of the host country. Secondly, the form of organization of an enterprise provided by the law expresses a kind of antitrust policy and a policy with respect to the economic system. Thus it seems to be quite important for the host country to apply its own policy expressed in the personal law. Thirdly, the state of the real seat will usually maintain most, if not all, of the workers. This does affect the question of the applicable personal law insofar as the principle of codetermination has been developed, as it has in Germany.

Though there are still remarkable interests of the host country, one might be inclined to ask whether there is not a way of combining considerations of these interests with the demands of international trade. As there must be a personal law determinable abstractly, the only possible way seems to be that a state should adopt a very liberal attitude towards recognition by adopting the incorporation doctrine, but applying, on the other hand, its own law to a number of issues where its own interests are touched, notwithstanding any contrary provision of the applicable personal law. This approach seems to have the advantages of the incorporation rule and protects

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181 Grossfeld, supra note 6, at 26. For discussions of how far the argument volenti non fit injuria is regarded as applicable, see KOPPENSTEINER, supra note 4, at 130-31; Grossfeld, supra note 6, at 24.
182 E.g., provisions on minimum capital, provisions prohibiting the purchase of shares in other legal persons, or provisions on the duration of a corporation. Grossfeld, supra note 6, at 27.
183 KOPPENSTEINER, supra note 4, at 133.
184 This attitude seems to be suggested in some respects by Niederer and by Koppensteiner as far as codetermination is concerned. KOPPENSTEINER, supra note 4; Niederer, supra note 33.
also the other disadvantages of the real seat theory. From a conflict of laws view this approach can be justified by defining the scope of the personal law quite narrowly and by developing separate conflict rules for other matters. Generally it can be said that in Germany this process of characterization is much more common than in the United States, though with regard to the personal law of corporations, conflict rules are not narrow. But even if a state is reluctant to narrow the scope of the personal law, it might achieve the above approach by applying its own law on some issues, though these issues are part of the personal law, which is a foreign law. The domestic law would be applied then not because of a conflict rule but because its substantial provision requires application. This principle of immediate application—in Germany it is called Sonderanknüpfung—is well known in private international law and it is expressed as well in article 4 of the Convention on the Mutual Recognition of Companies and Legal Persons. Thus, every state in which the corporation’s operations are having any effect may apply portions of its own law to secure its interests. Thus, all single interests are served ideally, but the whole is in disorder. The corporation’s internal affairs, its organization, and its liability, cannot satisfactorily be subject to different laws. It might become impossible for a corporation to comply with all applicable laws which might contain contrary provisions. Even if one would give only the state of the real seat the opportunity to apply its own law on some matters of personal law, the compromise would not be satisfactory. The reason for this is that the personal law usually is composed of

167 For the two possible meanings of this term see Koppensteiner, supra note 4, at 145-46.
168 1968 Convention, supra note 19. The term goes back to the Statutenentheorie, but can be regarded as being discussed and accepted especially during the last 20 years. See Bache, supra note 4, at 82.
provisions regarding rights and duties which correspond with one another. If another set of provisions are applied to certain issues, this system of balance will be broken up and the issue will be regulated in a manner in which possibly no legislator wanted to have it regulated. Thus, there will be created, as Currie once said,169 half a donkey and half a camel.170 Another disadvantage would be that certainty will be minimized as it might remain questionable to what extent a state wants to apply its own law despite the applicable personal law.

Thus, as the advantages of the compromise have been proved delusive, the decision must be made between the "pure" incorporation rule and the real seat theory. It appears that the incorporation doctrine is ideal as between states with the same standards in corporation law. Where this prerequisite has not been met, however, the dangers and disadvantages of the incorporation doctrine are too great and the interests of the state of the real seat still strong enough to justify the application of its own law. Within the EEC, however, where harmonization is in progress, it might be possible to accept the incorporation doctrine in the near future. At this time the differences in standards still appear to be too great and the danger of a European race of laxity remains.171


170 Reese and Kaufman describe the situation as chaotic. Reese & Kaufman, supra note 31, at 1142. It should be clarified that these criticisms mainly concern the application of different personal laws. If a matter is characterized as falling outside the scope of the personal law, a state may very well apply that law which wants to be applied according to its meaning. This is done more and more, especially in the field of currency and investment regulations. See Batiffol, supra note 1, at 36; references cited note 166 supra. These criticisms do not apply, since the correlations between the different questions will usually be not so significant that the application of different sets of law will break up an outbalanced system. However, the principle will cause other difficulties and where two laws both wanting to be applied conflict, the issue will become rather political. See Currie, supra note 2, at 177-82; Graue, Aussprache zum Referat Zweigert, in 50 Jahre Institut für Internationales Recht an der Universität Kiel 144 (1965); Mertens, Ausländisches Kartellrecht, 31 Rabels Z. 385, 391 (1967); Rehbinder, Die amerikanischen Restriktionen für Direktinvestitionen in Europa und das deutsche Kollisionsrecht, 15 Außen W. 346, 353 (1969). Here the question will arise whether a judge can be expected to handle these issues or whether he should just apply the lex fori. Currie, supra note 2, at 177, 182.

171 It should be kept in mind that the view as to how far there should be a harmonization is not unanimous. For a restricted interpretation of article 54, paragraph 3(g) of the Rome Treaty, supra note 105, see Mohring, Aktuelle Wirkungen des EWG-Vertrages auf das Niederlassungsrecht, den Dienstleistungsverkehr und das Agrarrecht, 1965 N.J.W. 1633, 1640.
III. Conflict Rules Concerning a Group of Corporations

A. Problems Involved

A very important issue for multinational enterprises is the question of what conflict rule is to be applied to a group of corporations. As one will find in this field not only one rule but several rules, each concerning only a limited issue, it seems appropriate with regard to the space available here to describe how these conflict rules are ascertained, rather than to develop the single rules.172

B. Approach

1. Substantial Approach

The approach which seems to be generally accepted173 asks first, whether the statutory provision in question is to be applied with respect to the substantive regulations it contains.174 A provision, for instance, concerned with the protection of the minority of shareholders is from the German viewpoint only designed to protect minority shareholders of a German subsidiary. Hence, it will not be applied to regulate the relations between a German parent and a foreign subsidiary.175 The same is said about provisions protecting the creditors and about the validity of the transfer of shares from an independent German corporation to another foreign corporation which enables the foreign corporation to exercise control over the German company. On the other hand, for example, provisions which deal with the question of whether a controlled corporation can acquire shares in the controlling company are provisions concerned with the reduction of capital of the parent corporation. Therefore, this seems to be a matter for the law of the parent corporation with which to deal. Hence, German law only applies in case of a German parent corporation, but not if the controlling company is a foreign one.176

172 Bache, supra note 4, at 30; Koppensteiner, supra note 4, at 136; Luchterhand, supra note 4, at 39.
173 Bache, supra note 4, at 30; Koppensteiner, supra note 4, at 92; H. Würdinger, Aktien und Konzernrecht 21 (1972); Bringeu, Parent-Subsidiary Relations under German Law, 7 Int’l Law. 138, 150 (1973); Immenga & Klocke, supra note 4, at 49; Prühs, supra note 4, at 395; Vagts, Book Review, 66 Am. J. Int’l L. 683 (1972) (review of H.-G. Koppensteiner, Internationale Unternehmen im Deutschen Gesellschaftsrecht (1971)).
174 Koppensteiner, supra note 4, at 93.
175 Koppensteiner, La protection des crédeites des sociétésfiliales, in Colloque international sur le droit international privé des groupes de sociétés 69 (B. Goldman ed. 1973) [hereinafter cited as Koppensteiner, La protection].
After it is determined that, according to the underlying rationale, certain provisions must be applied to the relation between parent and subsidiary, it might be shown, however, that provisions of the law governing the other corporation may also be applicable. In such a case it must be asked whether one may apply both laws cumulatively, as one does, for example, in determining the prerequisites of both personal laws of two persons who want to marry. This cumulation will be justified in cases where the connecting factors which lead to both laws are equivalent. If they are not found to be equivalent, the question arises as to which law shall prevail. In ascertaining this question, the interests of the states involved will be taken into account. But contrary to Currie's interest analysis one might not proceed on a case-by-case basis, asking how far the interests of the state are actually involved, but rather, proceed to determine the issue abstractly. Thus, it is generally said that the state of the controlled corporation has a prevailing interest in protecting outside shareholders and creditors.

2. Conflict Approach

In addition to this "substantial" test, however, it has been deemed appropriate to apply the traditional test in private international law—to characterize the given legal situation in order to range it under a conflict rule. Thus, is is asked whether the matter

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178 Currie, supra note 2, ch. 2.

179 Koppensteiner, supra note 4, at 174; Koppensteiner, La protection, supra note 175, at 79; Immenga, supra note 160, at 121. For a discussion of the similar but slightly modified French view see Goldman, La protection des actionnaire minoritaires des sociétés filiales, in Colloque international sur le droit international privé des groupes de sociétés 7 (B. Goldman ed. 1973); for the United Kingdom's modified view see Mann, La protection des actionnaires minoritaires des sociétés filiales, in Colloque international sur le droit international privé des groupes de sociétés 39 (B. Goldman ed. 1973); and for Switzerland's modified view see Schluep, in Colloque international sur le droit international privé des groupes de sociétés 48 (B. Goldman ed. 1973). The proposed Statute for the European Company, art. 224, 13 BULL. E.E.C. Supp. No. 8 at 44 (1970), claims, however, to be applicable in this regard even if the parent company is a société européenne and the subsidiary has its registered seat in the E.E.C. The reason for this is said to be that all subsidiaries of a société européenne should be treated equally. For criticisms of article 224 see Koppensteiner, Das Konzernrecht des EWG Verordnungsentwurfs über eine europäische Aktiengesellschaft aus kollisionsrechtlicher Sicht, 16 AUSSEN W. 433, 437 (1970); Wöde, Die "Europäische Aktiengesellschaft" und multinationale Unternehmen, 20 AUSSEN W. 82, 84 (1974); Walther, Der Wirtschafts- und Sozialausschuss zum Statut für europäische Aktiengesellschaften, 18 Die Aktiengesellschaft 84, 89 (1973).

180 Koppensteiner, supra note 4, at 91; Koppensteiner, La protection, supra note 175, at 87.
is one of personal law, of contract law, or of tort law. The demarcation between issues of personal law and those of contract law is an especially important but difficult question. In determining these questions it must be observed to what extent these matters have functions as, and in relation to, other problems which are obviously of the personal law and the effect which that characterization will have on either of the legal systems. Thus, for instance, the question of the protection of shareholders in case of a contract of domination has not been characterized as one of contract law, but as a personal law problem. Therefore, the principle of party autonomy does not apply here. If, however, an issue turns out to be one of contract law, such as a contract under section 292 of the German Stock Corporation Law, it must be asked if nevertheless the provision of law is applicable by a rule of immediate application (Sonderanknüpfung). In applying this principle, one again asks for the scope of application of the provision, but this time under the viewpoint of immediate application (Sonderanknüpfung).

Though two methods can be applied in determining the applicable conflict rule, there necessarily can be only one answer to the problem of which law governs the issue in question; that means that contrary results must be avoided. Usually, the principle of immediate application (Sonderanknüpfung) will work very well in this regard, as it applies a test similar to the one of the substantial approach. Hence, determinations made with both tests have succeeded in achieving the same result by two different methods.

By this, however, only the threshold problem is solved as there remains the question of how to characterize the remedies, institutions, and the like, provided for in the foreign law which might, for example, obtain the protection by another means.

As legislators have only recently begun enacting laws applying to groups of companies, the future will show whether courts will adopt conflict rules obtained by said method.

181 KOPPENSTEINER, supra note 4, at 151.
183 Immenga & Klocke, supra note 4, at 36.
184 BACHE, supra note 4, at 24; KOPPENSTEINER, supra note 4, at 154; Koppensteiner, La protection, supra note 175, at 71.
185 See note 166 supra and accompanying text.
186 KOPPENSTEINER, supra note 4, at 163.
187 Id. at 96; Koppensteiner, La protection, supra note 175, at 87.
188 For a discussion of these problems see Barz, Beherrschungs- und Gewinnabführungsverträge mit ausländischer Aktiengesellschaft, 21 Betriebsberater 1168 (1966); Immenga & Klocke, supra note 4, at 53.