CHARLES UNIVERSITY

Faculty of Law

Heorhi Kolas

Companies in Private International Law

Dissertation

Supervisor: Prof. JUDr. Monika Pauknerová, CSc., DSc.

Programme of study: Theoretical Legal Sciences –
Law and Legal Theory in European Context

Date of dissertation (closure of manuscript): 28. 01. 2024

I declare that I wrote the submitted dissertation independently and that all the sources were duly stated and that the dissertation has not been used to attain another or the same degree.

Furthermore, I declare that the actual text of the dissertation, including footnotes, has 348,575 characters including spaces.

Heorhi Kolas

In Prague on 28. 01. 2024

To the courageous and resilient souls who venture abroad in search of refuge or opportunity, driven by both fear and hope.

In the cherished memory of my late grandparents.

I express my sincere gratitude to my supervisor, Prof. JUDr. Monika Pauknerová, CSc., DSc., for her unwavering support, wise guidance, and continuous encouragement.

I am profoundly thankful to my family for their loving care and for instilling in me a curiosity for science.

I extend my deep appreciation to my dear friends who supported me throughout this journey, with special thanks to Andreas Nanos, Charles Guillorit, Ivan Teslenko, Marina Laurynovich, and Matvei Slavenko.

Table of Contents

Introduction

For several decades now, the increasing globalisation of various spheres of life has led to a dramatic growth in international trade and the creation of businesses that transcend national boundaries. In this regard, and due to the current state of legal development of private international law, more complex legal relations with a 'foreign element' inevitably arise. Such relationships give rise to a conflict of laws, wherein collisions occur between the laws and regulations of at least two states: the state in which the legal relationship arose and the state to which the foreign element belongs. Therefore, the determination of the applicable law remains one of the core issues in private international law.

This research will primarily focus on the issue of determining the applicable law to companies (*lex societatis*). Questions regarding the determination of which court has jurisdiction over disputes involving companies (judicial competence) will not be considered. Due to the broad range of entities falling under the term 'company' in private international law, the study will concentrate on business organisations aiming for profit-making, which have legal personality. This focus stems from the research's primary concentration on studying the European Union law and the law of the Czech Republic. Consequently, it will rely on the definitions provided by the Czech Business Corporations Act (Act No. 90/2012 Coll. of 25 January 2012, on Business Companies and Cooperatives) and the definition of a company outlined in Article 54 of the Treaty on the Functioning of the European Union (TFEU).

Conflict of laws in corporate relations involving a foreign element carries high risks and can lead to devastating consequences, particularly in the absence of a clear understanding of the fundamental concepts of private international law and company law. Determining the applicable law to companies holds significant practical implications. It is crucial for dispute resolution, as it directly impacts a company's legal capacity and legal personality. Disputes arising from a conflict of laws carry legal uncertainty, which hinders cross-border business relationships and poses potential risks for various stakeholders, including the companies themselves, their members, employees, creditors, and states. Modern private international law should carefully consider all these interests, concerns, and expectations.

Moreover, within the European Union, the formation of new corporate relationships represents a major challenge for private international law. Freedom of establishment, cross-border conversions and the emergence of supranational European business organisations coexist with the absence of a single system of company forms and the absence of uniform criteria for determining the law applicable to companies.

A great deal of work has been done to address the issues mentioned above, leading to the emergence of numerous approaches, methods, and theories in private international law. However, with international trade continuing to grow at an unprecedented pace, further research is required to address specific issues concerning the determination of applicable law to companies. Falling behind in this area is unacceptable, as ineffective legal regulations hold back the development of international trade and slow down the growth of national economies.

This research aims to identify and conduct a comprehensive and comparative analysis of the current problems of private international law concerning determining the law applicable to companies, as well as to identify and analyse solutions to these specific problems.

To achieve the stated aim, the research employs doctrinal analysis, historical, and comparative methods and provides examples of legal regulations and doctrine from the following countries: Belarus, Belgium, China, the Czech Republic, Egypt, France, Germany, Italy, Kazakhstan, Madagascar, the Netherlands, Russia, Spain, Switzerland, Tunisia, Turkey, Ukraine, the United Kingdom, and the United States.

The findings of this research could contribute to the development of new theories and approaches and are expected to hold practical significance for legal scholars, practitioners, policymakers, and companies engaged in cross-border business activities, as well as have the potential to influence the development of national or European Union legislation.

The research consists of twenty-one chapters combined into five parts: ‘The Concept of Private International Law’, ‘The Concept of Company in Private International Law’, ‘The Concept of Lex Societatis and its Scope in Private International Law’, ‘Theories of Determining the Law Applicable to Companies’, and ‘Cross-border Conversions in European Union Law’.

The first part explores the general concepts of private international law, including its historical development and the fundamental theories on which it is built. It examines the notion and scope of private international law, European private international law, and the issues of unification and harmonisation of law. These foundations are crucial for the subsequent chapters.

The second part deals with the problem of understanding the term ‘company’ in private international law, conducting a complex analysis of the concepts of person, legal person, and company, as well as the main theories associated with them. It also addresses the issue of recognising companies abroad. Furthermore, this part explores supranational business organisations governed by European Union law, such as the European Economic Interest Grouping (EEIG), the European public limited liability company or Societal Europaea (SE), and the European Cooperative Society (SCE).

The third part is dedicated to the key concept of this study, which is the law applicable to the company (*lex societatis*). It identifies the scope of *lex societatis* and its variations in different national legal systems. Additionally, it investigates the distinctions between the concept of '*lex societatis*' and the concept of 'nationality' of the company.

The fourth part covers the analysis of theories used in different legal systems to determine the law applicable to companies. It explores two main theories: the theory of incorporation and the 'real seat' theory. The understanding of each theory, criteria for determining the applicable law, and examples from various national legal systems are analysed, along with their advantages and disadvantages. Besides these two main theories, other alternative and mixed theories are examined, as well as the application of autonomy of the will in determining the applicable law.

The fifth part focuses on the issues of private international law in the European Union context, in particular freedom of establishment. It pays particular attention to the analysis of the practice of the Court of Justice of the European Union, which has a significant impact on the harmonisation and unification of European private international law, including the approaches to determining the law applicable to companies. The following key cases of the Court of Justice of the European Union are to be analysed: Daily Mail [1988], Centros Ltd vs. Erhvervsog Selskabsstyrelsen (1999), Überseering BV vs. Nordic Construction Company Baumanagement GmbH (NCC) (2002), Inspire Art Ltd (2003), Cartesio [2008], VALE Építési (2012), and Polbud - Wykonawstwo sp. z o.o. (2017).

Furthermore, this part of the research deals with cross-border conversions within the European Union, focusing primarily on seat transfer according to the provisions of the recent in-force Directive (EU) 2019/2121 and the legislation of the Czech Republic.

1. The Concept of Private International Law

1.1. Evolution of the Private International Law Doctrine

1.1.1 Private International Law in Ancient Times

Throughout the ages, the history of humankind has been built on cooperation and trade. There can be no individual, family, clan, tribe, or nation that can successfully exist in isolation; each of them has to work alongside others to become stronger and flourish. Humanity has benefited greatly from international trade.

Knowledge, technologies, alphabets, religions, cultures, customs, and eventually law were transported along with the goods through all the world's known trade routes, from the West to the East, from the North to the South.

In ancient times, the Phoenicians, Greeks, and Romans traded all over the Mediterranean Sea, settling their new cities (*poleis*). During the Middle Ages, Chinese merchants traded with Europeans, creating the Silk Road with numerous cities along the trade route. During the Age of Exploration, new types of food and materials were transported from colonies across the oceans, and new technologies and people came to the New World. In the New Age, the Industrial Revolution made humanity change the geography of the planet to transport products faster via the Suez and Panama Canal. The sky has been conquered in the previous century, and goods and services are sent even into space nowadays. The development of global trade has played a significant role in making all these achievements possible.

Trade serves to unite humanity and reveals the many common interests that exist over the differences. Its economic interest makes us learn tolerance, humanity, and respect for each other. It may prevent conflicts and even wars.[1] Not to mention the fact that the strengthening of cooperation between people from different parts of the world and the removal of barriers adds tremendously to our common well-being.

Historically, every modern state has had its legal system. It would be unnecessary to explain why.[2] Merchants wishing to trade in a foreign country must comply with its law; also, they would expect to remain subject to their home country's law, its rights, and protections. This creates a conflict of laws, a situation where two or more legal systems compete to regulate a single legal relationship. A system capable of responding to all these challenges is necessary. Private international law has become such a system.

---

[1] See JACKSON, O. Matthew – NEI, Stephen. *Networks of Military Alliances, Wars, and International Trade*. In: SSRN [online]. [Accessed 14 April 2015]. Available at: https://ssrn.com/abstract=2389300, http://dx.doi.org/10.2139/ssrn.2389300.

[2] See DAVID, René – JAUFFRET-SPINOSI, Camille – GORE, Marie. *Les grands systèmes de droit contemporains*. *[Major legal systems in the world today]*. 12th edition. Paris: Dalloz, 2016, 542 pages.

The origins of private international law can be traced back to the rules on the legal status of foreigners in ancient Greece and Rome.[3] Besides Europe, the rules about aliens were also present in ancient India, Mesopotamia, Egypt, and Judea.[4]

In ancient Greece, some limitations of legal capacity were established for certain categories of foreigners, such as Hellenes (Greeks) from other *poleis* or Persians. Slaves and barbarians, however, were not recognised as subjects of law at all. The next fundamentally new milestone in enshrining the rules on foreigners was the *jus gentium* in ancient Rome. It was a set of thoroughly elaborated rules which regulated legal relationships involving foreigners (*peregrini*) who were neither slaves nor Roman citizens. The legal relationships between Roman citizens were governed by *jus civile*. Both the *jus gentium* and the *jus civile* were part of Roman law. However, the rules of foreign law did not find their application. As a result, ancient Roman law did not know any conflict of law between the rules of different legal systems.[5]

Therefore, these rules were not private international law in the modern sense covered by this research. In the modern view, these rules were the law of foreigners (more on this matter can be found in chapter 3.3 of this research).

1.1.2 The Statutory School of Post-Glossators

The development of modern private international law theory can be traced back to the work of the glossators and post-glossators in medieval northern Italy in the thirteenth and fifteenth centuries. At that time, Italian lawyers began to wonder about the application of foreign law due to the need to adjudicate disputes with foreign merchants. The basis of their ideas was undoubtedly Roman law. However, because Roman law did not develop conflict-of-laws rules, they adapted it to solve the specific conflict-of-laws matter through free, scholastic interpretation of Roman texts, writing new rules as a comment (gloss).

The post-glossators, Bartolus de Sassoferrato (1314-1357) and Baldus de Ubaldis (1327-1400), classified rules from these comments into categories according to their content. For each category, they have established a conflict of laws principle, defining the scope of its application.

---

[3] See PHILLIPSON, Coleman. *The International Law and Custom of Ancient Greece and Rome*. *Volume 1*. London: MacMillan and Co, 1911. 421 pages. In: Internet Archive [online]. [Accessed 14 April 2023]. Available at: https://archive.org/details/in-ternationallaw01philuoft/mode/1up.

[4] PEROGOVSKII, Vasilii. *O nachalah mezhdunarodnogo prava otnositel'no inostrantsev u narodov drevnego mira. [On the Origin of International Law on Foreigners in the Ancient World]*. Kyiv: V universitetskoi tipografii, 1859. pp. 6-17. In: Yaroslav Mudryi National Library of Ukraine [online]. [Accessed 14 April 2023]. Available at: https://web.nlu.org.ua/view.html?id=104.

[5] NEFEDOV, Boris Ivanovich. The Emergence of International Private Law. Chapter I. *Moscow Journal of International Law*, No. 1, 2016, pp. 3-18. In: Moscow Journal of International Law [online]. [Accessed 14 April 2023]. Available at: https://www.mjil.ru/jour/article/view/125?locale=en_US.

The rules were divided into three groups of statutes (laws): personal, real, and mixed statutes. The considerations according to which the rules were classified into each category varied. In resolving conflict of laws issues, the statutory theory uses rules but not facts.[6]

Baldus substantiated the application of three conflict-of-laws principles for the resolution of specific cases, which are used today: the law of the place of location (*lex rei sitae*) for inheriting real estate by law; the law of the residence (*lex domicilii*) for the testator for the inheritance by will; the law where a legal act takes place (*lex loci actus*) for the form of legal acts, and others.[7]

1.1.3 French Statute Theory

In the sixteenth century, during a period of legal and political fragmentation in France, a doctrine known as French statute theory emerged. Its proponents adopted the working methods of the commentators, but their conception differed. The most notable representatives of this theory were Charles Dumoulin (1500-1566) and Bertrand d'Argentré (1519-1590).[8]

Dumoulin made a significant contribution to the field of private international law. He identified three main categories concerning the application of statutes: (1) the form of acts and procedures governed by the *lex loci actus*; (2) substantive questions not dependent on the will of the parties, which may fall under either real statutes operating *in rem* or personal statutes applying *in personam*; and (3) questions affecting the merits that are dependent upon the will of the parties. In this regard, Dumoulin argued that the intention of the contracting parties, whether expressed or implied, should be considered a source of law that supersedes the mere authority of a statute, which is limited by the territory of its state.[9] This idea forms the basis of today's doctrine of the autonomy of will for contractual obligations (*lex voluntatis*).

While Dumoulin focused on natural law and personal statutes, d'Argentré adhered to a more positivist approach and suggested that statutes should presumptively be considered territorial.[10]

---

[6] KUČERA, Zdeněk. *Mezinárodní právo soukromé*. *[Private International Law]*. 5th edition. Brno: Doplněk, 2001, p. 71.

[7] See LUNTS, Lazar' Adol'fovich. *Kurs mezhdunarodnogo chastnogo prava: Obshchaya chast'*. *[Course of International Private Law: General Part]*. Moscow: Yuridicheskaya literatura, 1973, p. 133.

[8] MILLS, Alex. The Private History of International Law. *The International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006, pp. 13-14. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/3663311.

[9] YNTEMA, E. Hessel. The Historic Bases of Private International Law. *American Journal of Comparative Law*, Vol. 2, No. 3, 1953, p. 305. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/837480.

[10] MILLS, Alex. The Private History of International Law. *The International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006, p. 14. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/3663311.

1.1.4 Dutch Statute Theory

The concept of territorial sovereignty was further developed by lawyers in the Netherlands. Dutch scholars were the first to raise the question of why foreign statutes can, in principle, apply beyond their state's territory. They were heavily influenced by Hugo Grotius's doctrine of sovereignty from 1625.[11] As a result, the theory of statutes acquired a new dimension. The most prominent representatives of the Dutch school were Ulric Huber (1636-1694), Paulus Voet (1619-1677), and his son Johannes Voet (1647-1714). They considered all statutes to be territorial by nature and believed that there was no sovereign obligation for a state to apply foreign law. Instead, the application of foreign laws could be based on the principle of international comity (*comitas gentium*). Huber explained that 'the solution to the problem must be derived not exclusively from civil law but from the convenience and tacit consent of nations'.[12]

The Dutch school, having completed the theory of statutes, started a new trend in the doctrine of private international law that began to take shape towards the end of the nineteenth century. This trend was largely based on the works of the renowned German jurist Friedrich Carl von Savigny (1779-1861).[13] Until the early nineteenth century, there was a consensus on the fundamental rules of private international law. These rules, rooted in statute theory, were incorporated into so-called Enlightenment-era codes such as the Bavarian Codex Maximilianeus Bavaricus Civilis of 1756, the Prussian General Land Law of 1794, the French Civil Code of 1804, and the Austrian Civil Code of 1811.[14]

1.1.5 Anglo-American Doctrine

The Anglo-American doctrine of private international law has its origins in the first half of the nineteenth century. It first emerged in the United States of America and was later adopted in the United Kingdom.[15]

---

[11] Sovereignty was defined by Hugo Grotius in his De Iure Belli ac Pacis [On the Law of War and Peace] of 1625 as follows: 'That power [*potestas*] is called sovereign [*summa potestas*] whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will'. STRAUMANN, Benjamin. Early Modern Sovereignty and Its Limits, Theoretical Inquiries in Law, Vol. 16, No. 2, 2015, p. 424. In: TIL [online]. [Accessed 14 April 2023]. Available at: https://www7.tau.ac.il/ojs/index.php/til/article/view/1344/1389.

[12] SCHULTZ, Thomas – MITCHENSON, Jason. The History of Comity. *Forthcoming, Jus Gentium – Journal of International Legal History*, Vol. 5, 2019. In: SSRN [online]. [Accessed 14 April 2023]. Available at: https://ssrn.com/abstract=3405341, http://dx.doi.org/10.2139/ssrn.3405341.

[13] DMITRIEVA, Galina Kirillovna. Istoriya nauki mezhdunarodnogo chastnogo prava. [History of International Private Law Doctrine], *Vestnik Universiteta imeni O. E. Kutafina. [Bulletin of the O.E. Kutafin University]*, No. 2, 2015, pp. 22-41. In: CyberLeninka [online]. [Accessed 14 April 2023]. Available at: https://cyberleninka.ru/article/n/istoriya-nauki-mezhdunarodnogo-chastnogo-prava.

[14] As per Article 3 French Civil Code, the legal status of immovable property, including that possessed by foreign nationals, is subject to French law. The laws concerning civil status and the legal capacity of individuals are applicable to French nationals, even if they reside in foreign countries.

[15] JUENGER, K. Friedrich. A Page of History. *Mercer Law Review*, Vol. 35, Issue 2, 1984, pp. 436-440.

Joseph Story (1779-1845) is known for his Commentaries on the Conflict of Laws published in 1834.[16] Story is also credited with being the first to use the term 'private international law'. However, at that time, the term was used interchangeably with 'conflict of laws', which already existed and was commonly used. In Europe, the term 'private international law' first appeared in 1841 in a work by Wilhelm Schäffner (1815-1897), The Development of Private International Law (*Entwicklung des Internationalen Privatrechts*).[17]

According to Story, a state should only apply its laws within its territory. This idea is rooted in the principle of territoriality. On the other hand, his doctrine incorporates the concept of international comity, allowing for the application of foreign law in certain cases. This principle is known as the doctrine of 'vested rights'. The state has to safeguard rights acquired abroad under foreign law. The judge does not apply foreign law directly but protects subjective rights that have been appropriately acquired under foreign law (vested rights).[18]

1.1.6 Friedrich Carl von Savigny's Theory

The doctrine of Friedrich Carl von Savigny (1779-1861) described in his *System des heutigen römischen Rechts*, was quite a revolution in the theory of private international law.[19]

Savigny rejected the statute theory altogether and proposed that the basic unit of private international law is the legal relationship. The role of private international law is to determine the applicable law for each legal relationship, assigning it to a specific seat (domicile) for every legal relationship. Savigny's approach places central importance on the fact that the private international law rules he developed are universal and shared by all nations, forming an 'international community of law' derived from the existence of a 'community of nations'. Savigny advocated for a universal approach to private international law, recognizing that differences among national legal systems could be overcome through the adoption of international treaties.[20]

---

[16] See STORY, Joseph. *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments.* Boston: Hilliard, Gray, and Cº, 1834. 557 pages. In: Google Books [online]. [Accessed 14 April 2023]. Available at: https://books.google.com/books?id-=4Ao9AAAAIAAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false.

[17] ANUFRIEVA, Lyudmila Petrovna. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]. Volume 1: Obshchaya chast'. [General Part]*. Moscow: Izdatel'stvo BEK, 2000, pp. 50-51.

[18] NORTH, Peter – FAWCETT, J. James. *Cheshire and North's Private International Law.* 13th edition. Oxford: Oxford University Press, 2004, pp. 20-22. See also CARSWELL, R. D. The Doctrine of Vested Rights in Private International Law. *The International and Comparative Law Quarterly*, Vol. 8, No. 2, 1959, pp. 268-288. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/755805.

[19] SAVIGNY, von Friedrich Carl. *System des heutigen Römischen Rechts. [System of Contemporary Roman Law]. Volume 8*. Berlin: Bei Veit und Comp., 1849. 540 pages. In: Deutsches Textarchiv [online]. [Accessed 14 April 2023]. Available at: https://www.deutschestextarchiv.de/-book/view/savigny_system08_1849?p=1.

[20] MILLS, Alex. The Private History of International Law. *The International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006, pp. 34-36. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/3663311 and also MILLS, Alex. Connecting Public and Private International Law. In:

1.1.7 Internationalism and Positivism

Savigny's doctrine gave rise to two major currents in private international law that still exist today: positivism and internationalism. The 'internationalists' embraced the idea of an international legal community.

According to the views of the adherents of the internationalism doctrine, private international law is derived from public international law, which distinguishes the personal and subject matter jurisdiction of different legal orders. They believe that a comprehensive system of conflict of laws rules can be derived from public international law.[21]

Their main legacy lies in the establishment of institutions for the unification of private international law. The first Conference on Private International Law was convened in The Hague in 1893. It did not result in the adoption of a single private international law codification as intended. However, many international treaties have been adopted since then, and many particular issues of private international law have been unified.

In contrast, the positivists abandoned the idea of searching for universal principles. They see the system of conflict of laws rules as part of the national law of each particular state, adhering to a very pragmatic and empirical approach. Their contribution lies in the development of rather practical concepts in private international law, including *renvoi*, problems of qualification, application of foreign law, public policy doctrine (*ordre public)*, and the development of conflict of laws rules related to torts, contractual obligations, rights *in rem*, etc.[22]

Researchers are also attempting to find a certain compromise between the two schools. One such approach is the comparative approach, founded by Ernst Rabel. This approach emphasises the close relationship between private international law and public international law while acknowledging that private international law forms a part of the legal system of each state. By conducting a comparative analysis of national legislation, scholars attempt to identify the common and general foundations of private international law, intending to find a path towards its unification.[23]

RUIZ ABOU-NIGM, Veronica – French, Duncan, eds., et al. *Linkages and Boundaries in Private and Public International Law*. Oxford: Hart Publishing, 2018, p. 6. ISBN 978-1509918652. In: UCL Discovery [online]. [Accessed 14 April 2023]. Available at: https://discovery.ucl.ac.uk/id/eprint/10038205/1/Mills%20-%20Connecting%20Public%20and%20Private%20International%20Law%20(final).pdf.

[21] KUČERA, Zdeněk. *Mezinárodní právo soukromé*. *[Private International Law]*. 5th edition. Brno: Doplněk, 2001, p. 91.

[22] DMITRIEVA, Galina Kirillovna. Istoriya nauki mezhdunarodnogo chastnogo prava. [History of International Private Law Doctrine], *Vestnik Universiteta imeni O. E. Kutafina. [Bulletin of the O.E. Kutafin University]*, No. 2, 2015, pp. 22-41. In: CyberLeninka [online]. [Accessed 14 April 2023]. Available at: https://cyberleninka.ru/article/n/istoriya-nauki-mezhdunarodnogo-chastnogo-prava.

[23] KALENSKÝ, Pavel. Universalismus a "nacionalismus" v doktríně mezinárodního práva soukromého. [Universalism and 'Nationalism' in the Doctrine of Private International Law]. *Časopis pro mezinárodní právo*.

1.2. Modern Concept of Private International Law

1.2.1 Scope of Private International Law

Currently, private international law is defined as a branch of law that encompasses a set of special legal regulations exclusively designed to regulate private law relations involving a foreign element.[24] Private international law generally comprises three groups of legal rules. There are conflict-of-laws rules that determine the applicable law (also known as *lex causae*), rules that determine competent judicial authority (also known as *forum*), and rules that establish the procedures for the recognition and enforcement of foreign judgments.

For instance, in France, a broader conception prevails; private international law (*droit international privé*) includes the law of nationality (*droit de la nationalité*) and the status of foreigners (*condition des étrangers*), as well as conflicts of laws (*conflits de lois*) and conflicts of jurisdictions (*conflits de juridictions*).[25] In contrast, in the United Kingdom and the United States, the terms 'conflict of laws' and 'private international law' may be used synonymously.[26]

On the other hand, there is a narrower approach to defining private international law. Hence, in Germany, private international law (*Internationales Privatrecht*) solely covers conflicts of laws. Jurisdiction and the recognition of foreign judgments are subject to international civil procedure (*Internationales Zivilprozessrecht*).[27]

For the purposes and within the scope of this research, only the issues of applicable law in corporate legal relationships are addressed. Matters concerning jurisdiction and the recognition of foreign judgments are not examined.

[Journal of International Law], Vol. 12, No. 4, 1969, pp. 60-61. See also RABEL, Ernst. *The Conflict of Laws: A Comparative Study*. *Volume 2*. Ann Arbor: The University of Michigan Press, 1960. In: The University of Michigan Law School [online]. [Accessed 14 April 2023]. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1011&context=michigan_legal_studies; JUENGER, K. Friedrich. Need for a Comparative Approach to Choice-of-Law Problems. *Tulane Law Review*, Vol. 73, Issue 4, 1999, pp. 1326-1337; REIMANN, Mathias. Parochialism in American Conflicts of Laws. *The American Journal of Comparative Law*, Vol. 49, No. 3, 2001, p. 369. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/840897; MEHREN, von Arthur Taylor. The Contribution of Comparative Law to the Theory and Practice of Private International Law. *The American Journal of Comparative Law*, Vol. 26, Issue 1, 1978, pp. 38-39.

[24] KUČERA, Zdeněk – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé. [Private International Law]*. 8th edition. Pilsen: Aleš Čeněk, s.r.o.; Brno: Doplněk, 2015, p. 27.

[25] BATIFFOL, Henri – LAGARDE, Paul. *International Privé Droit*. In: Encyclopædia Universalis France [online]. [Accessed 14 April 2023]. Available at: https://www.universalis.fr/encyclopedie/droit-international-prive/.

[26] HAY, Peter – BORCHERS, J. Patrick – FREER, D. Richard. *Conflict of Laws, Private International Law, Cases and Materials*. 16th edition. Foundation Press, 2021, 1253 pages. ISBN 978-1647085995.

[27] GEIMER, Reinhold. *Internationales Zivilprozessrecht*. *[International Civil Procedure]*. 8th edition. Cologne: Verlag Dr. Otto Schmidt, 2020, 1616 pages. ISBN 978-3504471149.

1.2.2 The Foreign Element in Private International Law

Four varieties of a foreign element can be distinguished, indicating that the legal relationship is subject to private international law: (1) the subject of the legal relationship (e.g. the legal entity is established under foreign law or resides abroad); (2) the object of the legal relationship (e.g. the company's real estate is located in a foreign country); (3) a fact legally significant for the creation or existence of a legal relationship (e.g. the transportation company was involved in an incident that occurred abroad); (4) a legal relationship that is legally dependent on another legal relationship governed by foreign law (e.g. the company's shareholders have chosen foreign law as the applicable law to govern the shareholders' agreement).[28]

1.2.3 Private International Law Method

Private international law uses distinct methods to address legal relationships involving a foreign element, such as the conflict-of-laws method. The conflict-of-laws method involves determining the relevant national legal system and its associated substantive rules. This choice is made by what is known as the 'connecting factor'.

Conflict-of-laws rules have more of a 'technical' nature, defining the applicable legal order rather than the actual substance of the matter.[29] In contrast to typical substantive or procedural rules, they consist of two main elements: scope (which defines the relationships to be regulated) and connecting factor (the rule for determining the applicable legal order, e.g. *lex domicilii, lex rei sitae, lex fori, lex loci actus*, etc.).[30]

The determination of applicable law (*lex causae*) should be based on the blindfold approach, which was introduced by Friedrich Carl von Savigny. This approach involves determining the applicable law without taking into account the contents of that law or any other laws. However, there is another challenge in determining the applicable law, known as the problem of qualification. This challenge involves identifying the relevant facts and placing them within legal categories to which a choice of law rule may be applied; a process known as characterisation or qualification.[31]

---

[28] KUČERA, Zdeněk – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé. [Private International Law]*. 8th edition. Pilsen: Aleš Čeněk, s.r.o.; Brno: Doplněk, 2015, pp. 24-25.

[29] BOGDAN, Michael, Marta PERTEGÁS SENDER. *Concise introduction to EU private international law*. 4th edition. Groningen: Europa Law Publishing, 2019, p. 2.

[30] ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University, 2015, p. 37. ISBN 978-80-210-8122-2. In: Právnická fakulta. Masarykova univerzita [online]. [Accessed 14 April 2023]. Available at: https://science.law.muni.cz/knihy/monografie/Rozehnalova_-Czech_private_international_law.pdf.

[31] CALSTER, van Geert. *European Private International Law*. 2nd edition. Oxford: Hart Publishing, 2016, pp. 4-5.

To put it simply, the court, before determining the applicable legal order, should abstain from considering whether it is favourable to the parties or not. Their views and expectations should be disregarded.

Furthermore, it should be noted that an important aspect of private international law is the principle of autonomy of the will of the parties, allowing them to choose the law to which they wish to subject their legal relations. Although there are plenty of exceptions to this rule.[32]

1.2.4 Sources of Private International Law

The specific method and complex legal nature are represented by the diversity of private international law sources. The main sources are domestic law, international treaties and customary international law, together with so-called 'soft law' and *lex mercatoria.*

Domestic legislation serves as a crucial source of private international law and can take two main forms: either as a single codifying act (typically a law or code on private international law) or as a collection of legal rules scattered throughout various legislative acts.[33]

For European Union member states, an additional source is the supranational EU law, which encompasses three distinct categories: primary law, secondary law, and supplementary law. Primary law primarily consists of the founding treaties of the EU, while secondary law provides the basis for private international law rules through EU Regulations. Supplementary law arises from international treaties forged between the EU member states and third countries.[34]

International treaties can be classified into bilateral and multilateral treaties, as well as universal and regional treaties. Examples of such treaties include The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), and the Convention of 30 June 2005 on Choice of Court Agreements (Hague, 2005) (HCCH).

---

[32] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeysko-go-soyuza/viewer.

[33] In some countries, there are unified acts that govern private international law. These countries include Italy, China, Ukraine, the Czech Republic, and Switzerland. On the other hand, some countries have opted for a single consolidated code to regulate this area of law. This approach is adopted by Tunisia, Belgium, Bulgaria, and Turkey. In France, Germany, Russia, Belarus, and Kazakhstan, provisions regarding private international law are integrated into their civil codes. In contrast, the United Kingdom and the United States rely on separate statutes and case law to address private international law matters. In 2020, the United Kingdom introduced the Private International Law (Implementation of Agreements) Act 2020, however, as its name suggests, this act primarily serves for implementing treaties on private international law.

[34] ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University, 2015, p. 37. ISBN 978-80-210-8122-2. In: Právnická fakulta. Masarykova univerzita [online]. [Accessed 14 April 2023]. Available at: https://science.law.muni.cz/knihy/monografie/Rozehnalova_-Czech_private_international_law.pdf.

Customary international law and soft law as a source of private international law have a special place in the hierarchy of sources as they do not have official legal power, however, such rules could be implemented directly in agreements, which is particularly common in the sale of goods, transportation, international payment agreements (e.g. INCOTERMS or UCP 600).

1.2.5 Private International Law as an International and Private Law

Although international treaties form the basis of modern private international law, and practitioners primarily turn to them, private international law is not part of international law. Private international law is a separate branch of law with specific subjects, methods, and sources that distinguish it from closely related legal systems: public international law and domestic civil law.[35] The three attributes of the subject of private international law are the existence of private law relations, the presence of a foreign element, the connection to two or more foreign states, and the clash of at least two legal systems – the one where the legal relationship with a foreign element arose and the one to which that foreign element belongs.

The prevailing opinion is that contemporary private international law is a branch of national law, despite its international dimension. A notable exception to this is the increasing number of regulations in EU law.[36] Unlike other branches of national law, private international law is considerably more tolerant of foreign law. It was designed to allow the application of foreign law.

It is crucial to keep in mind that private international law solely deals with relationships of a private law nature. There is a significant temptation to perceive private international law as a comprehensive international business law that covers all aspects of conducting business abroad. However, this is not entirely accurate. Private international law does not regulate public law relationships, even though they may have close connections to foreign elements and private law relationships. Examples of such public law relationships include tax, customs, investment legal relationships, financial control in import and export operations, bank systems, and more.

Researchers often fail to make this distinction in their works, leading to confusion among readers when they consider public law relations as subjects of private international law. The terminology used in this context can be confusing, as concepts such as nationality, residency, alien, foreigner, or foreign company can be used in both frameworks.

---

[35] ERPYLEVA, Nataliya Yur'evna. *Mezhdunarodnoe chastnoe pravo: Uchebnik dlya vuzov. [International Private Law: Textbook for Universities].* Moscow: Izdatel'skii dom Vysshei shkoly ekonomiki, 2015, p. 19. In: Izdatel'skii dom VSHE [online]. [Accessed 14 April 2023]. Available at: https://id.hse.ru/data/2015/04/18/1105085330/%D0%95%D1%80%D0%BF%D1%8B%D0%BB%D0%B5%D0%B2%D0%B0-%D1%82%D0%B5%D0%BA%D1%81%D1%82-litres.pdf.

[36] CALSTER, van Geert. *European Private International Law.* 2nd edition. Oxford: Hart Publishing, 2016, p. 2.

It is essential to emphasise that the legal relationships mentioned above, despite often involving foreign elements, are not within the scope of private international law. Firstly, they are primarily focused on public law matters. Moreover, they lack the key characteristic of a conflict of laws, as there is no competition between at least two legal systems. Instead, they primarily pertain to the laws applicable to foreigners, typically involving adherence to the rules of the state of residence or regulations governing activities conducted by foreigners abroad or requirements to report to their home state for activities conducted abroad. These aspects do not have the complex conflict of laws that is characteristic of private international law cases.

1.3 Unification and Harmonisation of Private International Law

When discussing the role of international treaties and international customary law in private international law, the questions of unification and harmonisation of different legal systems cannot be overlooked. Moreover, a new phenomenon of the so-called Europeanization of legal systems has emerged in the territory of EU member states.[37]

Unification of law is the creation of identical and unified rules for the national law of different states. The unification of law requires international cooperation. Unified conflict-of-laws and substantive rules are implemented in the national legislation with the help of international treaties. Consequently, the very possibility of conflicts between the legal systems of signatories of such treaties is eliminated.

The development of unified rules in private international law relies heavily on the collaboration of international agencies and organisations. Prominent examples of such institutions include the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC).[38]

The unification of law is a rather complex process, often filled with insoluble contradictions and requiring the engagement of numerous participants. However, unification is only one part of a large process aimed at bringing together national legal systems, at eliminating or reducing their differences. Such a process is called the harmonisation of law.

---

[37] See TOMÁŠEK, Michal. Lesk a bída "europeizace" občanského práva. [The Splendor and Misery of the "Europeanization" of Civil Law]. In: *Právník. [Lawyer]*, Vol. 143, No. 1, 2004. pp. 1-15; ČERVENKOVÁ, Lenka. *Europeanization and Unification of Private International Law.* In: DÁVID, Radovan, ed., et al. *COFOLA 2008 Conference: Key Points and Ideas*. 1st edition. Brno: Masarykova univerzita, 2008, p. 56.

[38] See DORORINA, Natal'ya Georgievna. *Mezhdunarodnye organizatsii, zanimayushchiesya unifikatsiei prava. [International Organisations Involved in Legal Unification]*. In: MAKOVSKII Aleksandr L'vovich – HLESTOVA, Irina Olegovna, eds. *Problemy unifikatsii mezhdunarodnogo chastnogo prava: Monografiya. [Problems of Unification of International Private Law: Monograph]*. Moscow: Institut zakonodatel'stva i sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federatsii, 2012, pp. 59-187.

Harmonisation is sometimes a barely visible process. It does not imply the mutual rule-making activity of several states. It can occur spontaneously or deliberately. Examples of spontaneous harmonisation include the imposition by one state of its laws on another state (the spreading of the law of conquerors to the territories of conquered peoples, e.g. the spreading of English, Spanish, French, and Dutch law in their overseas colonies), the reception of foreign laws and best practices (the reception of Roman law in Medieval Europe, which led to the formation of a single continental law system). These examples show no intention to harmonise legislation but naturally led to the formation of common and harmonised principles.

The deliberate harmonisation includes cases where the state itself decides to adopt part of the foreign law. This happens unilaterally. Examples are the adaptation of so-called model laws and codes, or the introduction of common law elements into the business law of continental law systems to become more attractive to businesses from the United States and the United Kingdom.[39]

1.4 The Concept of European Private International Law

The European Union (EU), since its emergence and to the present day, has been the most prominent and successful example of the unification and harmonisation of both law in general and private international law in particular. Moreover, thanks to the economic weight of the EU member states in the world economy, legal developments from EU law are quickly incorporated into the legislation of other countries.[40]

The scope of European private international law covers private legal relationships that arise in the cross-border interaction within the EU and which are regulated by uniform rules of EU law.[41]

The following groups of EU legal rules should be considered as part of European private international law: (1) legal rules regulating the competence of courts of EU member states in civil cross-border disputes (choice of jurisdiction), as well as issues of legal assistance, (2) conflict-of-

---

[39] BORISOV, Vitalii Nikolaevich et al. – MARYSHEVA, Natal'ya Ivanovna, ed. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]*. 4th edition. Moskov: Institut zakonodatel'stva i sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federatsii, 2018, pp. 107-109. ISBN 5-6040212-7-9.

[40] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, commonly referred to as the General Data Protection Regulation or GDPR, serves as an illustrative example of European law that has been rapidly adopted by non-EU nations. The GDPR provides a comprehensive framework for the protection of personal data of individuals within the European Union. Its impact on data protection laws is global in nature, as many countries have adopted similar regulatory measures or integrated components of the GDPR into their own legal frameworks. See SIMMONS, Dan. *17 Countries with GDPR-like Data Privacy Laws*. In: Comforte: Blog [online]. [Accessed 14 April 2023]. Available at: https://insights.comforte.com/countries-with-gdpr-like-data-privacy-laws.

[41] PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé. [European Private International Law]*. 2nd edition. Prague: C.H. Beck, 2013, p. 10.

laws rules (rules determining applicable law), (3) legal rules regulating the recognition and enforcement of judgments of courts of EU member states, and (4) legal rules intended to regulate specific cases of civil proceedings with a foreign element, such as cross-border mediation or the European payment order.[42]

The term 'European private international law' predominantly refers to the body of law within the European Union. It constitutes an integral part of European Union law, specifically dealing with cross-border legal relationships of private law nature.

The EU is a supranational organisation bringing together twenty-seven member states. EU law refers to the legal system created by the European Union and its institutions. The purpose of EU law is to ensure the functioning of the EU's internal market, promote the protection of the rights of EU citizens, and pursue the EU's policy objectives, such as promoting economic growth and protecting the environment.

EU law is a unique and distinct legal system which has a special status.[43] It appears to be supranational and lies at a certain intersection between the national law of EU member states and international law. EU law has supremacy over national laws within the EU.

In practical terms, this implies that, before applying a provision of a Member State's national law, it is always necessary to ascertain whether there is a unified EU law taking precedence over the relevant provisions of national private international law. It is important to note that this consideration may also impact the application of international treaties.[44]

The EU legal system is based on a complex framework of treaties, regulations, directives, and decisions that are adopted by the EU's institutions, such as the European Commission, the European Parliament, and the European Council.

There are two main groups of sources of EU law – primary and secondary legislation. Primary legislation includes founding treaties: the Treaty establishing the European Community of 1957 (EEC Treaty, Treaty of Rome), the Treaty on European Union (TEU, Maastricht Treaty) of 1992, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 1997 (Treaty of Amsterdam), the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European

[42] Ibid., p. 7.
[43] ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University, 2015, p. 31. ISBN 978-80-210-8122-2. In: Právnická fakulta. Masarykova univerzita [online]. [Accessed 14 April 2023]. Available at: https://science.law.muni.cz/knihy/monografie/Rozehnalova_Czech_private_international_law.pdf.
[44] PFEIFFER, Magdalena. Kde bydlí právnická osoba? Obvyklý pobyt a bydliště právnických osob z perspektivy evropského mezinárodního práva soukromého. [Where Does a Legal Person Live? Habitual Residence and Domicile of Legal Persons from the Perspective of European Private International Law]. In: *Právník. [Lawyer]*, Vol. 153, No. 7, 2014, p. 522.

Communities and certain related acts of 2001 (Treaty of Nice), the Treaty on the Functioning of the European Union of 2007 (TFEU), etc. Secondary legislation is legal acts that are adopted further to the primary sources by the EU authorities so that the EU can exercise its powers. These include regulations, directives, decisions, recommendations, and opinions.[45]

Primary sources do not contain direct rules of private international law. They provide the basis for the emergence of the competence of the EU authorities in this sphere. For instance, the legal basis for the EU's competence in this field is primarily derived from Article 220 EEC Treaty and subsequently from Article 81 TFEU. These articles confer the authority and mandate for the EU to develop and enact regulations, directives, and other legal instruments that govern cross-border legal matters within the European Union.

Articles 220 EEC Treaty is the only article of the treaty that addresses the subject falling in the scope of private international law. It provides that EU member states shall enter into negotiations with each other to secure, for the benefit of their nationals, *inter alia*, (1) the mutual recognition of companies and firms, and (2) the simplification of formalities governing the reciprocal recognition and enforcement of judgments and arbitral awards.

According to Article 81(1) TFEU, the EU promotes judicial cooperation in civil matters with cross-border implications, which may include the adoption of measures for the approximation of the laws and regulations of the EU member states and should be based on the principle of mutual recognition of judgments and decisions in extrajudicial cases.

The legal force of secondary sources' legislation depends on the type of the act. According to Article 288 TFEU, regulations are directly applicable in all EU member states; directives are binding, but leave it to the national authorities of each member state to which they are addressed to choose the form and methods of archiving the purpose of a directive; decisions are binding in their entirety, but only regarding whom they are addressed; and recommendations and opinions are non-binding.[46]

Regulations bear numerous advantages. For example, when comparing regulations with treaties, they do not require a certain minimum number of ratifications, and there is no delay in the entry into force, as well as, there is no need to keep track of ratification dates in every contracting state.[47] When comparing regulations and directives, regulations immediately provide a uniform

[45] *EU law*. In: EUR-Lex [online]. [Accessed 14 April 2023]. Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/eu-law.html.
[46] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon in 2007, published in the Official Journal of the European Union (OJ) C 326 on October 26, 2012, pp. 47–390.
[47] BOGDAN, Michael, Marta PERTEGÁS SENDER. *Concise introduction to EU private international law*. 4th edition. Groningen: Europa Law Publishing, 2019, p. 15.

rule that will be applied in any member state, whereas a directive often requires the implementation of its provisions into national legislation.

Examples of the main EU regulations that form the core of private international law are the following: Brussels I Regulation, Brussels Ibis Regulation, Brussels IIbis Regulation, Rome I Regulation, Rome II Regulation, Insolvency Regulation, Service Regulation, Evidence Regulation, European Enforcement Order Regulation, European Payment Order Regulation, Small Claims Procedure Regulation, Maintenance Regulation, Succession Regulation.[48]

The Brussels I Regulation, for example, determines which court has jurisdiction in cross-border disputes within the EU. The Rome I Regulation sets out rules for determining the law applicable to contractual obligations, while the Rome II Regulation governs non-contractual obligations.

Further, EU law includes not only written law but also the EU legal order. This covers general principles derived from decisions of the Court of Justice of the European Union (CJEU) as well as provisions of the Charter of Fundamental Rights of the European Union (CFR). A separate and integral part of EU law is international agreements with non-EU countries or with

---

[48] ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University, 2015, p. 31. ISBN 978-80-210-8122-2. In: Právnická fakulta. Masarykova univerzita [online]. [Accessed 14 April 2023]. Available at: https://science.law.muni.cz/knihy/monografie/Rozehnalova_Czech_private_international_law.pdf.
Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.
Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.
Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.
Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.
Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

international organisations (*sui generis*). They can be directly enforceable, and their legal force is superior to secondary legislation.[49]

Examples of judgments from CJEU concerning the determination of the law applicable to companies include the following cases: Daily Mail, Centros Ltd vs. Erhvervsog Selskabsstyrelsen, Überseering BV vs. Nordic Construction Company Baumanagement GmbH (NCC), Inspire Art Ltd, Commission v Netherlands, Cartesio, National Grid Indus, VALE Építési, Polbud - Wykonawstwo sp. z o.o., and others.[50] The fifth part of this research provides an analysis of the facts of the cases and the main principles derived from these court decisions.

In addition to judgments from the CJEU, the sources of European private international law encompass international treaties and domestic legislation of each EU member state, which have been adopted to implement EU law.[51]

Conclusions of Part 1

1. Private international law has undergone significant development, evolving from being a law focused on foreigners to one that facilitates the application of foreign laws within national systems, expands party autonomy, and introduces international and supranational uniform rules. This suggests that private international law is steadily moving towards the liberalisation of national legislations and the increasing adoption of international and supranational instruments to regulate private law relations.

2. The historical trajectory of private international law reveals its dynamism and inherent adaptability, where a single global event or researcher can have a significant impact. The perspectives on private international law held in the past and our present-day viewpoint suggest that our contemporary understanding of various concepts of private international law will inevitably become part of the historical continuum in the foreseeable future.

---

[49] *EU law*. In: EUR-Lex [online]. [Accessed 14 April 2023]. Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/eu-law.html.

[50] CJEU judgment no 81/87: The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECLI:EU:C:1988:456.
CJEU judgment no C-212/97: Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459.
CJEU judgment no C-208/00: Überseering BV v. Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919.
CJEU judgment no C-167/01: Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.
CJEU judgment no C-210/06: Cartesio Oktató és Szolgáltató bt. [2008] ECR I-09641.
CJEU judgment no C-378/10: Vale Építési kft. [2012] EU:C:2012:440.
CJEU judgment no C-106/16: Polbud-Wykonawstwo sp. z o.o. [2017] EU:C:2017:804.
CJEU judgment no C-411/03: SEVIC Systems [2005] ECR I-10805.

[51] PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé. [European Private International Law]*. 2nd edition. Prague: C.H. Beck, 2013, p. 10.

3. Presently, private international law stands as a distinct branch of law governing private legal relationships involving a foreign element. It employs a specific conflict-of-laws method and encompasses legal rules that regulate three primary areas: the determination of applicable law, the determination of competent jurisdiction, and the procedures associated with the recognition and enforcement of foreign judgments.

4. The sources of private international law include domestic law, EU law, international treaties, and customary international law. The diverse approaches to private international law across different jurisdictions can be addressed through harmonisation and unification of laws. Harmonisation aims to align laws naturally, while unification involves a deliberate rule-making process to establish uniform principles. Notably, the countries of the European Union have achieved significant success in this regard by using a wide range of instruments, rather than limiting themselves to a single approach.

2. The Concept of Company in Private International Law

2.1 The Concept of Person

In legal doctrine, the term 'person' refers to a bearer of rights who is granted legal personhood.[52] A person is a subject of law with legal personality and legal capacity, which is subject to its rights and obligations, can be a plaintiff or defendant in court, and possesses legal capacity in delict. The term 'person' includes two categories: natural persons (individuals, human beings) and legal persons (also known as artificial or juridical persons). However, a 'person' in the legal sense and an actual human being is not quite the same thing.

The term 'person' is derived from the Latin word '*persona*', which originally means an actor's mask or a character in a play. That word is likely a translation of the Greek word '*prosopon*' (*πρόσωπον*), which means a face or an appearance.[53] While modern English uses 'person' as a synonym for a human being, man, woman, or child, in a legal sense, this concept retains its ancient meaning.[54] The original meaning can be found, for example, in Russian law, where a 'person' in legal theory is called '*litso*' (*лицо*), meaning a face.

The concept of a 'person' in legal science is indeed a complex and debated topic. A 'person' is seen as a subject of law that represents a convergence of legal and economic elements. The economic element refers to personal interests, with individuals or groups seeking to fulfil specific interests in the legal framework. The legal element includes the subjective rights provided by law, which sanctions the permissible behaviours for the subject to pursue those interests.[55]

There are two main currents competing on the nature of a 'person': natural law and positive law. From the perspective of natural law, any individual is a 'person' regardless of their legal capacity, including those in a state of mental insanity or a foetus and a deceased. The lack of legal capacity, as the ability to engage in legal relations, is not an obstacle to the recognition of someone as a 'person'. The positivist perception of a 'person' is much more widely represented and is dominant in scientific and educational literature. In the positivist interpretation, a 'person' is considered a natural or legal person, which, per the effective rules of law, is granted legal personality and legal capacity.[56]

---

[52] BERAN, Karel. *The concept of juristic person*. Praha: Wolters Kluwer ČR, 2020, p. 10.
[53] GILL, Christopher. Personhood and personality: The Four-Personae Theory in Cicero, De Officiis I. *Oxford Studies in Ancient Philosophy*, Vol. 6, 1988, pp. 169-199.
[54] *Person*. In: Cambridge University Press & Assessment. Cambridge Dictionary [online]. [Accessed 15 June 2023]. Available at: https://dictionary.cambridge.org/dictionary/english/person.
[55] QUINTANA ADRIANO, Elvia Arcelia. The Natural Person, Legal Entity or Juridical Person and Juridical Personality. *Penn State Journal of Law & International Affairs*, Vol. 4, Issue 1, 2015. In: PennState Law: eLibrary [online]. [Accessed 15 June 2023]. Available at: https://elibrary.law.psu.edu/jlia/vol4/iss1/17.
[56] BIKTAGIROV, Raif Terent'evich. Sub''ekt prava kak opornaya kategoriia yurisprudentsii. [Subject of Law as a Support Category of the Legal Science]. *Grazhdanin. Vybory. Vlast'*. [Citizen. Elections. Power], No. 2, 2018, p. 47.

For instance, the 'normativists' and their most prominent representative, Hans Kelsen, consider that 'persons' exist only when they have rights and obligations; apart from them, a 'person' has no existence whatsoever. A natural person, in the author's view, is not a human being, because a human being is a concept of biology and physiology, whereas a 'person' is a concept of jurisprudence, and their equation is nothing but a manifestation of animism, as attributing the soul to an inanimate object.[57]

Lastly, it is important to note that in English law, the terms 'legal person' and 'legal entity' may define not only non-human artificial or juridical persons but also a 'person' in general, including natural and legal (juridical) persons.[58] Various legal systems use diverse terminology to define a 'person' as a legal category, such as 'legal person' (Czech: *právní osoba*, German: *Rechtsperson*), 'juridical person' (French: *personne juridique*), 'subject of law' (Czech: *subjekt práva*, French: *sujet de droit*, Polish: *podmiot prawa*), 'legal subject' (Czech: *právní subjekt, German: Rechtssubjekt*).

2.2 The Concept and Theories of Legal Person

A single person can achieve numerous things, but when people cooperate, they can accomplish more than individuals working separately. Humanity, being inherently social, develops best through cooperation, where the whole becomes greater than the sum of its parts. By sharing their experiences, knowledge, skills, and assets for a common purpose, a union of people becomes much more effective. Although people have worked together throughout history, the concept of unions of people as separate legal persons emerged relatively recently.

The idea of organisational existence in law was first discussed by jurists in the Roman Republic. In *Corpus iuris civilis*, the term '*persona*' was used in the sense of a role or individual, but not as a 'person' or legal person as understood today. For instance, slaves were referred to as '*personae*' (human beings) even though their legal capacity was very limited. Corporations, on the other hand, were usually referred to using the word '*universitas*', rather than '*persona*'.[59]

In: RTSOIT pri TSIK Rossii [online]. [Accessed 15 June 2023]. Available at: https://www.rcoit.ru/upload/iblock/5dc/ГВВ_2_2018_Субъект%20права%20как%20опорная%20категория%20юриспруденции.pdf.

[57] BERAN, Karel. The Person at Law from the Point of View of Pure Legal Science. *The Lawyer Quarterly*, Vol. 3, No. 1, 2013. In: The Lawyer Quarterly: International Journal for Legal Research [online]. [Accessed 15 June 2023]. Available at: https://tlqnew.ilaw.cas.cz/index.php/tlq/article/view/59.

[58] McLAUGHLIN, Susan. *Unlocking Company Law*. 4th edition. Abingdon: Routledge, 2018, pp. 76-77.

[59] KURKI, A. J. Visa. A Short History of the Right-Holding Person. In: KURKI, A. J. Visa. *Theory of Legal Personhood*. Oxford: Oxford University Press, 2019, pp. 31-54. ISBN 978-0198844037. In: Oxford Academic [online]. [Accessed 15 June 2023]. Available at: https://academic.oup.com/book/35026/chapter/298855110.

Although various organisations and unions existed in ancient times and the Middle Ages, such as universities, guilds of craftsmen and traders, manufactories, and monasteries, the idea of a 'legal person' separate from its members is relatively recent. It took its modern form in the nineteenth century because of global economic development, industrial revolution, and international trade.

The nature of a legal person has been a subject of debate in the doctrine, and two opposing directions can be distinguished. One group of theories views legal persons as special real subjects of private law, while the other group denies their existence as something real.

Among the proponents of the first group are Otto von Gierke and Raymond Saleilles. Otto von Gierke, known for his 'organic theory', draws an analogy between a legal person and a human personality. In his view, a legal person is not merely a collection of individuals, but a social organism functioning as an organic whole. This perspective views legal persons as more than just a sum of their components, but rather as distinct legal entities with a common interest collective identity and purpose.[60] In contrast, Saleilles, who developed the 'theory of reality', considered legal persons as special and real subjects of civil law. Avoiding excessive 'biologization', Saleilles believed that legal persons are not part of the biological or biosocial reality; rather, they exist solely in the social realm, and the 'unity of will' stands as a key characteristic of their existence.[61]

As for the second group of views on the nature of a legal person, the most spread is the theory of fiction. According to its proponents, a legal person is a creature of the law and legal order, a legal fiction, an artificial construction invented by the lawmaker. This concept finds its roots in a papal bull issued by Pope Innocent IV in 1245. Pope Innocent IV articulated that corporations have no soul and only exist in the human imagination, being a '*persona ficta*' or '*corpus mysticum*', a fictitious, non-existent person in real life.[62]

Friedrich Carl von Savigny, a prominent figure in legal theory, defined legal capacity (*Rechtsfähigkeit*) as the ability to hold rights and obligations. In Savigny's view, human beings

---

[60] GIERKE, von Otto. *Die Genossenschaftstheorie und die deutsche Rechtsprechung*. *Making of Modern Law: Foreign, Comparative and International Law, 1600-1926. [Making of modern law: Foreign, comparative and international law, 1600-1926]*. Berlin: Weidmann, 1887, p. 141. In: Google Books [online]. [Accessed 15 June 2023]. Available at: https://books.google.com/books?id=rqs3AAAAMAAJ&printsec=frontcover&hl=ru#v=onepage&q&f=true.

[61] SALEILLES, Raymond. *De la Personnalité Juridique: Histoire Et Théories; Vingt-Cinq Leçons d'Introduction à un Cours de Droit Civil Comparé sur les Personnes Juridiques. [On legal personality; history and theories; twenty-five introductory lessons for a comparative civil law course on legal persons]*. Paris: Rousseau, 1910, pp. 563-571. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/delapersonnalit00saleuoft/mode/1up.

[62] More in KOESSLER, Maximilian. The Person in Imagination or Persona Ficta of the Corporation. *LA Law Review*, Vol. 9, No. 4, 1949, p. 437. In: LSU Law Digital Commons [online]. [Accessed 15 June 2023]. Available at: https://digitalcommons.law.-lsu.edu/lalrev/vol9/iss4/2/.

who are born are considered original persons, possessing natural legal capacity. This capacity can be expanded through positive law, as seen in the case of legal persons, or restricted, as was the case with slaves. However, these expansions or restrictions are not inherent to the natural legal order but are products of positive law, which is a man-made law established by society. Artificial persons do not have any real existence; instead, they are created by law to bind subjective rights and obligations. These legal persons are artificial entities, and their existence is dependent on the legal framework that brings them into being. The rights and obligations associated with legal persons ultimately belong to specific individuals or remain subjectless.[63]

The weakness of the theory of fiction is that its proponents have missed the fact that human legal capacity is also based on the rule of law and, in this sense, is as fictitious as the legal capacity of legal persons.[64] Fiction is also not appropriate as a way of scientifically explaining phenomena; it does not contribute to defining the essence of a concept.[65]

As a result of the development of the theory of fiction, Alois von Brinz proposed the 'purpose theory'. According to Brinz, a legal person cannot be considered a person and a subject; only a physical person (a human being) can be a subject since, in the natural sciences, a human being always remains human, no matter what you call them. Subjective rights and obligations may belong both to a specific subject and serve a specific purpose (object). For legal persons, a subject of law is not required at all, as its role is performed by the property separated for this purpose.[66]

In French literature, very similar views were expressed by Marcel Planiol. He believed that a legal person is a collective property, which as a subject of law is a legal fiction created to simplify its use. But at the same time, he believed in the existence of 'non-subjective legal relations' (rights and obligations) and excluded the existence of such a subject's own will and interests.[67]

---

[63] SAVIGNY, von Friedrich Carl. *System des heutigen Römischen Rechts. [System of Contemporary Roman Law]. Volume 2.* Leipzig: Veit, 1863, pp. 1-29. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/systemdesheutige02saviuoft/mode/2up.

[64] KOZLOVA, Natal'ya Vladimirovna. *Pravosub''ektnost' yuridicheskogo litsa: Uchebnik. [Legal Personality of a Juridical Person: Textbook]*. Moscow: Statut, 2005, 220 pages.

[65] GOLODENKO, Irina Aleksandrovna. *Ponyatie i sushchnost' yuridicheskogo litsa. [The Concept and Essence of a Juridical Person]*. In: VAS'KOVSKII, Evgenii Vladimirovich et al – KANZAFAROVA, Ilona Stanislavovna, ed. *Pravovoe regulirovanie otnoshenii v sfere chastnogo prava: traditsii i sovremennost': k 150-letiyu so dnya rozhdeniya E. V. Vas'kovskogo. [Legal Regulation of Relations in the Field of Private Law: Traditions and Modernity: On the 150th Anniversary of the Birth of E. V. Vaskovsky]*. Odessa: Astroprint, 2016, p. 304.

[66] BRINZ, von Aloys. *Lehrbuch der Pandekten [Textbook of Pandects]. Volume 1.* Erlangen: A. Deichert.1857. 651 pages. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/lehrbuchderpand00bringoog/page/n5/mode/2up.

[67] PLANIOL, Marcel. *Traité élémentaire de droit civil: Conforme au programme officiel des Facultés de droit. [Elementary Treatise on Civil Law: In Accordance with the Official Curriculum of Law Faculties]. Volume 1.* Paris: Librairie Générale De Droit & De Jurisprudence, 1928. 1128 pages. In: Bibliothèque Nationale De France Gallica [online]. [Accessed 15 June 2023]. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k11599814/f1.item.

Another variant of the theory of fiction was the 'theory of interest' put forward by Rudolf von Jhering. He believed that a legal person, as a natural subject of law, does not exist. Since the law is a system of legally protected interests, the legislator gives legal protection to certain groups of people (their collective interest), allowing them to act externally as a single entity. However, according to Jhering, this does not create a new subject of law. Jhering combined the idea of the fictitiousness of legal persons with the recognition of the reality of the groups of people standing behind it, exercising their rights and enjoying their benefits.[68]

Adolf Lasson analysed legal persons from the perspective of the philosophy of law. In his view, the law makes an abstraction and sees a person only as a person, which is not an adequate representation of the human being in its entirety. The corporation cannot be said to have a conscientious will and set its own goals, but it exists as a will, a goal, for which it should be recognised as an objective outward existence.[69]

From a positivist perspective, a legal person is a purely legal construct. The source of legal personality, rights, and duties of a legal person comes from the rule of law. Nevertheless, today concepts of 'legal person', 'organisation', 'company', or 'corporation' do not only belong to jurisprudence. They could also be a part of the terminology of economics and political science. A business organisation in jurisprudence and a business organisation in economics are not the same things. Mixing concepts from different fields of knowledge cannot be appropriate. It is also essential to distinguish between a human being and a 'person' in a legal sense. For instance, with fetal rights, in the context of human rights, civil, or criminal law, it is the law that determines the very first moment when a human being becomes a 'person'.

On the other hand, it cannot be agreed that a union of people under a common interest is a phenomenon completely detached from nature and can only exist within the framework of law. Human beings, as social creatures, are meant to live in a community. The institution of family, for instance, represents a union of individuals that exists independently of legal regulations, with familial bonds often proving more resilient than the rights granted and obligations imposed by any legal system. As for the discourse on the non-existence of an entity as a real organism, in biology,

---

[68] KOZLOVA, Natal'ya Vladimirovna – EM, Vladimir Saurseevich, ed. *Ponyatie i sushchnost' yuridicheskogo litsa. Ocherk istorii i teorii: Uchebnoe possie*. *[The Concept and Essence of Legal Entity: A Outline of History and Theory: Textbook]*. Moscow: Statut, 2003, p. 148.

[69] LASSON, von Adolf. *Princip und Zukunft des Völkerrechts*. *[Principle and Future of International Law]*. Berlin: Verlag von Wilhelm Hertz, 1871. 195 pages. In: Münchener DigitalisierungsZentrum. Digitale Bibliothek [online]. [Accessed 15 June 2023]. Available at: https://www.digitale-sammlungen.de/de/view/bsb10812235?page=5; TANIMOV, O. V. Razvitie yuridicheskih fiktsii v epohu Novogo vremeni. [The Development of Legal Fictions in the Modern Era]. *Pravo. Zhurnal Vysshei shkoly ekonomiki*. *[Law. Journal of the Higher School of Economics]*, No. 4, 2014, pp. 4-18. In: Natsional'nyi issledovatel'skii universitet "Vysshaya shkola ekonomiki" [online]. [Accessed 15 June 2023]. Available at: https://law-journal.hse.ru/data/2015/01/12/1106491465/Танимов.pdf.

it is considered that a colony of bees or ants can be considered as a single organism or a 'superorganism'.[70] Moreover, some legal systems allow for the establishment of business organisations that, from the positivist perspective, may have legal capacity but do not possess legal personality, i.e. they are not legal persons. Examples of such entities include certain types of partnerships, such as the German general partnership (*offene Handelsgesellschaft, OHG*).

Therefore, it seems appropriate to use the English term 'entity' as something that exists separately from other things, possessing its independent existence.[71] In this context, the terms 'legal person' and 'entity' can be understood as form and matter, where 'entity' represents the essence (a physical object), while 'legal person' refers to its legal form. However, it should be noted that applying the same logic to legal persons created by public law might be more challenging, as it requires a clear distinction between the concepts of legal and political science.

The law regulates existing relations, putting them into legal form and using terminology that allows for building a coherent and logical system of knowledge and regulation. The concept of the business organisation is, first and foremost, an economic concept. Law plays a critical role in shaping and regulating business activity. Hence, law could be seen not as creating an artificial person, but rather as vesting a legal form in existing business relations.

Currently, the prevailing approach in the doctrine is positivist. A legal person is defined by the totality of its characteristics. For instance, a legal person is an organisation established and registered under the procedure established by law, which has separate property, may, on its behalf, acquire and exercise property and personal non-property rights and bear responsibilities, and be a plaintiff and defendant in court.[72]

This definition could be extended by further attributes. Therefore, a legal person is an entity that has the following characteristics: (1) it is established by law, (2) it has its distinct name, (3) it has a legal personality, (4) it has its structure and governing organs, (5) it has property separate from its members, (6) it can be a plaintiff and defendant in court, (7) it has the delictual capability, (8) it has a seat, an administrative centre, (9) it is governed by applicable law.

---

[70] HOLBROOK, Tate, – CLARK, Rebecca. *Secrets of a Superorganism.* In: Arizona State University [online]. [Accessed 15 June 2023]. Available at: https://askabiologist.asu.edu/explore/secrets-superorganism.

[71] *Entity.* In: Cambridge Advanced Learner's Dictionary & Thesaurus. Cambridge University Press [online]. [Accessed 15 June 2023]. Available at: https://dictionary.cambridge.org/dictionary/english/entity.

[72] GOLODENKO, Irina Aleksandrovna. *Ponyatie i sushchnost' yuridicheskogo litsa*. *[The Concept and Essence of a Juridical Person]*. In: VAS'KOVSKII, Evgenii Vladimirovich et al – KANZAFAROVA, Ilona Stanislavovna, ed. *Pravovoe regulirovanie otnoshenii v sfere chastnogo prava: traditsii i sovremennost': k 150-letiyu so dnya rozhdeniya E. V. Vas'kovskogo*. *[Legal Regulation of Relations in the Field of Private Law: Traditions and Modernity: On the 150th Anniversary of the Birth of E. V. Vaskovsky]*. Odessa: Astroprint, 2016, p. 321.

2.3 Legal Person in Corporate and Private International Law

Despite the substantial role that various business organisations play in the modern economy, a clear definition of a legal person is rarely explicitly stated in different national legislations. National legal systems generally avoid providing a precise definition of this concept in legislation, even though the concept of a legal person is widely accepted and seems to be understood.

For instance, French law contains only fragmented rules on a legal (moral) person (*personne morale*), such as stating that 'the capacity of legal persons is limited by the rules applicable to each of them'.[73] The legal definitions usually apply to specific types of legal persons, like societies (*sociétés*), which, according to French law, are established by two or more individuals who agree through a contract to contribute their assets or industry towards a common enterprise to share the profits or benefit from the resulting economy.[74]

Similarly, the German civil code lacks a precise definition for a legal (juristic) person (*Juristische Personen*) or its types: associations (*Vereine*),[75] foundations (*Stiftungen*),[76] legal persons under public law (*Juristische Personen des öffentlichen Rechts*).[77] Rather, these concepts are described through separate rules, allowing identification of the elements of each type. Nevertheless, there is no specific rule in place to explicitly define a legal person.

Dutch law also does not contain a specific legal definition of legal persons (*rechtspersonen*), although it provides definitions for their types (e.g. *verenigingen, coöperaties, onderlinge waarborgmaatschappijen, naamloze vennootschappen*). For instance, a cooperative (*coöperatie*) is an association (*vereniging*) formed by a notarial deed and according to its articles of incorporation it must have the purpose (objective) to provide for certain material needs of its members based on contracts, other than insurance agreements, concluded with those members in the course of its business, which it conducts or causes to be conducted for this reason for the benefit of its members.[78]

Similarly, the Spanish civil code does not provide a specific definition for a legal (juridical) person (*persona jurídica*) but lists the legal entities that fall under this category, namely corporations (*corporaciones*), associations (*asociaciones*), and foundations of public interest recognised by law (*fundaciones de interés público reconocidas por la ley*).[79] Nevertheless, unlike

[73] Article 1145 French Civil Code.
[74] Article 1832 French Civil Code.
[75] Articles 21-79 German Civil Code.
[76] Articles 80-88 German Civil Code.
[77] Article 89 German Civil Code.
[78] Article 2:53 Civil Code, 1992, No. NLD-1992-L-91671.
[79] Article 35(1) Spanish Civil Code, Royal Decree of 24 July 1889.

the previously mentioned codes, the Spanish civil code does include several general characteristics that define legal persons. In particular, (1) its legal personality begins from the very moment when they have been validly constituted, (2) it may acquire and possess property of all kinds, and contract obligations and exercise civil and criminal actions, according to the laws and their internal constitution.[80]

According to the Czech civil code, a legal (juristic) person (*právnická osoba*) is an organized body (*organizovaný útvar*) whose legal personality is provided or recognized by statute.[81] A similar definition is found in the Polish civil code, where legal persons (*osoby prawne*) include the State Treasury (*Skarb Państwa*) and organisational units (*jednostki organizacyjne*), to which specific provisions grant legal personality.[82] Another interesting detail is that the Polish civil code introduces the concept of an entity (organisational unit) that is not a legal person (*jednostki organizacyjnej niebędącej osobą prawną*), used in the context that if specific provisions grant legal capacity to such entities, the provisions regarding legal persons apply.[83]

The Chinese civil code, along with the Russian and Ukrainian civil codes, provides more comprehensive definitions of legal persons. Specifically, the Chinese civil code defines a legal person as an organisation with the capacity to enjoy civil-law rights and perform civil juristic acts, operating independently to exercise civil law rights and fulfil civil law obligations under the provisions of the law.[84] The Ukrainian civil code defines a legal (juridical) person (*юридична особа*) as an organisation established and registered as prescribed by law, with civil legal capacity and the capacity to act as a plaintiff and defendant in court.[85] The Russian civil code stipulates that a legal (juridical) person (*юридическое лицо*) is an organisation that has separate property and is liable for its obligations, can acquire and exercise civil rights and incur civil obligations on its behalf, and can be a plaintiff and defendant in court.[86]

There is no consistency in defining the term ‘legal person’ across various legal systems. Comparative analysis in this area can be frustrating due to the inconsistent use of different terminology in various national legal systems, such as ‘legal person’, ‘juridical person’, ‘juristic person’, ‘partnership’, ‘company’, ‘society’, ‘association’, or ‘corporation’.

[80] Articles 35, 38 Spanish Civil Code, Royal Decree of 24 July 1889.
[81] Section 20(2) Act No. 89/2012 Coll., Civil Code.
[82] Article 33 Act of 23 April 1964 – Civil Code.
[83] Article 33[1] Act of 23 April 1964 – Civil Code.
[84] Article 57 Civil Code of the People’s Republic of China (Adopted at the Third Session of the Thirteenth National People’s Congress on May 28, 2020).
[85] Article 80 Civil Code of Ukraine, 2003, No. 435-IV.
[86] Article 48 Civil Code of the Russian Federation of November 30, 1994, No 51-FZ.

For example, Dutch law 'legal person' (*rechtsperson*) is not the same notion as German law 'legal person' (*Rechtsperson*). Polish law term 'legal person' (*osoba prawna*) does not refer to the same notion as 'legal person' (*právní osoba*) in Czech law. While Spanish law 'juridical person' (*persona jurídica*) is equivalent to French law 'moral person' (*personne morale*), French law 'juridical person' (*personne juridique*) notion having the same essence as German law 'legal person' (*Rechtsperson*).

Therefore, it is essential to consider that different legal systems use varied similar terms, which do not always carry the same meaning. While this may not pose a problem within a single national system, it can become challenging when dealing with matters of private international law that require understanding and applying foreign legal terminology.

Courts often have to ensure that foreign law is properly applied to determine the applicable law and recognise the very existence of a foreign entity. It is never enough to simply find the governing rule and follow its text; one must fully understand its essence. Unifying the terminology and definition of a legal person across legislations would greatly benefit private international law matters, but until then, a deep understanding of the fundamentals of the concept 'legal person' and other general concepts remains highly important for anyone dealing with private international law.

Unfortunately, in private international law, translations are unavoidable. Translating legislation and legal doctrines into international communication languages, like English, also poses challenges because of discrepancies and reliance almost solely on translations. Given that English is the most widely used language, continental law jurists are compelled to use common law terminology in their translations, even though they may not fully capture the exact meaning of common law terms. Conversely, common law systems, owing to their general lack of codified law, do not exhibit the same reverence towards terminology as observed in continental law systems, leading to even more confusion.

For example, as it was mentioned before, in English law, the term 'legal person' is used in both meanings: (1) anything that has a legal personality (human or entity), leading to the distinction between natural persons and juridical (or artificial) persons, and (2) a non-human person that possesses legal personality.[87]

Another example is the term 'corporation', where English law considers all legal (non-human) persons to be corporations, as the term 'incorporation', derived from the Latin verb '*corporare*' meaning to furnish with a body or to infuse with substance, refers to the process by which a legal entity, separate from its owners and managers, is formed.[88]

[87] McLAUGHLIN, Susan. *Unlocking Company Law*. 4th edition. Abingdon: Routledge, 2018, p. 76.
[88] Ibid., p. 77.

In the United Kingdom, two types of corporations exist: corporations sole and corporations aggregate. Corporations sole encompass governmental organs, agencies, and officials, resembling public law legal persons in continental law countries. On the other hand, corporations aggregate can have multiple members and encompass statutory corporations, chartered corporations, registered companies, building societies, industrial and provident societies (co-operatives and community benefit societies), credit unions, and limited liability partnerships. The key incorporated business organisations in the UK are registered companies (governed by the Company Act 2006) and limited liability partnerships (LLPs, governed by the Limited Liability Partnerships Act 2000). Key unincorporated business organisations' legal structures are sole traders and partnerships (governed by the Partnership Act 1890 and Limited Partnership Act 1907), along with unincorporated associations for non-profit enterprises.[89]

In contrast, according to Czech law, the term 'corporation' (*korporace*)[90] is just one of the types of legal entities, along with foundation (*fundace*)[91] and institute (*ústav*).[92] A corporation is a legal person created by an association of persons.[93] Business corporations (*obchodní korporace*) include societies (*společnosti*) and cooperatives (*družstva*), which include a limited-liability company (*společnost s ručením omezeným*), a joint-stock company (*akciová společnost*), a cooperative (*družstvo*), an unlimited partnership (*neomezené partnerství*), and just for business purposes, a limited partnership (*omezené partnerství*), European Economic Interest Grouping, European Cooperative Society, European Company.[94]

Regarding private international law, it is worth noting that the doctrine commonly groups all possible forms of legal persons under the terms 'company' or 'corporation'. According to Monika Pauknerová, the term 'company' encompasses 'all associations of individuals and assets, regardless of their legal form and purpose, whether they are bodies governed by private or public law'.[95]

The main advantage of a broad interpretation of the 'company' concept in private international law lies in the recognition that the national legislator cannot predict every possible legal form globally, including legal persons and entities that lack legal personality. Therefore, applying a broad concept can eliminate legal gaps and encompass all forms of human cooperation.

---

[89] Ibidem.
[90] Sections 210-213 Act No. 89/2012 Coll., Civil Code.
[91] Sections 303-305 Act No. 89/2012 Coll., Civil Code.
[92] Sections 402-418 Act No. 89/2012 Coll., Civil Code.
[93] Section 210 Act No. 89/2012 Coll., Civil Code.
[94] Section 1 Act No. 90/2012 Coll., Business Corporations Act.
[95] PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém. [Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, p. 20.

Choosing the term 'company' for this purpose is also advantageous because companies constitute the most common form of engagement in international business, and a majority of court-resolved disputes involve companies.

In alignment with this broad interpretation of 'company' in private international law, this research primarily focuses on business organisations aiming for profit-making, which have legal personality, primarily including companies and partnerships. The foundation for this approach stems from Czech law, specifically referencing the definition of business corporations (*obchodní korporace*) in Article 1 of the Business Corporations Act. Additionally, it draws from the framework established in European Union law, designed to encompass the diverse range of business organisations across its member states, as defined by Article 54 TFEU.

According to Article 54 TFEU, 'companies or firms' (Czech: *společnosti*, Dutch: *vennootschappen*, French: *sociétés*, German: *Gesellschaften*, Polish: *spółki*, Spanish: *sociedades*) are defined as 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons (Czech: *právnické osoby*, Dutch: *rechtspersonen*, French: *personnes morales*, German: *juristischen Personen*, Polish: *osoby prawne*, Spanish: *personas jurídicas*) governed by public or private law, except those that are non-profit-making.

Regarding the terminology used in the legislation on private international law in different countries, there is no uniformity or unified approach. For example, the term 'legal person' is employed in the national legislation on private international law of in the following countries: Belarus[96], China[97], Kazakhstan[98], Spain[99], Russia[100], and Ukraine.[101] The Russian Civil Code also employs the term 'foreign organisation not recognized as a legal person under foreign law'.[102]

The scope of Italian legislation on private international law extends to include 'corporations, associations, foundations, and any other entity, public or private, even if without the nature of association'.[103] Swiss law uses the term 'society' (*Gesellschaft* or *société*) in Switzerland's Federal Code on Private International Law, covering all organised associations of persons and assets.[104] Similarly, Dutch law introduces the term 'corporation' (*corporatie*), referring to a corporation, association, cooperative, mutual society, foundation, or any other body

[96] Article 1111 Civil Code of the Republic of Belarus of December 7, 1998, No.218-Z.
[97] Article 14 People's Republic of China Law on the Laws Applicable to Foreign-Related Civil Relations.
[98] Article 1101 Civil Code of the Republic of Kazakhstan (Special Part) of July 1, 1999, No. 409.
[99] Article 1202 Civil Code of the Russian Federation of November 30, 1994, No. 51-FZ.
[100] Article 25 Law of Ukraine of June 23, 2005, No. 2709-IV 'On Private International Law'.
[101] Article 9 Spanish Civil Code, Royal Decree of 24 July 1889.
[102] Article 1203 Civil Code of the Russian Federation of November 30, 1994, No. 51-FZ.
[103] Article 25 Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law'.
[104] Article 150 Federal Act on Private International Law of December 18, 1987.

or partnership acting externally as an independent entity or organisation.[105] Czech law introduces the term 'entities other than natural persons' (*jiná než fyzická osoba*).[106] This term is a broader concept and includes both legal persons and entities without legal personality.[107] It allows foreign companies, even those not recognized as legal persons, to be sued in a Czech court or arbitration.[108]

Although it may seem that the differences in terminology are not significant and each of these legal systems includes common forms of business organisations such as companies and partnerships as the most prevalent types of legal persons, which are the subjects of this research, the approaches and results are not identical. These distinctions highlight that concepts of a legal person and other entities, which may initially seem self-evident, are not that simple. Thus, it underscores the potential for harmonisation and unification of corporate and private international law, beginning with its fundamental pillars.

2.4 Companies in Corporate Law

Companies, both in the general sense and in the sense of private international law, are the most common form of doing business in the global economy. The first official company was the East India Company, a joint-stock company founded in 1600 by British traders and chartered by Queen Elizabeth I. The shareholders consolidated their investments, transforming them into company shares, thus establishing the world's first commercial corporation. Initially engaged in the exchange of gold and silver for spices, textiles, and luxury goods in Asia, the East India Company evolved into a colossal enterprise, gaining control over India through a trade monopoly and assuming territorial powers of government. At its peak, it governed a fifth of the world's population and maintained a private army consisting of a quarter of a million soldiers, until it was dissolved in 1874.[109]

The modern concept of companies as we know them today emerged in English law with the Joint Stock Companies Act of 1844. The Limited Liability Act of 1855 granted shareholders limited liability initially for companies with over twenty-five members, but later this protection extended to all companies through the Companies Act of 1862.[110] The landmark case of Salomon v

[105] Article 10:117 Civil Code, 1992, No. NLD-1992-L-91671.
[106] Section 30 Act No. 91/2012 Coll., on Private International Law.
[107] PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář. [Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, p. 232.
[108] PFEIFFER, Magdalena – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav a BRODEC, Jan. *Mezinárodní obchodní právo [International Commercial Law]*. Pilsen: Vydavatelství a nakladatelství Aleš Čeněk, 2019, p. 120.
[109] *A Short History of Corporations*. In: New Internationalist [online]. [Accessed 15 June 2023]. Available at: https://newint.org/features/2002/07/05/history.
[110] Section 8 Companies Act 1862.

A Salomon & Co solidified the doctrine of a company's separate legal personality, as set out in the Companies Act 1862, ensuring that creditors of an insolvent company could not sue the company shareholders for unpaid debts.[111]

Despite these legal protections, there are instances where the courts may disregard the company's separate legal personality, known as 'piercing the corporate veil'. Piercing the corporate veil refers to exceptions to limited liability and is a judicial process whereby the court holds the shareholder liable for the debt incurred by a company.[112]

Presently, under Section 1 of the UK Companies Act 2006, a 'company' is defined as a company duly formed and registered under this act. UK law recognises four types of companies: (1) unlimited companies, (2) companies limited by shares, (3) companies limited by guarantee, and (4) community interest companies.

An unlimited company has no restriction on the liability of its members. A company becomes a limited company when the liability of its members is confined by its constitution. Such limitation could be either by shares, wherein members' liability is restricted to the number of shares held, or by guarantee, where members' liability is limited to the amount agreed to be contributed to the company's assets in the event of winding up.[113] Limited companies can be either public or private.

A public limited company (PLC) can offer its shares to the public and must have allotted minimum share capital with a nominal value of at least £50,000.[114] On the other hand, a private company is not allowed to offer its shares to the general public.

A community interest company is a corporate entity established to encourage the provision of products and services to benefit the community, and social and environmental needs. To qualify for this status, companies are subject to satisfying the community interest test.[115]

In contrast, in other national legal systems, terms such as 'society' (*Gesellschaft, Societas Europea*, *sociedad, společnost, société, общество*) or 'partnership' (*vennootschap, товарищество*) are more commonly used.

Spanish law, for instance, recognises three types of capital companies (*sociedades de capital*): limited liability companies, joint stock companies, and limited partnerships. Limited liability companies (*sociedad de responsibilidad limitada*, S.R.L. or *sociedad limitada*, S.L.)

---

[111] Salomon vs. Salomon (1896) UKHL 1, (1897) AC 22

[112] KING, Fung Tsang. Applicable Law in Piercing the Corporate Veil in the United States: A Choice With no Choice. *Journal of Private International Law*, Vol. 10, No. 2, 2014, p. 229. In: Taylor & Francis Online [online]. [Accessed 14 April 2023]. Available at: https://www.tandfonline.com/doi/abs/10.5235/17441048.10.2.227.

[113] Section 3 Companies Act 2006.

[114] Sections 755, 761, 763 Companies Act 2006.

[115] McLAUGHLIN, Susan. *Unlocking Company Law*. 4th edition. Abingdon: Routledge, 2018, p. 68.

divide their capital into stakes, comprising contributions made by all partners, who are not held personally liable for company debt. The capital in joint stock companies (*sociedad anónima*, S.A.), which shall be divided into shares, shall comprise the contributions made by all partners, who shall not be held personally liable for company debt. In contrast, limited partnerships (*sociedad comanditaria por acciones*, S. Com. por A.) also divide capital into shares, comprising contributions made by all partners, where at least one, as the general partner, is held personally liable for company debt.[116]

Similarly, Dutch law defines a public company (*naamloze vennootschap*) as a legal person with an authorised capital divided into transferable shares where a shareholder is not personally liable for what is performed in the name of the corporation and is not obliged to contribute to the losses of the corporation for more than what he has paid up or still has to pay up on his shares.[117] A private limited liability company (*besloten vennootschap*) is a legal person with capital that is divided into one or more transferable shares. Shareholder are not personally liable for what is performed in the name of the corporation and they are not obliged to contribute to the losses of the corporation for more than what they have paid up or still have to pay up on their shares.[118]

All these definitions provided for companies under national legislations align with those under UK law. A general definition of a company can be given as follows: a company is a separate legal person established by the joining the capital of its members, with a share capital that can be divided into shares.

However, it is essential to acknowledge that an English law private limited liability company, a French law *société à responsabilité limitée*, or a Dutch law *besloten vennootschap* are not the same things. Despite sharing some common features, such as a share capital, a general meeting of members, an executive director, separate property, and employees, the rights and duties of companies and their shareholders, as established by the applicable laws, will differ significantly. The determination of which legal order applies to a particular company falls within the realm of private international law and is the subject of this study.

Each legal system has its corporate law, where company law constitutes its core. Often, bankruptcy and financial law are also included in corporate law. However, for the purpose of this research, the focus will be given to the core of company law. Sources of company law may include separate company law acts, civil and commercial codes, EU law, as well as international or bilateral treaties.

---

[116] Article 1 Royal Decree No. 1/2010 of 2 July 2010, approving the consolidated text of the Capital Companies Act.
[117] Article 2:64 Civil Code, 1992, No. NLD-1992-L-91671.
[118] Article 2:175 Civil Code, 1992, No. NLD-1992-L-91671.

2.5. The Problem of Foreign Companies Recognition

As discussed in previous chapters, every legal person possesses a legal personality, encompassing a set of rights and obligations. Determining these rights and obligations within a company's home country presents no significant challenge, requiring a thorough examination of the domestic legal system. Difficulties arise, however, when a company seeks to exercise its rights and fulfil its obligations abroad.

In this case, the company is, to some extent, infringing on the sovereignty of the foreign state. When a state recognises the legal existence of a company that derives its legal personality from foreign law, it acknowledges the existence of an artificially created foreign legal entity as defined by foreign law and allows the company to operate within its national borders. By doing so, the state respects the consequences of foreign legal systems on its sovereign territory. It is not surprising that it often meets with some degree of resistance from national laws. It implies that before a foreign company can exercise its legal personality within the territory of a foreign state, the state must first recognise the existence of this legal personality.

Recognition involves acknowledging that a foreign company exists and operates within a country's borders.[119] It also entails accepting the company's legal status, applicable laws, and the regulations specified in those laws, which cover aspects such as its legal structure, establishment and closure procedures, internal organisation, legal responsibilities, etc.[120]

In practice, two challenges arise when a company seeks recognition in a foreign state. Firstly, the host state may reject recognition based on the company's unlawful objectives, purposes, or activities that conflict with public policy, or its failure to comply with the essential legal requirements of the host country. Secondly, the host country may be unfamiliar with a specific type of legal entity, or it may acknowledge its existence while limiting its legal capacity.[121]

This concept primarily applies to the relationships between a foreign company and a state, and to a lesser extent, to the relationships between two companies engaging in international cooperation.

---

[119] LAURENT, Levy – GOLDMAN, Berthold. *La nationalité des sociétés. Bibliothèque de droit privé. [The nationality of companies]*. Paris: Librairie générale de droit et de jurisprudence, 1984, p. 51.

[120] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

[121] BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français. [The Nationality of Companies in French Law]*. Université de Bourgogne, 2012, p. 91. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.

For instance, when two companies from different countries enter into a contract, it naturally raises questions about the legal personality of the foreign company, such as whether the foreign company is authorised to enter into the contract, which laws govern the contract, which court has jurisdiction over disputes, and so on. However, the recognition of the legal personality of a company is handled by the state through its bodies and agencies, such as courts that would resolve disputes between companies related to contract performance, or registering agencies that facilitate the registration of a new company established by a foreign company, as well as procedures for purchasing real estate or registering the foreign company's trademark, and other similar matters.

The earlier discussion of recognising foreign companies was based on two perspectives: the view that a legal entity is a creature of the legal system that created it and cannot exist outside the scope of that law (theory of fiction), and the alternative view that a company exists in the real world (organic theory, theory of reality). These theories have now been replaced by the theory that considers the legal person to be a mere legal technique and that does not seem to oppose the recognition of the legal personality of foreign companies.[122]

Another perspective on resolving the issue is the application of the so-called international theory, which suggests that companies are analogous to individuals. According to this theory, if a company is created by a competent state, it does not require specific recognition in other states.[123] The implementation of this principle can be found in the freedom of establishment, which is set out in European Union law.

Today, the question of recognising a company is often associated with determining the applicable law. This is because the legal personality of a company is based on a complex set of rights and obligations inherent to it. Once the content of the rights and obligations of a foreign entity and its participants is established, it can be determined whether this entity is an independent subject to recognise its legal personality.

In essence, the same mechanism is used in domestic affairs before determining whether a specific entity has a legal personality. The same process applies to a foreign company. The difficulty lies in identifying the applicable legal system and applying foreign law together with restrictions that might be imposed by national law on foreigners.

Therefore, the recognition of a company is closely linked to the criteria for determining the applicable law (which is further discussed in the fourth part of this research). In general, there are

[122] Ibidem.
[123] RABEL, Ernst. *The Conflict of Laws: A Comparative Study*. *Volume 2*. Ann Arbor: The University of Michigan Press, 1960, pp. 133-134. In: The University of Michigan Law School [online]. [Accessed 14 April 2023]. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1011&context=michigan_legal_studies.

two distinct approaches. The first approach relies on the concept of the place of incorporation. According to this approach, if a company is properly formed following the laws of the country where it is incorporated, it should be recognised in the host country. On the other hand, some countries follow the concept of the 'real seat'. Under this approach, a company will be recognized if it is duly established according to the laws of the place where the company is effectively managed and operated.

While the concept of the place of incorporation provides a relatively straightforward basis for recognition, the concept of 'real seat' introduces more complexities for recognising foreign corporations. For example, in French law concerning foreign companies (from non-EU countries), recognition would necessitate the real seat to be situated in the state of incorporation. Hence, a company that is legally incorporated in one state but has its actual 'real seat' in another country would not be recognised as a company connected to its state of incorporation or a company validly associated with another state.[124]

It is worth noting that from 1857 until 2007, the regulation of this matter in France followed a different path.[125] In the first half of the nineteenth century, foreign companies were recognized based on the 'real seat' doctrine. However, after the Belgian supreme court (*Cour de Cassation)* refused to recognise the legal personality of a French public company (*société anonyme*) in Belgium in 1849, a treaty which provided for reciprocal recognition was concluded between the two countries in 1854, along with subsequent amendments to their laws. As a result, for a long time in France, public companies (*sociétés anonymes*) could only be recognized through a general decree or an international treaty.[126]

There are two ways to resolve the problem of the recognition of companies abroad. Firstly, establishing a uniform criterion for determining the applicable law to companies, as the diversity of criteria and various exceptions pose major difficulties in this matter. Secondly, by signing international treaties and conventions or using other international instruments that would obligate states to recognise companies incorporated in other signatory countries. Examples of multilateral conventions include the proposals of the League of Nations of 1929, the Hague Convention of 1951, The Rules of the Institute of International Law in 1965, the Council of Europe Convention

[124] BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français*. *[The Nationality of Companies in French Law]*. Université de Bourgogne, 2012, p. 92. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.

[125] The basis for this was the Law of May 30, 1857, which authorized legally established Belgian companies to exercise their rights in France. This law was only repealed by the Law No. 2007-1787 of December 20, 2007, relating to the simplification of the law.

[126] DRURY, R. Robert. The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome". *The Cambridge Law Journal*, Vol. 57, No. 1, p. 12. In: JSTOR [online]. [Accessed 15 June 2023]. Available at: https://www.jstor.-org/stable/4508425.

on the Establishment of Companies in 1966, and the European Community Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968. Although the latest convention did not come into force due to the non-ratification by the Netherlands, it played an important role by influencing the approach to addressing these issues in countries of the European Union.[127]

Currently, any company established in an EU member state must be recognized in another member state. This is based on the declared freedom of movement of goods, people, services, and capital and the resulting freedom of establishment, which is contained in the provisions of Article 54 TFEU, as well as the corresponding case law. According to this article, companies that are duly established under the laws of a member state and have their registered office, central administration, or principal place of business within the EU shall be treated in the same way as natural persons who are nationals of that member state.

Therefore, there is no need for an international agreement between EU member states. Article 54 TFEU has become the cornerstone of recognition in EU law. Recognition of foreign companies in the EU now applies only to non-EU companies.[128]

2.6. European Supranational Business Organisations

2.6.1 The European Economic Interest Grouping (EEIG)

The European Economic Interest Grouping (EEIG) became the first supranational organisational and legal form established by the European Union. It was introduced to encourage cross-border business ventures and promote economic integration. The creation of the EEIG was provided for in Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) – EEIG Regulation. This legal act required EU member states to take the necessary measures by 1 July 1989 to ensure that the provisions of the regulation applied directly in their territory.[129]

The EEIG aimed to tackle several issues. Firstly, to unlock the potential of the common market, barriers hindering cross-border cooperation needed to be eliminated. European legislation established the EEIG to enable companies from different EU member states to form alliances for joint work. Secondly, in 1985, the creation of the EEIG was viewed as a precursor to the establishment of a truly European company. Thus, the European Commission sought to provide

[127] Ibid., pp. 12-13.
[128] BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français. [The Nationality of Companies in French Law]*. Université de Bourgogne, 2012, pp. 119-120. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.
[129] Articles 41, 43 EEIG Regulation.

European enterprises with a legal framework that would enable them to perform certain cross-border transactions without creating a European company. The EEIG was also created as a test case, which was embraced by companies and governments alike and considered by the commission as an indication of how the European company would develop if and when established.[130]

The prototype of the EEIG was a French grouping with a common economic interest (*Groupement d'intérêt économique*, GIE) introduced in 1967.[131] According to French law, two or more natural or legal persons may form, for a fixed period, an economic interest grouping to facilitate or develop the economic activity of its members, to improve or increase the results of this activity. The economic interest grouping does not in itself give rise to the realisation and sharing of profits and can be set up without capital. The economic interest grouping enjoys legal personality and full capacity from the date of its registration in the commercial register. The members of the grouping are liable for its debts on their own assets. The creditors of the grouping can only pursue the payment of debts against a member after having unsuccessfully given formal notice to the grouping by extrajudicial act.[132]

The same principles were used in the EEIG Regulation. The purpose of the EEIG is to facilitate or develop the economic activities of its members and improve or increase the results of those activities. The EEIG should not be intended to make profits for itself and its activities must be related to the economic activities of its members and not more than ancillary to those activities.[133]

In connection with this, the EEIG Regulation imposes numerous restrictions on grouping activities. The EEIG may not: (1) exercise, directly or indirectly, a power of management or supervision over its members' own activities or the activities of another undertaking, in particular in the fields of personnel, finance and investment; (2) directly or indirectly, on any basis whatsoever, hold shares of any kind in a member undertaking; the holding of shares in another undertaking shall be possible only in so far as it is necessary for the achievement of the grouping's objects and if it is done on its members' behalf; (3) employ more than five hundred persons; (4) be used by a company to make a loan (entering into any transaction or arrangement of similar effect, and property includes moveable and immoveable property) to a director of a company, or

[130] MEISELLES, K. Michala. The European Economic interest grouping – A chance for multinationals? *European Business Law Review*, Vol. 26, Issue 3, pp. 391-415. In: University of Derby [online]. [Accessed 15 June 2023]. Available at: https://repository.derby.ac.uk/item/937zw/the-european-economic-interest-grouping-a-chance-for-multinationals.
[131] WERLAUFF, Erik. *EU-Company Law. Common business law of 28 states*. 2nd edition. Copenhagen: DJØF Publishing, 2003, 672 pages.
[132] Articles 1-4 Ordinance No. 67-821 of September 23, 1967 on Economic Interest Groups.
[133] Article 3(1) EEIG Regulation.

any person connected with him, when the making of such loans is restricted or controlled under the member states' laws governing companies; (5) be a member of another EEIG.[134]

Thus, the purpose of the EEIG does not include making and distributing profits for its own benefit. Therefore, the EEIG is not a commercial organisation, unlike the legal entities that are members of the grouping. The activity of the EEIG only accompanies the main activity of its members and cannot go beyond the scope of the activity of the grouping's members.

A grouping must comprise at least (1) two companies, firms or other legal bodies, (2) two natural persons or (3) a company, firm or other legal body and a natural person. Companies shall have their central administrations in different Member States and natural persons shall carry on their principal activities in different Member States.[135]

Only the following may be members of a grouping: (1) companies or firms within the meaning of Article 58(2) EEC Treaty (Article 54 TFEU) and other legal bodies governed by public or private law, which have been formed under the law of an EU member state and which have their registered or statutory office and central administration in the EU; where, under the law of a member state, a company, firm or other legal body is not obliged to have a registered or statutory office, it shall be sufficient for such a company, firm or other legal body to have its central administration in the EU; (2) natural persons who carry on any industrial, commercial, craft or agricultural activity or who provide professional or other services in the EU.[136]

The EEIG is established by concluding a contract between its members and registering the EEIG in the official registry of the state where the legal address of the grouping will be located.[137] A contract for the formation of a grouping shall include the name, the official address, the aim (objects), members' information, and the duration of the grouping.[138]

After its formation, the EEIG has an independent legal personality, with rights and obligations of all kinds, the ability to make contracts or carry out other legal acts, and the right to sue and be sued in its own name.[139] However, the question of recognising the legal personality status of the EEIG is left to the discretion of EU member states by the EEIG Regulation. Article 1 of the EEIG Regulation defines that the Member States will determine whether the groupings registered at their registries have a legal personality.

[134] Article 3(2) EEIG Regulation.
[135] Article 4(2) EEIG Regulation.
[136] Article 4(1) EEIG Regulation.
[137] Articles 1, 6 EEIG Regulation.
[138] Article 5 EEIG Regulation.
[139] Article 1 EEIG Regulation.

Despite the fact that the EEIG is a legal entity that directly derives from the provisions of European Union law, the contract for the formation of a grouping and the internal organisation of a grouping shall be regulated by the internal law of the state in which the official address is located.[140]

The official address referred to in the contract for the formation of a grouping must be situated in the EU. It is associated with the place where the grouping has its central administration, or with a place of central administration of one of the members if the grouping carries on their activity there. This address may be transferred within the EU.[141]

Regarding the profits from the activities of the EEIG, they are considered the profits of the members and shall be divided among them in the proportions set out in the contract for the formation of the grouping, or if there is no such provision, in equal shares.[142]

In cases of losses, EEIG members shall have unlimited joint and several liabilities for its debts and other liabilities of any kind. National law shall determine the consequences of such liability.[143] The same applies to every new member of the grouping.[144] Furthermore, a withdrawn member shall continue to be liable for the debts of the grouping arising during its membership for a period of five years from the date of cessation of membership.[145]

In addition to the establishment and basic functioning provisions, the EEIG Regulation also defines the provisions for the winding up of the EEIG. In accordance with Article 31 of the EEIG Regulation, the EEIG may be wound up by a decision of its members ordering its winding up. However, there are several situations where a grouping must be wound up: (1) upon expiration of the period of the EEIG existence specified in the contract, (2) upon achievement of the grouping's purpose or the impossibility of pursuing it further, and (3) when the members do not comply with the conditions laid down in Article 4 of the EEIG Regulation.[146] The winding up of a grouping shall result in its liquidation, which together with insolvency and cessation of payments are subject to national law.[147]

[140] Article 2 EEIG Regulation.
[141] Articles 12-13 EEIG Regulation.
[142] Article 21 EEIG Regulation.
[143] Article 24 EEIG Regulation.
[144] Article 26 EEIG Regulation.
[145] Article 37 EEIG Regulation.
[146] Article 31(3) EEIG Regulation.
[147] Articles 35-36 EEIG Regulation.

2.6.2 The European Company (SE)

The introduction of the European Company, or Societas Europaea (SE), became the next step in the development of business organisational forms in the EU. The SE is governed by Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) – SE Regulation, which sets out the legal framework for establishing and operating an SE, as well as the rights and obligations of SEs and their shareholders. Another act that regulates SE is Council Directive 2001/86/EC of 8 October 2001, supplementing the Statute for a European company regarding the involvement of employees. The transitional period for both acts ended on 8 October 2004.

European Company is a legal entity in the form of a public limited liability company, which has a separate legal personality, with share capital where no shareholder is liable for more than the amount they have subscribed.[148]

The subscribed capital shall be a minimum of 120,000 euros. The laws of a Member State requiring a greater subscribed capital for companies carrying on certain types of activity shall apply to SEs with registered offices in that Member State.[149]

SEs shall be treated in every EU state as if it were a public limited-liability company formed under the law of the Member State in which it has its registered office.[150] Therefore, besides its statutes, the SE should be governed by national laws adopted specifically for SEs and public limited-liability companies.[151] For example, the national law of an EU member state on public limited-liability companies is applied to winding up, liquidation, insolvency, cessation of payments and similar procedures for a SE with its registered office situated in that state.[152] As a result, national and EU laws are mixed. For this reason, SEs have different regulations in each EU member state where it is created.[153] That leads to the situation where there are actually twenty-seven different types of the same SE legal form.[154]

The SE Regulation in Article 2 provides four ways to create a European Company. Firstly, through a merger, whereby at least two public limited liability companies from different EU

[148] Article 1 SE Regulation.
[149] Article 4 SE Regulation.
[150] Article 10 SE Regulation.
[151] Article 9 SE Regulation.
[152] Article 63 SE Regulation.
[153] DĚDIČ, Jan – ČECH, Petr. *Evropská (akciová) společnost*. *[European (stock) company]*. 1st edition. Prague: BOVA POLYGON, 2006, p. 5.
[154] ARLT, Agnes – BERVOETS, Cécile – GRECHENIG, R. Kristoffel – KALSS, Susanne. The Societas Europaea in Relation to the Public Corporation of Five Member States (France, Italy, Netherlands, Spain, Austria). *European Business Organization Law Review*, Vol. 3, Issue 4, 2002, p. 736. In: SSRN [online]. [Accessed 15 June 2023]. Available at: https://papers.ssrn.com/sol3/-papers.cfm?abstract_id=2404620.

countries combine to form a European Company.[155] Secondly, forming a European holding company, which requires at least two public or private limited-liability companies governed by the law of a different EU State, or with a subsidiary company or branch situated in another EU member state for at least two years.[156] Thirdly, a European Company can be created by forming a European subsidiary, which also requires companies, firms, or other legal bodies as defined in the second paragraph of Article 48 of the Treaty or national law, to be governed by the law of a different member state, or to have a subsidiary company or branch situated in another EU country for at least two years, as in the case of forming a European holding company.[157] Finally, a public limited-liability company formed under the national law of the EU state may be converted into an SE, provided it has had a subsidiary company governed by the law of another EU member state for at least two years.[158]

It is important to note that the SE Regulation allows Member States to permit the creation of SE companies that have their actual place of business (administrative centre) outside of the European Union. However, such companies must be registered and have a legal address in a member state, and they must maintain a genuine and continuous link with the economy of one of the EU member states.

The formation of an SE is subject to the laws governing public limited-liability companies in the Member State where the SE establishes its registered office.[159] Further, a European Company must be registered in the Member State where it has its registered office.[160] Once registered, the SE will acquire legal personality.[161]

As per Article 38 of the SE Regulation, the structure of SEs consists of a general meeting of shareholders, and either a supervisory organ and a management organ (in the case of a two-tier system) or an administrative organ (in the case of a one-tier system).

As stated in Article 7 of the SE Regulation, the registered office of an SE must be situated within the European Union, in the same Member State as its head office. Furthermore, a Member State may require SEs registered within its territory to locate both their head office and the registered office in the same place. Additionally, SEs' registered office may be transferred to another member state.[162]

---

[155] Articles 17-31 SE Regulation.
[156] Articles 32-34 SE Regulation.
[157] Articles 35-36 SE Regulation.
[158] Article 37 SE Regulation.
[159] Article 15 SE Regulation.
[160] Article 12 SE Regulation.
[161] Article 16 SE Regulation.
[162] Article 8 SE Regulation.

Article 64 of the SE Regulation specifies that if an SE no longer meets the requirement stated in Article 7, the member state where the SE's registered office is located must take necessary steps to ensure that the SE rectifies its position within a specified period. The SE may comply with this requirement by either re-establishing its head office in the member state where its registered office is situated or by transferring its registered office through the procedure laid out in Article 8 of the SE Regulation.

There are several advantages to the establishment of a European Company. Firstly, the SE Regulation offers a simple instrument for conducting business across multiple EU countries by allowing for the reorganisation of operations under a singular European company. This facilitates the management of business activities without the need for the establishment of subsidiary networks. Secondly, SE offers greater mobility within the common market by enabling the transfer of a registered office to another EU member state without the requirement for the dissolution of the company. Thirdly, European Company provides a structured framework for engaging staff who are employed in more than one country in the management of business operations. Last but not least, if an individual owns an SE, it is possible to create one or more subsidiary companies that are also classified as European Companies.[163]

On the other hand, despite all the benefits, these forms are not necessarily suitable for most businesses, as they are primarily geared towards large companies. Not many businesses have reached the level where they can establish public limited liability companies in their own country, let alone afford to establish and operate a European Company. Nevertheless, the implementation of SE is undoubtedly a huge and long-awaited step forward in overcoming barriers to the common market.

2.6.3 The European Cooperative Society (SCE)

The European Cooperative Society (SCE) is another type of supranational business organisation created by Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) – SCE Regulation. The regulation came into effect on August 18, 2006, and was supplemented by Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society regarding the involvement of employees, which required EU member states to adopt laws, regulations, and administrative provisions necessary to comply with the directive by no later than 18 August 2006.

[163] *Setting up a European Company (SE)*. In: Your Europe [online]. [Accessed 15 June 2023]. Available at: https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm.

As per Article 8 of the SCE Regulation, an SCE is primarily governed by the regulation itself and secondarily by the provisions of its statutes and relevant laws adopted by EU member states.

The creation of a new form of EU business organisation, as stated in paragraphs 3-5 of the preamble of the SCE Regulation, was motivated by the recognition that while the European Company (SE) based on the general principles of the public limited-liability company and the European Economic Interest Grouping (EEIG) allow undertakings to promote certain activities in common while maintaining their independence, they do not fully meet the specific requirements of cooperative enterprises. The establishment of the SCE was necessary to provide cooperatives, which are widely recognized forms of business organisations in all EU member states, with appropriate legal instruments to facilitate their cross-border activities.

The preamble of the SCE Regulation in paragraph 10 lays down the principles upon which the regulation of SCEs should be based. These principles include: (1) conducting activities for the mutual benefit of members, (2) involving members in the SCE's activities as customers, employees, or suppliers, (3) equal control vested in all members, (4) limiting interest in loan and share capital, (5) distributing profits according to the business done with the SCE or the needs of members, (6) avoiding artificial restrictions on membership, and (7) distributing net assets and reserves on winding-up according to the principle of disinterested distribution. These principles are designed to provide cooperatives with a legal framework that enables them to develop cross-border activities while preserving their cooperative identity and values.

According to Article 1(1) of the SCE Regulation, the establishment of an SCE should be aimed at satisfying the needs of its members and/or promoting their economic and social activities. This can be achieved through various means, such as entering into agreements with members to supply goods or services, performing work related to the SCE's activities, or facilitating their participation in economic activities. The overarching goal of an SCE should be to benefit its members and promote their development, as opposed to solely generating profit.

An SCE possesses a legal personality, and it is required to have a subscribed capital, which is divided into shares. Its members have limited liability, meaning that they are not liable for more than the amount they have subscribed. The minimum capital required for an SCE to be established is set at 30,000 euros.[164]

A new SCE could be formed by the following means: (1) foundation of a new cooperative, (2) merger between cooperatives formed under the law of an EU member state, where at least two

[164] Articles 1, 3 SCE Regulation.

of them are governed by the law of different EU member states, and (3) conversion of a cooperative formed under the national law of an EU member state, located in one of EU member state and for at least two years it has had an establishment or subsidiary governed by the law of another EU state.[165] The foundation of a new cooperative requires the participation of at least (1) five natural persons, or (2) five natural and legal persons, or (3) two legal persons, which all resident in, or governed by the law of, at least two different EU member states.[166]

The applicable law for the formation of an SCE shall be the law applicable to cooperatives in the EU state in which the SCE establishes its registered office.[167] The registered office of an SCE shall be located in the same state as its head office.[168] In this state, the public registration of the SCE should be fulfilled.[169] On the day of the registration, the SCE acquires its legal personality.[170]

An SCE could transfer its registered office to another EU state, and such transfer will not result in the winding-up of the SCE or the creation of a new legal person.[171] However, it is worth highlighting that according to Article 6 of the SCE Regulation, a national law may impose on SCEs registered in its territory the obligation of locating the head office and the registered office in the same place.

As for the structure of SCE, it shall have the following organs: (a) a general meeting; and (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.[172]

Regarding winding-up, liquidation, insolvency, cessation of payments, and similar procedures, an SCE shall be governed by the legal provisions that would apply to a cooperative formed under the law of the Member State in which its registered office is situated. When an SCE no longer complies with the requirement laid down in the SCE Regulation, the Member State in which the SCE's registered office is situated shall take appropriate measures to oblige the SCE to regularise its situation within a specified period either: (1) by re-establishing its head office in the Member State in which its registered office is situated or (2) by transferring the registered office.[173]

---

[165] Specific provisions for mergers in Articles 19-34 and provisions for conversion in Article 35 SCE Regulation.
[166] Article 2 SCE Regulation.
[167] Article 17 SCE Regulation.
[168] Article 6 SCE Regulation.
[169] Article 11 SCE Regulation.
[170] Article 18 SCE Regulation.
[171] Article 7 SCE Regulation.
[172] Article 36 SCE Regulation. Further regulations on the one-tier and two-tier system can be found in Articles 37-41 and Articles 42-44 SCE Regulation.
[173] Articles 72-73 SCE Regulation.

2.6.4 Societas Unius Personae (SUP)

The Societas Unius Personae (SUP) is a proposed legal framework for a single-member limited liability company in the EU. It was initially proposed in 2014 through the Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies (SUP Directive).[174] However, the proposal was withdrawn in 2018.[175]

All the previously discussed forms of European business organisations were designed primarily for larger businesses and were aimed at a relatively small number of enterprises. The SUP Directive was targeted at the most common form of business organisation, which is the limited liability company. In 2014, when the proposal was introduced, there were 20.7 million small and medium-sized enterprises contributing to 58 per cent of the EU's GDP and accounting for 67% of private sector employment. Among these enterprises, 11.75 million were established as private limited liability companies, and out of these, 5.17 million had a single member.[176]

The proposal's main goal was to increase the uniformity of requirements for single-member private limited liability companies across the European Union, offering greater legal certainty concerning their establishment, and lowering the costs associated with establishing and operating such subsidiaries in foreign countries.[177]

However, it is crucial to note that the proposed draft does not provide for the creation of a new legal entity at the supranational level for single-member companies. Instead, it aimed to facilitate the gradual elimination of barriers to the freedom of establishment in terms of the requirements for establishing subsidiaries in EU member states. Ideally, this goal could have been achieved by individual EU member states independently enacting identical legislation. As such, the proposal had an adequate legal foundation under Article 50 TFEU and did not require the use of Article 352 TFEU.[178]

In other words, the proposal aimed to provide a common legal form for single-member companies across all EU member states by unifying national law in this regard, making it easier

---

[174] *Directive of the European Parliament and of the Council on single-member private limited liability companies*. In: EUR-Lex [online]. [Accessed 15 June 2023]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=&uri=CELEX:52014PC0212.

[175] SCHEINERT, Christian. *Single-member private limited liability companies (Societas Unius Personae)*. In: European Parliament. Legislative Train Schedule [online]. [Accessed 15 June 2023]. Available at: https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-single-member-companies.

[176] *Commission Staff Working Document. Impact Assessment. Accompanying the document. Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies*, p. 9. In: EUR-Lex [online]. [Accessed 15 June 2023]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0124&from-=en.

[177] Ibid., p. 4.

[178] Article 3 SUP Directive.

for businesses to operate and expand throughout the EU. This proposal followed up on the provisions of Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited-liability companies, which introduced a legal instrument allowing individual entrepreneurs to establish limited liability companies with a single member throughout the EU.

The SUP Directive was meant to apply to all private limited liability companies or their equivalents listed in Annex I of the proposal. A SUP could be formed *ex nihilo* by any natural or legal person or by the conversion of a private limited liability company.[179] The SUP was proposed to be registered in a member state in which it is to have its registered office, and it must have its registered office and either its central administration or its principal place of business in the EU.[180]

With regard to shared capital, the SUP Directive prescribed that the share capital shall be at least one euro, and since there is only one shareholder, it is only allowed to issue one share that cannot be split.[181] The proposed directive grants the single-member the right to take decisions without the need to organise a general meeting and lists subjects that must be decided by the single member.[182] The single-member has extended powers for managing the company and exercises the powers of the general meeting of the company. The single-member is also allowed to take decisions without calling a general meeting.[183]

Conclusions of Part 2

1. A 'person' is a natural person or legal person that possesses a legal personality and capacity, being subject to rights and obligations.

2. A natural person and a legal person are both concepts of the law and do not exist in the real world, as they are legal fictions. However, in the same way that there is an individual that embodies the essence of a natural person in real life, there exists an entity that constitutes the essence of a legal person, taking a legal form. The prevailing view on the nature of a 'legal person' suggests that it is created by law and exists only within the framework defined by the law.

3. Comparative analysis of corporate law across different jurisdictions reveals that lawmakers often avoid providing an explicit definition of a legal person, presuming it to be self-evident, or instead opt to enumerate criteria that an entity must satisfy.

[179] Articles 8-9 SUP Directive.
[180] Articles 10, 14 SUP Directive.
[181] Articles 15-16 SUP Directive.
[182] Article 22 SUP Directive.
[183] Articles 4, 21 SUP Directive.

4. A legal person exhibits various characteristics: (1) its incorporation is sanctioned by law, (2) it possesses a distinctive name, (3) it enjoys legal personality, (4) it has a structure and governing organs, (5) it possesses separate property distinct from its members, (6) it can act as a plaintiff or defendant in legal proceedings, (7) it has the capacity to commit legal wrongs, (8) it has a registered seat or administrative centre, and (9) it is governed by applicable law.

5. When applying foreign law, it is important to interpret it following the logic and native language of the foreign legislator. Considering that translations are not always precise, a deep understanding of the fundamentals of corporate law is necessary to ensure the correct interpretation of foreign law.

6. There is no terminological unity regarding legal persons or other entities in the different national legislations on private international laws. Although some of them may appear to regulate similar categories, a closer look reveals that certain forms of entities fall outside the scope of regulation. Consequently, in private international law, the advantageous approach interprets the term ‘company’ expansively. Under this approach, the term ‘company’ covers all associations of individuals and assets, irrespective of their legal form or purpose, regardless of whether they are governed by private or public law. That includes all entities regardless of whether they possess legal personality or not.

7. Another primary challenge in this context lies in the recognition of a company abroad. The issue of recognition is closely connected to state sovereignty. It is the prerogative of each state to recognise the legal personality and legal capacity of a foreign company within its territory. Such recognition entails the determination of the applicable law. The resolution of this matter can be approached through two methods: the establishment of a unified criterion for determining the applicable law or the adoption of international instruments based on mutual recognition among participating countries.

8. The issue of recognizing companies and harmonising regulations has led EU law to establish EU supranational business organisations. Currently, three types of organisations can be established under the EU legal framework: European Economic Interest Grouping (EEIG), European Company or Societas Europaea (SE), and European Cooperative Society (SCE). Additionally, there is a proposed regulation for Societas Unius Personae (SUP) aiming to provide a legal framework for a single-member limited liability company.

3. The Concept of Lex Societatis and Its Scope in Private International Law

3.1. The Concept of Lex Societatis

Every company holds a unique legal status, which refers to its distinct legal identity as recognized by the state.[184] Essentially, this legal status includes the company's legal personality and capacity, along with the rights, duties, and responsibilities granted by the state through its laws. Therefore, the rights and obligations of companies, including those of their members, shareholders, and executives, as well as requirements for names and charter capital, differ according to each national law.

Private international law uses the term 'personal law' to define a company's legal status in private law. Personal law refers to the legal order of the country that determines the legal status of both natural and legal persons. In other words, it is the applicable law governing the personal status of individuals and companies.

To determine the applicable personal law for companies, the specific concept of '*lex societatis*' is used. The *lex societatis* governs the entire lifecycle of a company, from its incorporation to dissolution. It encompasses its formation, legal structure, legal personality, authority to act on behalf of the company, internal legal relations, changes within the company, and the process of dissolution.[185] The applicable law is determined using the conflict-of-laws approach.

It is important to note that *lex societatis* is a term derived from the doctrine of private international law and not expressly provided for in legislation. Currently, national legislations may use different terms to refer to the same concept, such as 'law of a legal person' (Belarus[186], Kazakhstan[187]), 'personal law of a legal person' (Spain[188], Russia[189], Ukraine[190]), 'applicable law' (the Netherlands[191], Italy[192], Switzerland[193]). Some legal orders may not specifically name this concept but refer to it through phrases such as 'legal personality and capacity'. (Czech Republic[194],

---

[184] *Legal status*. In: Eustat [online]. [Accessed 17 June 2023]. Available at: https://en.eustat.eus/documentos/elem_1831/definicion.html#:~:text=Legal%20status%20Refers%20to%20the%20legal%20identity%20by,full%20legal%20responsibility%2C%20regarding%20themselves%20and%20third%20parties.

[185] PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém. [Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, p. 28.

[186] Article 1111 Civil Code of the Republic of Belarus of December 7, 1998, No. 218-Z.

[187] Article 1109 Civil Code of the Republic of Kazakhstan (Special part) of July 1, 1999, No. 409.

[188] Article 1202 Civil Code of the Russian Federation of November 30, 1994, No. 51-FZ.

[189] Article 25 Law of Ukraine of June 23, 2005, No. 2709-IV 'On Private International Law'.

[190] Article 9 Spanish Civil Code, Royal Decree of 24 July 1889.

[191] Article 10:118 Civil Code, 1992, No. NLD-1992-L-91671.

[192] Article 25 Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law'.

[193] Article 155 Federal Act on Private International Law of December 18, 1987.

[194] Section 30 Act No. 91/2012 Coll., on Private International Law.

China[195]). Legislative acts in some countries (such as Germany, France, the United Kingdom, and the United States) do not contain specific regulations on *lex societatis.*[196]

3.2. Scope of Lex Societatis

The scope of *lex societatis* covers the range of legal issues governed by the law applicable to a company. However, it is important to be aware that *lex societatis* does not cover all legal issues that a company may face, but primarily issues closely related to its personal status in private law.

The personal law of a company does not extend to rights and obligations arising from contracts, torts, and bankruptcy involving a foreign element. These legal relationships are separately regulated, each with its own rules and criteria for determining the applicable law. Matters related to a company's capacity to conduct business in a specific country, deriving from public law (e.g., business licenses, tax, and investment laws), are also not governed by *lex societatis.*

The doctrine of private international law includes the fundamental legal aspects of a company's existence. It governs issues such as establishment, functioning, management, and dissolution. The applicable law should address crucial questions, such as whether a specific entity possesses legal personality, the extent of its legal capacity, the scope of its representative authority, its members' rights and obligations, and more. The scope of a company's *lex societatis* can be defined by legislation or based on case law and legal doctrine.

Within the European Union member states, *lex societatis* covers legal capacity and legal nature, formation and dissolution, capital structure, internal governance matters, the acquisition and loss of the status of a shareholder or member, as well as the ensuing rights and duties of shareholders, duties, and the liability of executives for a breach of duties.[197]

However, in some countries, such as France and Germany, specific legislative acts do not provide a clear list of issues falling under the scope of *lex societatis*. Instead, the scope is synthesised based on case law and legal doctrine.

---

[195] Article 14 People's Republic of China Law on the Laws Applicable to Foreign-Related Civil Relations.

[196] See GERNER-BEUERLE, Carsten – SIEMS, Mathias. *The Private International Law of Companies in Germany*. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International La*w of Companies in Europe. Munich: Hart Publishing, 2019, pp. 385-414. In: SSRN [online]. [Accessed 17 June 2023]. Available at: https://ssrn.com/abstract=3355688, http://dx.doi.org/10.2139/ssrn.3355688.

[197] GERNER-BEUERLE, Carsten – MUCCIARELLI, M. Federico – SCHUSTER, Edmund-Philipp – SIEMS, M. Mathias. *Study on the law applicable to companies. Final Report*. Luxembourg: Publications Office of the European Union, 2016, pp. 301-302.

For example, French doctrine describes *lex societatis* as the law that covers the terms of existence and operation of a company as an autonomous legal entity under private law: its formation, organisation, capacity, representation, and dissolution.[198]

Spanish legislation provides that the personal law governing legal persons (*personas jurídicas*) shall apply in all matters relating to their capacity, incorporation, representation, operation, transformation, dissolution, and extinction.[199]

In the Czech Republic, the scope of the law applicable to companies includes the following: the trading name and the internal relationships within such entities, the relationships between any such entity and its partners or members and the mutual relations between the partners or members, the liability of the partners or members for such entity's liabilities, the individuals who act as the entity's bodies and its winding up.[200]

According to Dutch legislation, the applicable law governs, in particular: the formation and dissolution of a cooperation (*corporatie*), its legal personality and competence to bear rights and obligations, to perform juridical acts and to act in court; the internal order; the power of representation; the liabilities of functionaries; the question of liability of an incorporator, partner, shareholder, member, director, or other functionaries for acts binding legal person.[201]

Italian legislation on private international law provides a more detailed list of matters. The law applicable to an entity (*ente*) determines, in particular: the legal nature; the name; the issues of establishment, reorganisation and termination; the legal capacity; the process for the establishment, functioning as well as the powers of the bodies of a legal person; the representation of a legal person; the procedure for the acquisition and loss of the membership in the legal or the status of the partner, as well as the rights and obligations related to the membership in the legal person; questions of liability for obligations; the consequences of failure to comply with the provisions of the law or the founding documents of a legal person.[202]

In Belgium, the law applicable to a legal person (*personne morale*) determines in particular, the existence and legal nature; the name or corporate name; formation, dissolution and liquidation; the capacity of the legal entity; the composition, powers and operation of its governing bodies; internal relations between associates or members, as well as relations between the legal entity and the associates or members; the acquisition and loss of associate or member status; the rights and

[198] YOUBO, Lou Bouinan Sonia. *La lex societatis en droit international des affaires*. *[Lex societatis in international business law]*. Droit. Université de Bordeaux, 2015, p. 22. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-01253783.
[199] Article 9 Spanish Civil Code, Royal Decree of 24 July 1889.
[200] Section 30 Act No. 91/2012 Coll., on Private International Law.
[201] Article 10:119 Civil Code, 1992, No. NLD-1992-L-91671.
[202] Article 25 Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law'.

obligations attached to shares and their exercise; liability for breach of corporate law or the articles of association; the extent to which the legal entity is liable to third parties for debts incurred by its organs.[203]

Regarding states outside the European Union, according to Swiss law, *lex societatis* shall govern, in particular: the legal nature of a legal person; its establishment and dissolution; its legal capacity and capacity to act; its name or business designation; its organisation; internal relationships, including the relationships between the entity and its members; liability for the violation of company law; liability for the entities' debts; the power of its representatives.[204] This list of matters is very similar to the Italian one.

Russian law also has a wide list of issues related to the scope of *lex societatis*. In contrast with Swiss law, the Russian list does not indicate the liability arising from the violation of company law. However, the Russian list is not exhaustive, as is the Swiss or Italian one. The Russian Civil Code includes the following issues within the scope of the *lex societatis*: the legal status; the organisational and legal form; the requirements for the name; the issues of creation, reorganisation, and liquidation, including legal succession; the content of legal capacity; the order of acquisition of civil rights and obligations; internal relations, including relations of a legal person; the ability to meet its obligations; the liability of members for its obligations.[205]

Under Ukrainian law, personal law determines 'the civil legal capacity and legal capacity' of a legal person.[206] Chinese legislation has a non-exhaustive list, which contains civil capacity, civil competence, organisational structure, shareholder rights, etc.[207] Neither the legislation of Belarus nor Kazakhstan contains a list of matters regulated by *lex societatis*. Such a list cannot be found in the legislation of common law countries such as the United States and the United Kingdom.

Thus, in certain national legislations, the list of questions falling within the scope of the *lex societatis* is both extensive and detailed (the Czech Republic, Italy, Spain, Switzerland, Russia). Other national legislations only provide general 'keywords' (China, Ukraine). Some legislations lack any explicit list of issues falling within the scope of the *lex societatis* (Belarus, Germany, France, Kazakhstan, the United Kingdom, and the United States). The scope in these cases is typically derived from their case law and legal doctrine. Nonetheless, the approaches outlined in the doctrines of all these states highlight a shared understanding of the scope of *lex societatis*.

[203] Article 111 Law of 16 July 2004 on the Code of Private International Law.
[204] Article 155 Federal Act on Private International Law of December 18, 1987.
[205] Article 1202 Civil Code of the Russian Federation of November 30, 1994, No. 51-FZ.
[206] Article 26 Law of Ukraine of June 23, 2005, No. 2709-IV 'On Private International Law'.
[207] Article 14 People's Republic of China Law on the Laws Applicable to Foreign-Related Civil Relations.

3.3. Nationality and Its Difference from Lex Societatis

Besides the term '*lex societatis*' and the concept of applicable law, legal doctrine often refers to the 'nationality of a company'. The terms 'nationality' and '*lex societatis*' are commonly distinguished and do not refer to the same legal categories.[208]

In the early 20th century, the same legal order defined both private legal corporate relations and relations arising from public or international law, including the sphere of administrative regulation, diplomatic protection, etc.[209] By analogy with the then widely used criterion of nationality to determine the applicable law to a natural person, the term nationality of a legal person was also used.[210]

Since the mid-20th century, national laws began to adopt different approaches to defining *lex societatis* for conflict of laws purposes, on the one hand, and 'nationality' for public law purposes, on the other.[211] This change was facilitated, in particular, by the parallel application of the incorporation criterion for determining the law applicable to the internal affairs of a company (*lex societatis*) and the residency criterion for tax law. This, along with other factors such as the greater spread and complexity of cross-border cooperation, forced the separation of two distinct categories: *lex societatis* and the law that defines the legal regime of the company as a foreign entity (law of foreigners, nationality of a company).

In contrast, the current French Civil Code contains a provision stating that 'any company with its seat located on French territory is subject to the provisions of French law'.[212] This means that if a company's seat is in France, all its relations, private or public, internal and external, are subject to French law (unless the company is from the EU, which will be discussed further). Hence, in French law, the distinction between private and public law within relationships, to determine the applicable law for a company, was not as critical.

---

[208] GUILLAUME, Florence. *"Lex societatis": Principes de rattachement des sociétés et correctifs institués au bénéfice des tiers en droit international privé suisse. Schweizer Studien zum internationalen Recht*. *[Lex societatis: Principles of Connecting Companies and Corrective Measures Established for the Benefit of Third Parties in Swiss Private International Law. Swiss Studies in International Law]*. Zürich: Schulthess, 2001, pp. 82, 86.

[209] ASOSKOV, A.V. Retsenziya na stat'i Dzh. Demmanna, posvyashchennye kontseptsii svobody vybora prava, primenimogo k korporativnym otnosheniyam. [Review of J. Dammann's articles devoted to the concept of freedom of choice of law applicable to corporate relations]. *Vestnik grazhdanskogo prava*. *[Journal of Civil Law]*, Vol. 7, No. 4, 2007, pp. 271-280.

[210] BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français. [The nationality of companies in French law]*. Droit. Université de Bourgogne, 2012, p. 27. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.

[211] ASOSKOV, A.V. Retsenziya na stat'i Dzh. Demmanna, posvyashchennye kontseptsii svobody vybora prava, primenimogo k korporativnym otnosheniyam. [Review of J. Dammann's articles devoted to the concept of freedom of choice of law applicable to corporate relations]. *Vestnik grazhdanskogo prava*. *[Journal of Civil Law]*, Vol. 7, No. 4, 2007, pp. 271-280.

[212] Article 1837 French Civil Code.

Therefore, it is important to emphasise that modern French doctrine defines nationality as more of a general connection with a state. The nationality of a company primarily includes questions related to the determination of applicable law (*loi applicable*) and the legal regime (*le régime juridique*) for the exercise of the rights granted to national companies of a given state.[213] At the same time, it should be pointed out that the use of the term 'nationality of a company' is widely criticised in French doctrine.[214]

For the purposes of this research, the 'nationality of a company' will be understood as the company's connection with a state in public law (either national or international). This definition is derived from the postulates that the concept of 'nationality' of a company is a part of the law of foreigners, as it is a branch of law that defines the criteria for distinguishing the status of a domestic and foreign company, while private international law, in its turn, determines the legal order applicable to specific private legal relations with a foreign element.[215] Private international law has its methods of regulation, such as the conflict-of-laws method, which, employing connecting factors, determines the applicable law.[216]

The nationality of a company has its own scope. Firstly, in tax law, where nationality affects the tax regime of a company through the concepts of 'resident' or 'non-resident'. Secondly, it plays a key role in regulating investments because, depending on the national status of a company (domestic or foreign), it can lead to different conditions, guarantees, and benefits. Thirdly, a company's nationality affects its legal status as determined by other public laws that regulate matters crucial to national security and wealth, such as ownership of agricultural land and natural resources, operation in the media sector, and more. Fourthly, a company's nationality relates to diplomatic protection, as states generally protect both domestic companies and their citizens abroad. Additionally, economic sanctions and embargoes should also fall within the scope of a company's nationality.[217]

---

[213] BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français. [The nationality of companies in French law]*. Droit. Université de Bourgogne, 2012, pp. 30-31. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.

[214] Ibid., p. 27-29.

[215] PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Rekodifikované mezinárodní právo soukromé. [Recodified Private International Law]*. 1st edition. Prague: Univerzita Karlova v Praze. Právnická fakulta, 2014, p. 20.

[216] ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University. Faculty of Law, 2015, pp. 37-38.

[217] KOLAS, Heorhi. Lex societatis and Nationality in Private International Law. In: KNOLL, Vilém – HABLOVIČ, Jakub – VNENK, Vladislav, eds. *Naděje právní vědy 2020: Právní věda v praxi: Sborník příspěvků ze stejnojmenné mezinárodní konference pořádané Fakultou právnickou Západočeské univerzity v Plzni on-line dne 27. listopadu 2020. [The Hope of Legal Science 2020: legal science in practice: proceedings of the international conference of the same name organized by the Faculty of Law of the University of West Bohemia in Pilsen online on 27 November 2020]*. Pilsen: Západočeská univerzita v Plzni, 2021, pp. 794-806.

The nationality of a company is closely related to such concepts as 'foreign company', 'non-resident', and 'legal regime of foreign persons'. Each state establishes its criteria for determining companies' nationality in its public law. These criteria can also be found in bilateral agreements such as treaties for the avoidance of double taxation, and investment protection treaties. The choice of law applicable to a company is derived from the conflict-of-laws method. In comparison, criteria for determining the nationality of a company are not based on the conflict-of-laws method but come from the substantive law of a particular state.

This can be explained by the absence of conflicts of laws in determining a company's nationality. In this context, there exists a single legal order and its substantive legal rules. These rules ascertain whether a company is domestic or foreign and determine its nationality for public law purposes such as tax regime. Also, unlike the *lex societatis*, the legal relationships covered by the nationality are not extraterritorial. Instead, they are limited by the territory of the state that defines the company's nationality.

Moreover, where a company is incorporated in one state, has foreign shareholders from a second state, and carries out its operations in a third state, its nationality (as relevant to tax law or international investment law) could vary, even within the framework of a single legal system. The criteria and tests used for determining nationality and applicable public law are not interconnected, as they originate from different public law acts, international treaties, or bilateral agreements. To illustrate, a single company might maintain tax residency status in several states, diligently fulfilling tax obligations in each of them, and no conflicts of laws will appear.

To put it simply, *lex societatis* arises from static internal corporate relations of private law, which are independent of the will of the company and are based on the very fact of its existence. Whereas the nationality of a company applies to dynamic relations of public law when a company exercises its legal capacity in a particular state (paying tax, making investments, etc.).[218]

In this context, there is no direct link between the criteria used to determine *lex societatis* and the 'nationality' of a company. For instance, within UK law, where *lex societatis* is established by the place of incorporation, a company's tax residency is subordinate to the place of central management and control. As a result, a single company have *lex societatis* of one country (such as its country of incorporation), could be a tax resident of another country (which could be where its actual place of operations is situated), and enjoy benefits under an international treaty with a third country (potentially due to the company's sole member being a national of that third country).

[218] Ibidem.

Conclusions of Part 3

1. The legal status of companies encompasses various concepts, including *lex societatis*, nationality, or residency. It is important to distinguish the legal nature of these concepts to avoid misinterpretation when applying or introducing laws.

2. *Lex societatis* is the legal order that governs the legal personality and legal capacity of a company in the realm of private law. Determining *lex societatis* involves employing the conflict-of-laws method. The scope of *lex societatis* should include legal relationships arising from legal personality and legal capacity, formation and dissolution, capital structure, internal relationships of its members, acquisition, as well as the rights, duties, and liabilities of members and executives in the event of a breach.

3. The nationality of the company, in contrast to *lex societatis*, pertains to the company's connection with the state in the domain of public law (either national or international). It is determined under the substantive rules of law applicable to foreigners. The scope of a company's nationality encompasses legal relationships arising from tax law, investment law, and other public laws regulating the rights and obligations of foreigners, as well as matters related to diplomatic protection, sanctions, and embargoes.

4. Nevertheless, it's important to understand that the term 'nationality of a company' is not universally agreed upon across different legal systems. For example, French law uses 'nationality' broadly to describe the general connection between a company and a state. However, it is crucial to keep private and public law domains separate, as it is a key aspect in correctly determining which rules apply to companies involved in cross-border activities. Therefore, when studying any foreign legal system, it is essential to have a clear understanding of established terminology in law and doctrine and to comprehend all nuances that may arise in interpreting specific norms of foreign law.

4. Theories of Determining the Law Applicable to Companies

4.1. Basic Concepts of Theories of Determining the Law Applicable to Companies

As defined in the previous chapters, lex societatis, or the personal law of a company, refers to the legal system that governs the legal personality and legal capacity of a company. There is also a distinction between the concepts of *lex societatis* and the nationality of a company. When companies do business abroad, they become subject to two legal systems – the legal system of the state of their *lex societatis* and the legal system of the place where they operate.

In contrast to *lex societatis*, which pertains to private law, nationality is primarily associated with public law. However, determining the nationality of companies is beyond the scope of private international law and the scope of this research. The applicable law in private international law is determined using the conflict of laws method, which involves considering various connecting factors such as *lex domicilii, lex rei sitae, lex fori, lex loci actus*, etc. In the doctrine of private international law, the terms 'criteria' or 'theory' are often used instead of the term 'connecting factor' to determine the applicable law for companies.

Currently, there are two main theories (doctrines) for determining *lex societatis* - the incorporation theory and the 'real seat' theory. These theories consider the following criteria (connecting factors): the place where the company was initially incorporated (registered) and the place where the administrative seat of the company is located (real seat). Other theories include the theory of the place of operation and the theory of control, as well as various mixed theories that aim to combine the advantages of several criteria into one.

4.2 Theory of Incorporation

The incorporation theory refers to the legal order of the state in which a company was established (registered, incorporated).[219] At the root of this theory lies the recognition that a company is created and becomes a subject of law by the willingness of the state and is incorporated into the existing legal order in that state, thereby giving grounds to consider the company to be tied to that state.[220] Thus, since the company is a subject of the state in which it has been incorporated, the legal order of that state must be followed, even abroad.

---

[219] KUČERA, Zdeněk – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé. [Private International Law]*. 8th edition. Pilsen: Aleš Čeněk, s.r.o.; Brno: Doplněk, 2015, p. 251.

[220] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

This idea appears to derive primarily from two doctrines. First of all, it is a logical extension of the theory of the legal person being a legal fiction, according to which a legal entity does not exist outside the legal order, unlike an actual human being, who is physically present. The second doctrine that lies at the basis of the theory of incorporation is the theory of state sovereignty, which recognises the external autonomy of states and adheres to non-intervention or non-interference in each other's internal affairs. Therefore, it leads to a situation where the host state respects the connection between the foreign company with the country of its incorporation without forcing it to use the host state's legal order as the company's *lex societatis* or trying to nationalise the company in any other way.

The theory of incorporation also resonates with citizenship (nationality) as a connecting factor for determining the personal law of the natural person. Quite often, states that adhere to the theory of incorporation also use citizenship as a connection factor for determining the personal law of a natural person, which appears a very simple solution. In practice, company registration documents are as basic as passports for individuals and become the main documents to be examined to determine the place of incorporation.

The theory of incorporation dates back to the eighteenth century, when it originated in maritime countries, foremost in the United Kingdom. British colonial interests required companies to be incorporated under domestic law, while at the same time guaranteeing the application of that law in the place of their actual business operations. This encouraged economic development and allowed trading companies to move to the colonies while ensuring that the British legal status was kept.[221]

Therefore, the place of incorporation as a connecting factor is primarily used in countries that belong to the common law system, which spread with the British colonial expansion (United Kingdom, United States, India, Nigeria, Cyprus, Malta, Australia, New Zealand, Canada). Also, many European countries, such as Belgium, the Czech Republic, the Netherlands, Spain, Switzerland, Belarus, Russia, Ukraine, follow this theory. Also, this theory can be found in Latin America (Brazil, Venezuela, Mexico, Cuba, Peru) and Asia (Kazakhstan, China).[222]

---

[221] DUBOVITSKAYA, Elena Alekseevna. Pravosposobnost' yuridicheskih lits po pravu Evropeiskih soobshchestv (praktika Evropeiskogo suda). [Legal Capacity of Juridical Persons under European Communities Law (Practice of the European Court)]. *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*. *[Bulletin of the Higher Arbitration Court of the Russian Federation]*, No. 12, 2000, p. 100.

[222] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN*. *[Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

The legal definition of the place of incorporation of a legal entity is given, for example, in Article 1203 of the Civil Code of the Russian Federation, which states that the personal law of a legal person is the law of the country where the legal person is established.

Thus, in the countries that adhere to the theory of incorporation, a company established in China will be Chinese, and the one registered in France will be French, etc. As proof of the company attributing to a particular legal order, it is sufficient to just find a record in official company registrars (such as the Companies House in the United Kingdom), which makes the theory of incorporation straightforward and easy to apply.

However, the theory of incorporation rule is not standardised among countries that adhere to the theory of incorporation. More and more countries are making exceptions to this theory in their national laws and are not using the 'pure theory of incorporation'.

For example, according to Article 154(1) of the Swiss Federal Act on Private International Law, corporations are governed by the law of the place of incorporation if the registration and publicity requirements of the latter are met. Otherwise, pursuant to Article 154(2) of that law, the law of the place of incorporation should be replaced by the law of the place where the corporation is 'actually administered'.

In Italy, the main connecting factor is the territory of the state where the incorporation process has been completed. However, Italian law applies if the administrative centre or the primary purpose of the company is located in Italy.[223] Since the administrative or operational centre is located in Italy, the company likely has Italian creditors and therefore the law aims to protect their interests as a priority.

A similar situation arises in China. The law governing a company is determined by its place of registration. If the principal place of business of a legal entity differs from its place of registration, the law of the principal place of business can be applied. Under Chinese law, the principal place of business is considered to be the habitual residence of a legal entity.[224] In contrast to Italian law, the Chinese legislator does not exclusively associate the principal place of business connecting factor with the territory of China.

According to Spanish law, companies with domicile in Spain (registered office in Spain) are governed by Spanish law, regardless of their state of incorporation. However, companies whose principal establishment or business activity is located in Spain will have to place their

[223] Article 25(1) Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law.
[224] Article 14 People's Republic of China Law on the Laws Applicable to Foreign-Related Civil Relations.
See also PAUKNEROVÁ, Monika. Companies in Private International Law: Czechia, China and European Union. *The Lawyer Quarterly*, Vol. 10, No. 3, 2020, pp. 230-244. In: The Lawyer Quarterly [online]. [Accessed 22 August 2023]. Available at: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/411.

domicile in Spain. Case law and scholars are divided on the interpretation of these rules; however, the dominant view (accepted by the courts) is that these rules are to be considered as a version of the incorporation theory.[225]

In the case of Ukraine, the opposite is true. Ukrainian law is often attributed to the theory of the real seat; however, this theory applies only in a subsidiary manner; the main connecting factor is the place of incorporation. According to Article 25 of the Law of Ukraine On Private International Law, personal law is the law of the state where the legal person is located; the location is the state where 'a legal person was registered or otherwise created under the law of this state'. And only if it is not possible to determine this location, 'the law of the state where the executive body of a legal person is located shall apply'.[226]

The United States, although being an explicit theory of incorporation adherent, has an exception to its application. This exception is the pseudo-foreign corporation doctrine, which, according to Paschalis, operates as a sort of public policy clause. If a company has no connection with the state of incorporation other than the act of incorporation, while the centre of its management and operations is located elsewhere, a company qualifies as a pseudo-foreign corporation. When determining whether a corporation is a pseudo-foreign corporation, consideration must be given to the place of principal business, the domicile of a substantial number of shareholders, the residence of parties and entities, the location of the property, the law of the place where the company commits torts, the law governing contracts entered into by the company, or the sole or principal place of business, etc.[227]

Evidently, even those countries that adhere to the incorporation theory do not necessarily follow its standard pure form. A study conducted in 2016 among the countries of the European Union showed that the countries where the connection factor is based on the incorporation theory are clearly formulated in legislation or through judge-made law ('pure' incorporation theory) are the following: Bulgaria, Cyprus, Czech Republic, Finland, Hungary, Ireland, Lithuania, Malta, Netherlands, Slovakia, Sweden, and the United Kingdom.[228]

---

[225] See GERNER-BEUERLE, Carsten – MUCCIARELLI, M. Federico – SCHUSTER, Edmund-Philipp – SIEMS, M. Mathias. *Study on the law applicable to companies. Final Report*. Luxembourg: Publications Office of the European Union, 2016, p. 126.

[226] Law of Ukraine of June 23, 2005, No. 2709-IV 'On Private International Law'.

[227] PASCHALIDIS, Paschalis. *Freedom of Establishment and Private International Law for Corporations*. 1st ed. Oxford: Oxford University Press, 2012, pp. 3-4.

[228] GERNER-BEUERLE, Carsten – MUCCIARELLI, M. Federico – SCHUSTER, Edmund-Philipp – SIEMS, M. Mathias. *Study on the law applicable to companies. Final Report*. Luxembourg: Publications Office of the European Union, 2016, p. 56. Note that the United Kingdom left the European Union on January 31, 2020, in accordance with the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01.

For instance, in the Czech Republic, the legal personality and the capacity of companies are subject to the body of laws of the state according to which companies are incorporated (created).[229]

One of the variations of the theory of incorporation involves the application of the statutory seat as a connecting factor for the determination of *lex societatis*. The statutory seat refers to the place where the registered main office of a company is situated, as stated in the company's registration documents. This criterion can be found in the laws of Turkey or the recently amended laws of Belgium, the country which was a real seat country before, as well as in the laws of the European Union regarding European supranational business organisations.

Hence, the Turkish Act on International Private and Procedure Law, in Article 9, provides that a company is governed by the law of the country where its administrative head offices are located according to its statutes.[230] However, if the actual central office is located in Turkey, Turkish law may apply. With a company without statutes or a group of individuals and property without a legal entity, the applicable law will be the law of the place of their actual administrative headquarters.

As per the current effective Belgium Law on the Code of Private International Law, a legal person (*personne morale*) is governed by the law of the state in which its statutory seat (*siège statutaire*) is located.[231]

For a long time, Belgium was a country adhering to the real seat theory. However, in 2019, a significant reform of corporate law was conducted, during which a statutory seat criterion for determining companies' personal law was chosen.[232] This transition does not appear to be accidental. This connecting factor has found its reflection in European Union law.

According to Article 3 of SE Regulation, a European company shall be governed by the law of the EU member state in which it has its registered office. European law on cross-border conversions does not contain a single binding rule, yet conversions imply the use of national law (more details on cross-border conversions in chapter 5.3 of this research).

At first glance, the statutory seat as a connecting factor should not yield a different result from the criterion of the place of incorporation. This is because the place of incorporation and the place of the statutory seat coincide at the moment of the initial establishment of the company.

---

[229] Section 30 Act No. 91/2012 Coll., on Private International Law.
[230] Act No. 5718, on Private International and Procedural Law.
[231] Article 110 Law of 16 July 2004 on the Code of Private International Law with amendments of adopted in article 14 Law of 23 March 2019 introducing the Code of Companies and Associations and containing various provisions.
[232] See more about new amendments VAN DER ELST, Christoph. *The New Belgian Companies Code: A Primer*. In: SSRN [online]. [Accessed 22 August 2023]. Available at: https://ssrn.com/abstract=3586278, http://dx.doi.org/10.-2139/ssrn.3586278.

However, if the statutory seat could subsequently be transferred without changing the company's legal form, confusion could arise regarding the applicable law for such a company, as the place of initial incorporation would remain unchanged. Currently, this issue remains largely theoretical. However, the trend of legislative development in the European Union member states suggests that it may arise in the future. For instance, Czech law provides a legal basis for companies to retain Czech law in the country of the new statutory seat (see chapter 5.4 of this research). If *lex societatis* were to follow the statutory seat, and if the statutory seat law allowed for the application of foreign law as an option, it would create a much more logical scheme without legal loopholes, as everything would be aligned in a coherent chain of reasoning.

The theory of incorporation is clear and very logical, and the interpretation of the law in the countries which adhere to it is typically not problematic. However, the application of the theory is not free from disadvantages. This theory has been repeatedly criticised in various countries, including those where it has been applied.

There are at least three main disadvantages associated with the theory of incorporation. Firstly, the theory provides a very formalistic view and says little about the actual nature and location of the company's business operations.

Secondly, it allows businesses to exploit these rules by establishing fictitious letterbox companies whose real activities are not in any way connected with the state in which they are established. The main reasons for this include tax purposes or lenient company law regimes. For instance, some laws protect the personal data of company shareholders and beneficiary owners or information about branches.[233] When a company is registered in these jurisdictions because of lower corporate taxes, it is mainly a public law concern (tax law). However, it affects the interests arising under civil law, because a dispute between shareholders and the company (its management) must be resolved under the law of the country, according to the theory of incorporation, although the reality is that no one and nothing from this company is connected with that law; the parties could be merely familiar with its rules.

In the US, this issue is referred to as the 'Delaware effect'. Delaware is a state whose corporate legislation and tax advantages have been attracting businesses from all over the world. These companies usually have nothing to do with the state of Delaware. Another name for this in

[233] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

the US is ‘race to the bottom’ or ‘race to the top’. This is because insofar as regulatory matters are concerned, corporate laws would be based on the lowest (highest) common denominator.[234]

A third disadvantage of the theory of incorporation concerns cross-border corporate migration. The company may not be allowed to transfer its registered or administrative seat without being re-registered, having it wound up and dissolved first. In other words, if a foreign company which operates and has its administrative centre in a theory of incorporation country and fully associates itself with that state could not apply its rules as personal law, the law of the country of its incorporation applies. Before the new law starts to apply to this company, the shareholders have no other option than to establish a new entity in this country and wind up the company in the country of its original incorporation. In the European Union, it is possible to transfer companies between member states based on the freedom of establishment, which is outlined in the fifth part of this research.

The main advantages of the incorporation theory are its simplicity, legal certainty, and predictability. The laws of the countries of incorporation are quite simple to understand. Even a person with no knowledge of foreign law will have little difficulty in determining the personal law of a company. However, a minor reservation should be made regarding the lack of uniformity across different jurisdictions; although these exceptions are commonly derived from legislation, which does not pose any significant comprehensibility or applicability issues.

In order to determine personal law, it is sufficient to look through the incorporation documents. Anyone involved enough in the company matter can foresee and predict which law will be applicable. There is no need to await a specific dispute where a court will decide the question of applicable law. There is no need to study the company’s business processes and search for the decision-making centre, the head office, or the principal shareholders.

All that above leads to the stability of legal regulation, and stability is a crucial thing for businesses. Entrepreneurs are supposed to be aware of the conditions under which they enter into a relationship with other companies or set up their businesses, and legislators have to comply with the principle of predictability of legal regulation.

In this respect, improving the quality of legal regulation, even the Delaware effect can be found to be positive, as the desire among states to attract businesses to register with them generates more competition among lawmakers. This should result in the development of flexible rules of corporate law and the creation of other advantages for legal entities established under the law of

[234] HJI PANAYI, Christiana. Corporate Mobility in the European Union and Exit Taxes. *Bulletin for International Taxation*, Vol. 459, No. 63, 2009, p. 463. In: SSRN [online]. [Accessed 22 August 2023]. Available at: https://ssrn.-com/abstract=1529488.

these countries.[235] Therefore, the place of incorporation as a connecting factor forces legislators to evolve their legal systems by applying the highest standards and implementing the world's best practices. In the long run, countries that improve their investment climate become wealthier. In the European continent, the Netherlands and Ireland are clear examples of this.

Although the theory of incorporation is very formal, it is also fairly reasonable that the legal order which created the corporation should also govern it. On the one hand, it recognizes the sovereignty of the foreign state and its subjects, and, on the other hand, it protects a foreign company's autonomy of will to be established in another country. In turn, if a company would move its administrative centre or principal place of business operations, personal law would not be changed by foreign legal order.

4.3 'Real Seat' Theory

The 'real seat' theory determines the applicable law of a company based on the state where the company's 'real seat' is located.[236] In France, it is commonly referred to as *siège réel* or *siège social*, while in Germany, it is known as *Sitztheorie*. A company is considered to have its 'real seat' in a state if it is physically situated and conducts its management and operational activities there.[237] In other words, the 'real seat' means the place where the company has its main legal, financial, administrative, and technical management.[238]

In essence, the 'real seat' refers to the place where the central management and control of a company are situated. This includes the board of directors and the general meeting of shareholders, representing the executive and decision-making power of the company (principal establishment). Importantly, it represents the administrative centre at a particular point in time. As a result, if a company is primarily engaged in business activities outside the jurisdiction in which it is incorporated, its 'real seat' may differ from its place of incorporation. Moreover, it is not always obvious which country the company is predominantly associated with at any given time.

---

[235] BUTAKOVA, Yana. *Lichnyi zakon yuridicheskogo litsa. Nu ne to chtoby ochen' lichnyi i sokrovennyi [The Personal Law of a Legal Entity. Well, Not Exactly Personal and Intimate]*. In: Yurist kompanii. Prakticheskii zhurnal dlya yurista [online]. [Accessed 22 August 2023]. Available at: https://www.law.ru/news/36552-chetyre-sposoba-istolkovat-dogovor-s-nestykovkami-v-polzu-vashey-kompanii.

[236] KUČERA, Zdeněk – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé. [Private International Law]*. 8th edition. Pilsen: Aleš Čeněk, s.r.o.; Brno: Doplněk, 2015, p. 252.

[237] RAMMELOO, Stephan. *Corporations in Private International Law: A European Perspective*. Oxford: Oxford University Press, 2001, p. 174.

[238] PASCHALIDIS, Paschalis. *Freedom of Establishment and Private International Law for Corporations*. Oxford: Oxford University Press, 2012, pp. 4-5.

The theory of 'real seat' is based on the idea that since the state, in the territory of which a company has its actual seat, affects to the greatest extent the presence and activities of this company, it should also determine the rules of its internal affairs.[239]

A 'real seat' as a connecting factor for *lex societatis* first appeared in the Belgian Law of 18 May 1873 on Commercial Companies, Article 129 of which stated that any company whose principal establishment (*établissement principal*) is in Belgium is subject to Belgian law, even if its articles of incorporation were executed in a foreign country. However, Belgium currently adheres to the statutory seat theory as a criterion of the incorporation theory, as indicated in the previous paragraph.

The 'real seat' theory is currently most commonly applied in continental European countries such as Austria, Germany, Luxembourg, France, Portugal, and Greece. It also serves as a subsidiary connecting factor in Italy, Spain, and Ukraine. However, the application of 'real seat' rules has recently been limited in the European Union with regard to companies incorporated in another member state. The legal capacity of such companies should be fully recognized according to the laws of the state of incorporation.[240] This issue will be covered in the fifth part of this research.

For example, the French Civil Code in Article 1837 stipulates that a company whose seat (*le siège*) is located on French territory is subject to the provisions of French law, and third parties may rely on the statutory seat (*siège statutaire*), but the company may not invoke it against them if its real seat (*siège réel*) is located elsewhere.

It should be indicated that the legislation and case law of the states adhering to this theory have neither terminological unity nor contain clear criteria for the definition of 'real seat'.[241] Therefore, it is a rather complicated issue to determine the real seat in each particular case.

Another disadvantage of this theory is the complexity of determining the connecting factors of the 'real seat'. Determining the place where central decisions are made in a company is far more complex than described in the laws.[242] Firstly, today's management style is very different from what it was even fifty years ago. The strict vertical control hierarchy no longer prevails, and all

---

[239] GROSSFELD, Bernhard. *Internationales und Europäisches Unternehmensrecht: Das Organisationsrecht transnationaler Unternehmen. [International and European Business Law: The Organisational Law of Transnational Companies]*. 2nd edition. Heidelberg: C.F. Müller GmbH, 1995, p. 39.

[240] BAELZ, Kilian – BALDWIN, Teresa. The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law. *German Law Journal*, Vol. 3, Issue 12, 2002. In: Cambridge University Press [online]. [Accessed 22 August 2023]. Available at: https://doi.org/10.1017/S2071832200015674.

[241] ANUFRIEVA, Lyudmila Petrovna. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]. Volume 2: Osobennaya chast'. [Special Part]*. Moscow: Izdatel'stvo BEK, 2000, p. 50.

[242] JOHNSTON, Andrew – SYRPIS, Phil. Regulatory competition in European company law after "Cartesio". *European Law Review*, Vol. 34, Issue 3, 2009, p. 381.

processes are very rarely tied to a single decision-making centre. Secondly, the development of information technology, most notably the Internet, has made it possible to manage the company from any place in the world and not be tied to a single location. Thirdly, there are more and more big businesses in the world, united into groups of companies, as well as transnational companies whose decision-making centres are very difficult to locate.

Moreover, there is always a risk of loss of legal personality for a company that fails to comply with the requirement of having its 'real seat' in the territory of a state that adheres to the 'real seat' theory. Also, moving a company's 'real seat' to another country would change its personal law and cause it to lose its original legal personality, requiring it to be re-established under the law of the country of the new location.[243]

The 'real seat' theory offers several significant advantages. Firstly, it ensures that the law of the state which is affected the most by a company's operations is applied. This potentially should lead to more equitable outcomes compared to the incorporation theory. This allows for an extraterritorial application of the law, benefiting all parties involved.[244] Additionally, this theory provides more confidence for authorities and creditors by safeguarding the application of domestic corporate law standards.[245]

Furthermore, the 'real seat' theory addresses the issue of the so-called Delaware effect.[246] It prevents businesses from evading the application of laws in the countries where they operate by setting up letterbox companies. This limitation makes it more challenging for the 'offshore finance industry' and its beneficiaries, ultimately contributing to achieving a balance between the interests of various corporate stakeholders which emphasises that a company should serve the interests of all its stakeholders, including society as a whole.[247]

---

[243] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, p. 53. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

[244] PASCHALIDIS, Paschalis. *Freedom of Establishment and Private International Law for Corporations*. Oxford: Oxford University Press, 2012, p. 9.

[245] EBKE, F. Werner. The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond. *The International Lawyer*, Vol. 38, No. 3, 2004, p. 818. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/40708225.

[246] PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém. [Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, p. 84.

[247] EIDENMÜLLER, Horst. *Shell Shock: In Defence of the "Real Seat Theory" in International Company Law*. In: University of Oxford. Oxford Business Law Blog [online]. [Accessed 22 August 2023]. Available at: https://blogs.-law.ox.ac.uk/business-law-blog/blog/2022/03/shell-shock-defence-real-seat-theory-international-company-law.

4.4 Other Theories for Determining Law Applicable

4.4.1 The Theory of Control

The theory of control, along with the theory of incorporation and 'real seat', is a standalone criterion. It combines the personal law of a company with citizenship. It ties the personal law of the company to the nationality of the persons (physical or legal) who actually control the company.[248] At its heart is the fact that a company has the personal law of the state from whose territory its activities are controlled and managed; otherwise, it can be called the criterion of the nationality of the legal entity's members.

The theory of control originated in English law. It was first applied by the Treasury Department of the High Court of Justice in the decision in Cesena Sulphur Co. v. Nicholson (1876).[249] The proposition that central control is the correct criterion for a company's domicile was confirmed by the House of Lords in the leading precedent case of De Beers Consolidated Mines Ltd. v. Howe (1906).[250]

However, the greatest demand for control theory arose in the period of the First World War. In 1915, an English court trial was held against Daimler.[251] In the process, it was found that only one of the 25,000 shares in the company's share capital was owned by a British citizen, while all the rest were owned by German holders. The company was registered in Great Britain and from the point of view of English law should have been regarded as an English company.[252] However, Lord Justice Parker ruled the company to be 'hostile' because it was under the control of German beneficiaries.[253]

A circular issued by the French Ministry of Justice on February 24, 1916, stated that, when it comes to the hostile nature of legal persons, it is not enough to examine the legal forms adopted by companies; neither the place of the seat nor other characteristics that determine personal law, since it is primarily a question of identifying the real nature of the company's activities.[254]

During World War II, the theory of control took its final form. In the United Kingdom, the Trading with the Enemy Act of 1939 was adopted, which prohibited trade with the enemy.

---

[248] PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém. [Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, p. 95.
[249] Cesena Sulphur Company v Nicholson [1876] 35 LT 275.
[250] De Beers Consolidated Mines Ltd. v. Howe (1906) AC 455.
[251] Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain), Limited, [1916] 2 AC 307.
[252] LUNTS, Lazar' Adol'fovich. *Kurs mezhdunarodnogo chastnogo prava: Obshchaya chast'. [Course of International Private Law: General Part]*. Moscow: Yuridicheskaya literatura, 1973. 376 pages.
[253] PERETERSKII, Ivan Sergeevich – KRYLOV, Sergei Borisovich. *Mezhdunarodnoe chastnoe pravo: Uchebnik dlya yuridicheskih institutov i fakul'tetov. [International Private Law: Textbook for Legal Institutes and Faculties]*. 2nd edition. Moscow: Gosudarstvennoe izdatel'stvo yuridicheskoi literatury, 1959, p. 85.
[254] ANUFRIEVA, Lyudmila Petrovna. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]. Volume 2: Osobennaya chast'. [Special Part]*. Moscow: Izdatel'stvo BEK, 2000, p. 52.

Section 2 of this act states, in particular, that the enemy is any body of persons (whether corporate or unincorporated) carrying on business in any place, if and as long as the body is controlled by an enemy (at war with His Majesty). The theory of control was also incorporated into the US Foreign Agents Registration Act (FARA) of 1938. It declared that an 'agent of a foreign principal' is any person who acts as an agent, representative, employee, or servant, or otherwise acts under the order, request, direction, or control of a 'foreign principal', and engages in political activities within the United States.[255]

Besides the United States and the United Kingdom, this criterion may also be applied in Switzerland, France, and Liechtenstein. For example, in French jurisprudence, the control criterion can be applied if the inquiry is related to the enjoyment of rights.[256]

However, the criterion of control is generally used in the law of developing countries, which seek to preserve certain advantages and privileges only for companies under the control of local residents. For example, according to Article 22 of the Ordinance of Madagascar Concerning general provisions of internal law and private international law,[257] legal persons whose seat (*le siège social*) is in Madagascar shall enjoy all the rights recognized to local ones and compatible with their nature and object. However, if their management (*leur gestion*) is placed, in any way whatsoever, under the control of foreigners or of organisations that are themselves dependent on foreigners, they only enjoy the rights granted to foreigners, as per Article 20.

Further, the law defines the type of natural or legal person who is presumed to have control over the company (*détenir le contrôle d'une société*). First, such persons hold control when they, directly or indirectly, hold more than half of the voting rights of an agreement or agreements concluded with other shareholders of this company. Third, persons presumed to exercise this control when it holds, directly or indirectly, a fraction of the voting rights exceeding forty per cent and no other partner or shareholder holds, directly or indirectly, a fraction greater than its own.

---

[255] The Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq.
Today, the term 'foreign agents' has become very common also in Russia by the Federal Law No. 255-FZ of July 14, 2022 (as amended on July 24, 2023), On Control Over the Activities of Persons Under Foreign Influence, which is mostly used to control political activists. According to that law a 'foreign agent' is a person (natural or juridical), who has recieved a support and (or) is a subject of foriegn influence by other means and providing the followin activities: political activities, systematic collection of information in the field of military and military-technical activities of the Russian Federation, creation or distribution of messages and materials intended for public, as well as other types of activities.

[256] VOZNESENSKAYA, Ninel' Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN. [Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeyskogo-soyuza/viewer.

[257] Ordinance No. 62-041 of September 19, 1962, concerning general provisions of domestic law and private international law.

This criterion is also reflected in several international treaties. It is contained in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, and the Energy Charter Treaty of 1994 (ECT). For example, the Energy Charter Treaty provided in Article 17(1) for the possibility for the contracting party to deny the advantages of ECT to a legal entity if citizens or nationals of a third state own or control such entity.[258]

While this criterion is not without its flaws, it is a very formal test used by states not to determine equitable personal law, but to limit the national regime of a company, deny the enjoyment of rights equal to domestic companies, or impose sanctions.

Therefore, even in this form, it is not possible to use it as a primary test because it is not clear how it can be applied to companies with a multinational shareholding structure. Moreover, it is practically impossible to keep track of changes in the membership of publicly listed companies.

4.4.2 The Theory of Place of Business

Another distinct criterion is the theory of place of business. According to this theory, the personal law of a company is determined by the place of its main activity (operations).

This criterion is often used in the laws of developing countries, which thus aim to ensure control over companies carrying out business activities on their territories. In particular, as an alternative, this conflict of laws clause is used in the legislation of Egypt and Tunisia. This criterion is also used as a subsidiarity in Spanish[259] and Italian law.[260]

For example, Article 11 of the Egyptian Civil Code stipulates that the legal status of foreign juristic persons such as companies, associations, foundations, or others, is subject to the law of the state in whose territory such legal persons have established their actual principal seat of management. If, however, a legal person carries on its principal activities in Egypt, Egyptian law will be applied.[261]

Article 43 of the Tunisian Code of Private International Law provides that legal entities (*personnes morales*) are governed, regarding the rights related to their legal personality, by the law of the state in which they were incorporated, or when it concerns their activities, by the law of

[258] BOGUSLAVSKII, Mark Moiseevich. *Mezhdunarodnoe chastnoe pravo [International Private Law]*. 5th edition. Moscow: Yurist, 2005, pp. 147-150.
[259] Article 41 Spanish Civil Code, Royal Decree of 24 July 1889.
[260] Article 25 Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law'
[261] Law No. 131 of the year 1948: The Egyptian Civil Code.

the state in which they conduct these activities (*lorsqu'il s'agit de leurs activités, à la loi de l'Etat ou elles exercent ces activités*).[262]

Article 25 of the Italian law 'Reform of the Italian System of Private International Law', states that companies, associations, foundations and any other public or private entity, even if not of an associative nature, are governed by the law of the state in whose territory the incorporation procedure has been completed (*legge dello Stato nel cui territorio è stato perfezionato il procedimento di costituzione*). However, Italian law applies if the headquarters of the administration (*la sede dell'amministrazione*) is located in Italy, or if the main object of such entities (*l'oggetto principale*) is located in Italy.

For the purposes of private international law, the main concern with this criterion is that it always blends the regulation of the business activities of a company with its personal law. Moreover, this criterion cannot ensure certainty and consistency over its application. A company may perform its activities in a number of countries at one time and it can be very challenging, if not impossible, to make a clear choice in favour of one (principal) country. Moreover, a company may change its principal place of business in a short time. The theory of the place of business can easily confuse the practitioner.

4.4.3 Autonomy of the Will

As was mentioned in the first part of this research, one of the basic principles of civil law is the theory of autonomy of the will. In private international law, it is reflected in the form of the principle of freedom of choice of law. This principle is common in the law of obligations. It allows the parties to decide autonomously and choose the applicable law on their own free will. The court hearing the dispute will most likely follow the choice of the parties. Exceptions to the rule of freedom to choose the applicable law derive from public policy (*ordre public*) and overriding mandatory rules.

In this regard, it sounds very tempting to use autonomy of will as the primary criterion for determining the law applicable to the personal law of a company. Therefore, members of a company could agree on the law that applies to their relationships. However, this would be both logical and absurd at the very same time. The key problem lies in a difference of interpretation of the nature of a legal entity as an organism or as a legal fiction. On the one hand, if a company is an organism, its members are free to decide what rules it should operate under, where it should have a management and control centre and where it should carry out its activities. Nothing forces

[262] Law No. 98-97 of November 27, 1998, enacting the Code of Private International Law.

a company to cooperate or do business with another company if it is not satisfied with the law applicable. On the other hand, according to the theory of fiction, a company cannot emerge outside the legal framework. Indeed, members of a company may physically join their assets and efforts, but it is the law of a particular state that gives it a legal form. There is no legal personality without the act of the state, and hence, the very precondition of legal capacity does not arise.

Since currently the theory of fiction is applied in all legal systems and national legislations do not allow the establishment of domestic companies governed by foreign law, there is no foundation of autonomy of will as such to determine the personal law through the freedom of choice.

Another problem is that, in contrast to the law of obligations, corporate law in different states is dominated by a plethora of imperative rules. Freedom of choice of law in international contract law is expressly derived from the dispositive nature of civil law and the principle of freedom of contract in the law of obligations that comes from it.

This is understandable, as states are trying to protect the rights and legitimate interests of all market players by providing uniform rules and eliminating harmful and unfair practices. Therefore, if a state does not allow companies to escape at least a part of the mandatory rules by exercising their autonomous will, it will never allow a company to escape the entire domestic corporate law.

From a broader perspective, reliance solely on the criterion of autonomy cannot be considered the primary or exclusive determinant for determining personal law. Nevertheless, the autonomy of will should be regarded as a fundamental principle and ideal to which the science of corporate law and private international law should aspire. Nevertheless, it is already possible to identify a number of corporate legal relations which could be primarily based on the autonomy of will. And these should be, first of all, various kinds of agreements between shareholders and participants, so the autonomy of will should be developed in such spheres.

4.4.4 The Doctrine of Combination

The doctrine of combination (*Kombinationslehre*),[263] developed by Daniel Zimmer, is based on the principle of autonomy of the will of the parties, which follows from the meaning of Article 27(3) of the German Civil Code. In particular, Zimmer pointed out that the principle of the

[263] ZIMMER, Daniel. *Internationales Gesellschaftsrecht: das Kollisionsrecht der Gesellschaften und sein Verhältnis zum internationalen Kapitalmarktrecht und zum internationalen Unternehmensrecht. [International Company Law: The Conflict of Laws of Companies and its Relationship with International Capital Market Law and International Corporate Law]*. Heidelberg: Verlag Recht und Wirtschaft, 1996, p. 232.

autonomy of the parties should also be reflected in the international law of companies, and the limits of the parties' autonomy should be defined, as, for example, in the international law of obligations.[264]

According to the doctrine of combination, a company is subject to the law to which it was subjected by its founders. Where the place of establishment differs from the effective location of the administrative centre of the company, the above principle applies if the company reveals a 'substantial connection with a foreign country' (*substantielle Auslandsbeziehung*).

If Zimmer's criterion is applied, it may be that the answer to the substantial connection with a foreign country question will change over a short time, which does not make the method reliable. The mere absence of an important customer abroad is sufficient in itself to indicate the absence of a significant foreign connection. Besides this, the absence of such a material connection (e.g. the loss of a major customer abroad) and the resulting change in the personal status of the company can unexpectedly affect the interests of the founders (participants) of the company themselves. Thus, the theory of combination is associated with significant legal instability, and it is not suitable for determining the personal law of the company.[265]

4.4.5 The Limited Theory of Incorporation

According to German researcher Günther Beitzke, the theory of incorporation should be applied to determine the *lex societatis* of a company. In his perspective, if a foreign company has its seat outside the state of its incorporation, the theory of incorporation should be subject to certain limitations. In such cases, a court, or another competent authority should set a specific period of time within which the foreign company must be reorganised and adapt to the requirements of the law of the host state. This ensures the proper consideration of the domestic legal order.[266]

The application of the limited incorporation theory contributes to the protection of the interests of creditors, minority stakeholders, and employees. It also facilitates the realisation of the freedom of establishment and economic activity for companies, as outlined in EU law. A notable

---

[264] Ibid., p. 223.

[265] AUHATOV, A. Ya. Modifitsirovannye teorii opredeleniya lichnogo zakona yuridicheskogo litsa. [Modified Theories of Determining the Personal Law of a Juridical Person]. *Mezhdunarodnoe publichnoe i chastnoe pravo. [International Public and Private Law]*, No. 2, 2005, pp. 21-26.

[266] BEITZKE, Günther. *Kollisionsrecht von Gesellschaften und juristischen Personen. [Conflict of Laws for Companies and Juristic Persons]*. In: LAUTERBACH, Wolfgang. *Vorschläge und Gutachten zur Reform des deutschen internationalen Personen- und Sachenrects. Vorgelegt im Auftrag der 2. Kommission des Deutschen Rates für internationales Privatrecht von Wolfgang Lauterbach. [Proposals and Opinions on the Reform of German International Personal and Property Law. Presented on behalf of the 2nd Commission of the German Council for International Private Law by Wolfgang Lauterbach]*. Tübingen: Mohr, 1972, pp. 116-119.

advantage of this theory is its prevention of the accidental loss of legal capacity as a result of a hasty transfer of the company's seat to another state.[267]

4.4.6 The Theory of Reservations

The theory of reservations (*Vorbehaltstheorie*), formulated by Peter Behrens, uses the criterion of the place of incorporation as the primary one. However, it seeks to safeguard the interests of third parties located in the country of the 'real seat'. Where protective rules are provided by the law of the real seat to preserve the rights of creditors, employees, and members (founders) of the company, and these third parties seek their enforcement, Behrens proposed the application of 'mandatory reservations' (*zwingend erforderliche Vorbehalte*).[268]

The advantage of this theory lies in its ability to maintain a straightforward place of incorporation criterion while ensuring the adequate protection of the third parties' interests beyond the country of incorporation through the imposition of mandatory reservations of the real seat state.

However, this theory has at least two weaknesses that make it rather impracticable. Firstly, the concept of 'mandatory reservations' lacks clarity and requires further elaboration, leading to complications in its application and leading to a lack of legal stability.[269] Secondly, the broad range of mandatory rules in corporate law, coupled with the theory's lack of concretisation, may result in the blending of different legal systems.[270]

4.4.7 The Theory of Super-addition

The theory of super-addition is another modification of the theory of incorporation. Its creator, Otto Sandrock, drew inspiration from the American legal doctrine of pseudo-foreign corporation and the legislation of two US states (New York and California) to develop the super-addition or 'overlay' theory (*Überlagerungstheorie*).[271] It is based on an approach to determining

---

[267] MÜLLER-DRIVER, Andreas. *Grenzüberschreitende Restrukturierungen von Kapitalgesellschaften zwischen Deutschland und England*: *Dissertation*. *[Cross-Border Restructuring of Capital Companies between Germany and England: Dissertation]*. Frankfurt/M.: Peter Lang GmbH - Internationaler Verlag der Wissenschaften, 2002, p. 115.

[268] AUHATOV, A. Ya. Modifitsirovannye teorii opredeleniya lichnogo zakona yuridicheskogo litsa. [Modified Theories of Determining the Personal Law of a Juridical Person]. *Mezhdunarodnoe publichnoe i chastnoe pravo*. *[International Public and Private Law]*, No. 2, 2005, pp. 21-26.

[269] NAPPENBACH, Celina. *Parteiautonomie im internationalen Gesellschaftsrecht: Dissertation*. *[Party Autonomy in International Company Law: Dissertation]*. Berlin: Logos-Verl, 2002, p. 40.

[270] GROTHE, Helmut. *Die "ausländische Kapitalgesellschaft & Co.": Zulässigkeit grenzüberschreitender Grundtypvermischungen und Anknüpfung des Gesellschaftsstatuts unter besonderer Berücksichtigung des europäischen Gemeinschaftsrechts*. *[The 'Foreign Capital Company & Co.': Permissibility of Cross-Border Basic Type Mixtures and the Connection of Corporate Statutes with Special Consideration of European Community Law]*. Hamburg: Heymann, 1989, p. 100.

[271] SANDROCK, Otto. *Die Konkretisierung der Uberlagerungstheorie in einigen zentralen Einzelfragen. Ein Beitrag zum internationalen Gesellschaftsrecht*. *[The Concretization of the Overlapping Theory in Some Key Specific Issues. A Contribution to International Company Law]*. In: SANDROCK, Otto. *FESTSCHRIFT FUR GUNTHER BEITZKE*

personal law under the law of the state of incorporation while taking into account the interests of third parties. Regulations should protect 'the immediate private law interests of the company'.[272]

This theory involves a division between the establishment and recognition of a company on the one hand and the personal law that governs the company's internal and external relations on the other hand. According to the overlay theory, the personal law of the company is determined by the law of the state of the establishment. A company established abroad will also be recognized domestically as an existing foreign company. However, if the actual seat is located in that country, the law of the state where the company is established is superseded (*überlagert*) by the relevant rules of the law of the seat.[273] This occurs only if one of the parties to the legal relationship invokes it.[274] Contrary to Berens' reservation theory, mandatory rules of the state where the company's seat is located should find their application.

The theory of super-addition served as the basis for the Convention on the Mutual Recognition of Companies and Firms. According to Article 4 of this convention, any contracting state may declare that it will apply any provisions of its own legislation that it deems essential to companies or bodies corporate having their real registered offices on its territory, even if they have been established under the law of another contracting state.[275] The clear advantage of this approach is that it preserves the protective principle of the 'real seat' criterion.

The theory of super-addition has several positive contributions. Firstly, it removes barriers and encourages foreign companies to enter domestic markets, fostering competition without an expensive business restructuring. Secondly, it protects the interests of third parties by allowing the application of the mandatory rules.[276]

However, a certain legal uncertainty arises when such a fundamental question as the applicable law depends on the opposing party, and logically, the opposing party will always choose the law in its favour. Consequently, this approach is primarily litigation-oriented (which is very

---

ZUM 70. GEBURTSTAG am 26. April 1979. [Festschrift for Günter Beitzke on His 70th Birthday on April 26, 1979]. Walter de Gruyter: Berlin; New York, 1979. pp. 669-696.

[272] SANDROCK, Otto. *Die multinationalen Korporationen im Internationalen Privatrecht*. *[Multinational Corporations in International Private Law]*. In: WILDHABER, Luzius et al. *Internationalrechtliche Probleme multinationaler Korporationen*. *[International Legal Problems of Multinational Corporations]*. Karlsruhe, 1978, p. 202.

[273] SANDROCK, Otto. Centros: ein Etappensieg für die Überlagerungstheorie. [Centros: A Partial Victory for the Overlap Doctrine]. *Betriebs-Berater*. *[Business Advisor]*, Vol. 26, 1999, p. 1337.

[274] PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém*. *[Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, p. 106.

[275] The Convention of 29 February 1968 on the Mutual Recognition of Companies and Firms.

[276] KADYSHEVA, Ol'ga Vladimirovna. *Natsional'nost' yuridicheskih lits v mezhdunarodnom chastnom prave: Avtoreferat kandidatskoi dissertatsii po spetsial'nosti 12.00.03 - Grazhdanskoe pravo; predprinimatel'skoe pravo; semeinoe pravo; mezhdunarodnoe chastnoe pravo (yuridicheskie nauki)*. *[Nationality of Juridical Persons in International Private Law: Abstract of the Candidate Dissertation in the Specialty 12.00.03 - Civil Law; Entrepreneurial Law; Family Law; International Private Law (Legal Sciences)]*. Moscow, 2003, pp. 20-22.

characteristic of American legal doctrine). Hence, if there is no dispute, it is impossible to determine the applicable law. Therefore, while the theory of super-addition has several positive characteristics, it cannot be considered the only theory appropriate for determining the personal law of a company.

4.4.8 Grasmann's Doctrine of Differentiation.

Günther Grasmann went one step further than Otto Sandrock by abandoning the basic conflict of laws rule altogether. He argues that criteria for internal relations are unsuitable for external relations and vice versa. Instead, he differentiates between the internal relations among the members (founders) of the company and the external relations between the company and third parties (creditors). For these two spheres, he proposes two different conflict-of-laws clauses. Grasmann justifies this distinction between the internal and external relations of the company on one hand, by the interests of the company, and on the other hand, by the need to protect third parties. The company itself is interested in enjoying the same freedoms as domestic companies with which it competes while in a foreign country.[277]

Grasmann points out that the interests of the individuals involved differ between external and internal relationships. Individuals engaged in external relationships should have a stronger certainty in the applicable law of the company, as their connection to the company is not as enduring over a long period of time. The autonomy of the company's founders' will should be decisive in binding the internal statute since the interests of third parties will not be affected. The purpose of the doctrine of differentiation is to provide greater freedom to formalise the internal relations of company participants and to offer optimal protection to third parties in external relations.[278]

For external relations, the grounds for the imposition must be chosen to follow the interests of the business, which, in turn, leads to the application of the law of the administrative centre seat of the company. Internal relations should be regulated by the law of the place of incorporation: the establishment and termination of the company, the articles of association and changes thereto, the name of the company, its bodies, the conduct of business and control, as well as the legal position of the shareholders. External relations include the acquisition of rights and duties, the scope of

---

[277] GRASMANN, Günther. *System des internationalen Gesellschaftsrechts. Aufien- un Innenstatut der Gesellschaften im Internationalen Privatrecht. [System of International Company Law. Foreign and Domestic Statutes of Companies in International Private Law]*. Berlin: Herne, 1970, p. 344-347.

[278] AUHATOV, A. Ya. Modifitsirovannye teorii opredeleniya lichnogo zakona yuridicheskogo litsa. [Modified Theories of Determining the Personal Law of a Juridical Person]. *Mezhdunarodnoe publichnoe i chastnoe pravo. [International Public and Private Law]*, No. 2, 2005, pp. 21-26.

legal and legal capacity, liability, the formation and preservation of capital, the powers of bodies for day-to-day management, and the powers of bodies for representation. However, in many cases where the interests of several parties are affected, the distinction between internal and external relations inevitably leads to the cumulative application of multiple legal orders, thus resulting in almost insoluble conflicts of law and problems of adaptation. By its very nature, corporate law pertains to internal relations. It focuses not only on the needs of the company's founders but also on the protection of the company's creditors. For example, in cases where a shareholder is disqualified from doing business and is not liable for the transactions entered into, adverse consequences (infliction of harm) may occur, as there is a close connection between external and internal relations in corporate law.[279]

The application of different legal orders, as in the case of the 'overlay' theory, will lead to a lack of stability and blending of rules. This may not necessarily align with the interests of a company, its members, and creditors. Both the company and those involved with it generally opt to operate under rules that have been mutually agreed upon to avoid unpredictable risks. When different legal systems are mixed, they not only fail to provide the desired stability of trade and legal regulation but can also fundamentally undermine it.

Conclusions of Part 4

1. There are two primary theories for determining the applicable law to companies: the theory of incorporation and the 'real seat' theory. According to the theory of incorporation, the connecting factors are the law of the place of incorporation and the law of the place of the statutory seat. The 'real seat' theory relies on the law of the place of the actual administrative seat.

2. Incorporation theory has a number of advantages, including predictability, simplicity, and consistent application, which protect the interests of the company's stakeholders. However, it also carries the risk of potential abuse of creditors' rights, and the host state in which the company operates is in a vulnerable position, as the law of that country could be disregarded. On the other hand, the theory of the 'real seat' addresses the challenge of applying the law based on the company's actual administrative and operational centre, rather than its formal registration. This approach safeguards the interests of creditors and the host state by applying their domestic law. Nevertheless, the determination of the real seat can be complex and unpredictable, raising concerns about potential negative consequences, including the loss of the company's legal personality.

[279] Ibidem.

3. In addition, the modified theories attract attention to their potential to address the specific issues associated with defining a uniform criterion for determining the applicable law; however, their practical implementation remains a subject of scepticism.

4. In light of this reasoning, if a choice has to be made in favour of the most effective theory, it can be concluded that the incorporation theory is better suited to be used as the only unified approach. Regarding the connecting factor, the use of the statutory seat proves to be preferable, as it aligns with current trends and the increasing prevalence of company transfers with changes in the statutory seat. This criterion is not only as simple and predictable as the incorporation criterion but also shows a degree of adaptability.

5. Cross-border Conversions in the European Union Law

5.1 Freedom of Establishment in the European Union

The Treaty Establishing the European Economic Community (EEC Treaty, Treaty of Rome), signed in 1957, aimed to promote economic prosperity and unity among European nations by creating a common market that would eliminate trade barriers. This objective was achieved through various measures, such as the customs union in 1968, the removal of quotas, the free movement of citizens and workers, and partial tax harmonisation with the introduction of value-added tax in 1970. However, restrictions on the free trade of goods and services, as well as the establishment of businesses, persisted due to anti-competitive practices imposed by public authorities. In 1986, the Single European Act incorporated the goal of establishing an internal market within the EEC Treaty, defining it as '*an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured*'.[280]

The freedom of movement of goods eliminates tariffs and quotas, allowing for the sale of goods produced in one EU country in another without hindrance. Similarly, freedom of movement of services permits service providers to operate in any EU country without facing discriminatory regulations or administrative obstacles. The freedom of movement of capital enables businesses to invest and transfer capital across EU borders and access financing from all over the EU. Lastly, freedom of movement of persons allows EU citizens to live, work, and study in any EU country of their choosing and even grants non-EU citizens the ability to move and work within the EU under certain conditions.

Freedom of establishment is a key element of the European Union's internal market. It is often considered a part of the freedom of movement of persons.[281] The freedom of establishment is currently regulated by Articles 49 to 55 of the Treaty on the Functioning of the European Union (TFEU). These provisions have a direct effect, enabling individuals and businesses to rely on this freedom in national courts.[282]

The freedom of establishment is based on the principle of non-discrimination. This principle is highlighted in Article 54 TFEU (formerly Article 48 within the original EEC Treaty or EC Treaty), which states that companies or firms formed under the law of a Member State and

[280] RATCLIFF, Christina – WOSYKA, Mathias – MARTINELLO, Barbara – FRANCO, Davide. *The internal market: General principles*. In: European Parliament. Fact Sheets on the European Union [online]. [Accessed 6 September 2023]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/33/the-internal-market-general-principles.
[281] SVOBODA, Pavel. *Úvod do evropského práva. [Introduction to European Law]*. 5th edition. Prague: C.H. Beck, 2013, p. 210.
[282] The direct effect of the freedom of establishment was confirmed by CJEU judgment C-79/85: D.H.M. Segers v Bestuur van de Bedrijfsvereniging voor Banken Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2381 (paragraph 12).

having their registered office, central administration, or principal place of business within the EU, shall be treated in the same way as natural persons who are nationals of EU member states.

Under Article 54(2) TFEU, the term 'companies or firms' refers to entities formed under civil or commercial law, including cooperative societies, as well as other legal persons governed by public or private law, except for those which are non-profit-making.

If the concepts of 'formed in accordance with the law of a Member State' or 'registered office' are considered self-evident, the term 'central administration' requires additional explanation. It is important to note that, despite its frequent use in EU law, including CJEU case law, the term 'central administration' is not precisely defined. In doctrine and case law, it can be understood as the place to which the company's actions are genuinely connected, the place where the will of the legal entity is expressed, the place where the statutory bodies are located or gathered, and as the place where fundamental decisions are made. The use of the term 'central administration' in conflict-of-laws rules is viewed as a pragmatic compromise, eliminating the need to determine whether a member state relies on the theory of residence or incorporation.[283]

Article 49 TFEU (formerly Article 43 EEC Treaty) enshrines the principle of freedom of establishment, stating that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited'. This prohibition also extends to restrictions on the setting-up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any other member state.

In connection with the above, two types of freedom of establishment are distinguished: primary and secondary. Primary establishment refers to the right of any person or company from one EU country to establish their business in another member state, as well as to transfer their organisation to the territory of another member state.[284] Secondary establishment allows a business already established in one EU state to open an office or branch in another state.

Moreover, 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, under the conditions laid down for its nationals by the law of the country where such establishment is affected.

The right of establishment covers all measures which permit or even merely facilitate access to another member state and the pursuit of economic activity in that state granting the

[283] PFEIFFER, Magdalena. Kde bydlí právnická osoba? Obvyklý pobyt a bydliště právnických osob z perspektivy evropského mezinárodního práva soukromého. [Where Does a Legal Person Live? Habitual Residence and Domicile of Legal Persons from the Perspective of European Private International Law]. In: *Právník. [Lawyer]*, Vol. 153, No. 7, 2014, p. 527.
[284] TICHÝ, Luboš et al. *Evropské právo. [European Law]*. 5th edition. Prague: C.H. Beck, 2014, p. 375.

persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.[285] Hence, the following general definition could be given: freedom of establishment denotes the right of citizens of EU member states to establish and operate businesses in any other EU member state.

However, the freedom of establishment is not absolute, and there are specific limited exceptions that, nevertheless, must be proportionate and non-discriminatory. Article 51 TFEU excludes activities related to the exercise of official authority from the scope of freedom of establishment and provision of services. However, this exclusion is subject to a narrow interpretation and covers only specific activities that entail the exercise of authority. Additionally, a profession can be excluded only if its entire activity is dedicated to the exercise of official authority or if the part dedicated to the exercise of public authority is inseparable from the rest. Specific exceptions also permit member states to exclude the production or trade of war materials (Article 346(1)(b) TFEU) and to maintain regulations for non-nationals concerning public policy, public security, or public health (Article 52(1) TFEU).[286]

5.2 Court of Justice of the European Union Case Law on Freedom of Establishment

5.2.1. Daily Mail, C-81/87, 27 September 1988

The Daily Mail[287] sought to transfer its central management and control to the Netherlands while retaining its incorporation under UK law. After establishing central management and control in the Netherlands, the company should become subject to corporation tax in the Netherlands. Upon completion of the transfer, the Daily Mail would be liable for Netherlands corporation tax, and any taxable transactions would only be based on capital gains earned after the relocation. The primary motivation behind this decision was to avoid capital gains tax in the UK, as the company aimed to sell a significant portion of its non-permanent assets to use the profits from the sale to purchase its own shares. Thus, as a tax resident of the Netherlands, the Daily Mail was required to pay taxes on capital gains arising after the transfer of its residence.[288]

According to UK corporate law, a company incorporated under UK law with its registered office in the UK could establish its central management and control outside the UK without losing

[285] CJEU judgment no C-411/03: SEVIC Systems [2005] ECR I-10805.
[286] RATCLIFF, Christina – WOSYKA, Mathias – MARTINELLO, Barbara – FRANCO, Davide. *Freedom of establishment and freedom to provide services*. In: European Parliament. Fact Sheets on the European Union [online]. [Accessed 6 September 2023]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/-40/freedom-of-establishment-and-freedom-to-provide-services.
[287] CJEU judgment no 81/87: The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECLI:EU:C:1988:456.
[288] CALSTER, van Geert. *European Private International Law*. 2nd edition. Oxford: Hart Publishing, 2016, p. 346.

its legal status in the UK. Under UK tax law, a company is considered a tax resident of a place where it has its central management and control. Nevertheless, the Income and Corporation Tax Act of 1970 prohibited UK-resident companies from ceasing their UK tax residence without consent from the Treasury. The Daily Mail applied to the Treasury. The Treasury agreed, but on the condition that the Daily Mail sell some assets before moving central management and control there, in an attempt to recoup some of the lost tax revenue. Subsequently, the Daily Mail initiated legal proceedings before the High Court of Justice. The company contended that Articles 52 and 58 of the EEC Treaty granted it the right to transfer its central management and control to another member state without prior consent or unconditional access to such consent (paragraphs 3-8).

The High Court of Justice referred the following four questions to the European Court of Justice (the Court):

(1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where: (a) payment of tax upon profits or gains which have already arisen may be avoided; (b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?

(2) Does Council Directive 73/148/EEC[289] *give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?*

(3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?

(4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

First and foremost, the Court underscored that freedom of establishment constitutes a fundamental principle, safeguarded by the provisions of the Treaty and directly applicable (paragraph 15). Corporations typically exercise their establishment right by forming agencies, branches, or subsidiaries, as explicitly permitted by Article 52 EEC Treaty (paragraph 17).

[289] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

The Court then stated that 'unlike natural persons, companies are creations of the law and, in the current state of Community law, creations of national law', and thus, 'their existence relies solely on the diverse national legislation that dictates their incorporation and operations' (paragraph 19).

National legislations vary greatly in both the factor providing a connection to the national territory required for the incorporation of a company and whether a company incorporated under the legislation of the state may subsequently change that connecting factor. Also, national law could require that both the registered office and central administration of the company (real head office) must be situated within their territory, and the removal of the central administration from that territory leads to the winding-up of the company with all its consequences according to company and tax law (paragraph 20).

Given that the EEC Treaty in Article 58 places the right of establishment on the same footing, as connecting factors, the registered office, central administration, and principal place of business of a company, the Court answered the first question as follows: '*Articles 52 and 58 of the Treaty confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State*' (paragraph 25).

Regarding the second question about the applicability of Council Directive 73/148/EEC, the Court concluded that the directive pertains to the movement and residence of natural persons and its provisions cannot be extrapolated to legal entities by analogy (paragraph 28). Consequently, Directive 73/148/EEC does not apply to that case and it '*confers no right on a company to transfer its central management and control to another Member State*' (paragraph 29).

Thus, the Court ruled that prohibitions in national law on transferring central management and control to another member state do not contravene community law. Within this context, the Court did not delve into the third and fourth questions.

The judgment in the Daily Mail case often led to an interpretation that the provisions of the EEC Treaty (TFEU) concerning freedom of establishment could not effectively supersede national regulations governing primary establishment. Consequently, relocating a company's registered office was deemed to be outside the scope of the freedom of establishment in relation to both the host and home member states. In Germany, where the 'real seat' principle is followed, the ruling was viewed as supporting this principle.[290]

[290] RINGE, Wolf-Georg. No Freedom of Emigration for Companies? *European Business Law Review*, Vol. 16, No. 3, 2005, pp. 7-8. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=1085544.

However, the Court analysed neither the conflict of laws rules, nor the issue of recognising a foreign company, nor the question of winding-up that was required by the country of incorporation. Instead, it solely focused on the requirement for obtaining the Treasury authorisation for transferring a company's residence.[291]

5.2.2. Centros Ltd, C-212/97, 9 March 1999

Centros Ltd, a wine import and export company, was incorporated in the UK and was owned by two Danish nationals.[292] Despite being registered in the UK, the company had never conducted any business there, as its target market was Denmark. Consequently, Centros Ltd applied to establish a branch office in Denmark. However, the Danish regulatory body, the Trade and Companies Board (the Board), rejected the application on two grounds. Firstly, Centros Ltd had never traded in the UK since its inception, and secondly, the company was attempting to establish its primary establishment in Denmark instead of a branch office, to circumvent Danish regulations mandating a minimum capital of 200,000 Danish kroner at that time. Centros Ltd's share capital amounted to only 100 British pounds (paragraphs 1-7).

After the Board rejected Centros Ltd's application to register a branch office in Denmark, the company brought an action against it before the Eastern High Court (*Østre Landsret*). The court upheld the Board's reasoning, prompting Centros Ltd to file an appeal with the Supreme Court (*Højesteret*). During the appeal proceedings, Centros Ltd argued that it met the requirements stipulated by the law for foreign corporations and, as a result, was entitled to establish a branch office in Denmark under Article 52 EC Treaty (paragraphs 8-9).

On the other hand, the Board argued that its decision to deny Centros' registration did not contravene articles 52 and 58 EC Treaty, as establishing a branch in Denmark appeared to be an attempt to evade national regulations regarding the minimum share capital requirements. Moreover, the Board contended that its refusal to register was necessary to safeguard the interests of private or public creditors and other contracting parties, as well as to prevent fraudulent insolvencies (paragraph 12).

Ultimately, the Supreme Court decided to seek a preliminary ruling from the Court by posing the following question, which a listed in paragraph 13:

---

[291] HJI PANAYI, Christiana. Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths. *Queen Mary University of London. School of Law Legal Studies Research Paper*, No. 26, 2009, pp. 38-39. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/-abstract=1437555.28. 10.1093/yel/28.1.123.

[292] CJEU judgment no C-212/97: Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459.

Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?

The Court began by rejecting the Danish government's argument that Article 52 EC Treaty did not apply because the situation was purely internal to Denmark, involving Danish nationals who had formed a company in the UK that did not conduct any actual business there (paragraph 16). As well as it states that it is irrelevant that the company was established in the first jurisdiction solely for the purpose of setting up in the second, where its primary, or even exclusive, business was to be carried out (paragraph 17). The Court affirmed that it cannot be considered an abuse of the right of establishment and the right to establish a company in one state and to set up branches in others is a fundamental aspect of the freedom of establishment guaranteed by the EC Treaty (paragraph 27).

The Court came to two conclusions. First, it is contrary to Articles 52 and 58 EC Treaty for a member state to refuse registration of a branch of a company that is formed under the law of another state and has its registered office there but does not conduct any business there, where the branch is intended to carry on its entire business, while avoiding the application of the rules governing the formation of companies which are more restrictive as regards the paying up of a minimum share capital. Secondly, this interpretation does not prevent the authorities from taking appropriate measures to prevent or punish fraud, whether it involves the company itself or its members evading their obligations to private or public creditors (paragraph 39).

In this way, the Centros Ltd. case reconsiders the abuse of the freedom of establishment and, on the other hand, broadens the interpretation of freedom of establishment, indicating that EU nationals can establish companies freely in the jurisdiction they consider most favourable and transfer their activities back to their home state.

The Centros Ltd case has contributed significantly to the regulatory competition within the EU. Over twenty years have passed since its adoption, and it is now evident that some EU members are more popular for company registration than others, leading to competition among legislators. Ireland and Estonia are notable examples of countries that have significantly improved their

approach to business regulation. Although this may result in a capital outflow from one country to another in the short term, it is a natural way to establish a common market, which requires unified and harmonised corporate and business law. Such competition is beneficial because it promotes the adoption of best practices and facilitates discussions on establishing clear boundaries in common business law. This helps to distinguish the interests of individual states from the broader objectives of the common market, which should enhance the overall business climate of the EU.

5.2.3. Überseering BV, C-208/00, 5 November 2002

The Überseering case[293] dealt with the question of whether it was possible for a company founded in one EU member state to transfer its registered office to another state without winding up the company and losing its legal personality.

Überseering BV was a construction company that had been incorporated in the Netherlands and had its registered office there. In October 1990, Überseering obtained a plot of land in Düsseldorf, Germany, with a motel and a garage. It then hired a contractor (NCC) via a project-management contract to renovate both the garage and the motel. Concurrently, two German nationals residing in Düsseldorf obtained complete ownership of Überseering by purchasing all of its shares (Paragraphs 6-7).

Despite the contractor meeting its contractual obligations, Überseering BV complained about the quality of the paintwork. Überseering attempted to obtain reimbursement, but its claims were rejected. In 1996, it initiated legal proceedings against NCC before the Regional Court (*Landgericht*), which ultimately dismissed the case. The Higher Regional Court (*Oberlandesgericht*) upheld the decision and concluded that Überseering, as a company incorporated under Dutch law, did not have legal capacity in Germany, and the action was inadmissible since the company had transferred its actual centre of administration to Düsseldorf after two German citizens purchased all of its shares (Paragraphs 8-10).

The court's ruling was based on the principle of 'real seat', which is adhered to in Germany. Überseering BV would not have lost its legal personality when it transferred its central administration to Germany only if it was reincorporated in Germany to acquire legal capacity under German law, which the company failed to do.

The case ultimately reached the German Federal Supreme Court (*Bundesgerichtshof*), which decided to suspend the proceedings and refer the following questions listed in paragraph 21 to the Court for a preliminary ruling:

[293] CJEU judgment no C-208/00: Überseering BV v. Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919.

1. Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, 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 centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?

2. If the Court's answer to that question is affirmative: Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?'

According to the Court's judgment, the mutual recognition of companies is a necessary precondition for the exercise of the freedom of establishment (paragraph 59) and is guaranteed by Articles 43 and 48 EC Treaty, which are directly applicable (paragraph 60). On the contrary, the Daily Mail case was held as not applicable since the case did not deal with the way in which a Member State treats a company that is validly incorporated in another state and is exercising its freedom of establishment in the first Member State (paragraph 66). Instead, it focused on the relationship between a company and the state under whose laws it was incorporated when the company wished to transfer its actual centre of administration to another Member State while maintaining its legal personality in the state of incorporation (paragraph 62).

Furthermore, the Court held that a restriction on the freedom of establishment, which is incompatible with Articles 43 and 48 of the EC Treaty, arises when a host Member State refuses to recognise the legal capacity of a company established under the laws of another Member State where it has its registered office. In particular, it concerns the situation where a company moved its actual centre of administration to a host Member State following the acquisition of all its shares by nationals of that state, so the company cannot defend its rights under a contract in that state unless it is reincorporated under its laws (paragraph 82).

The court also pointed out that the application of the company seat principle may restrict freedom of establishment, but only if it '*applies without discrimination, is justified by overriding requirements relating to the general interest, and is proportionate to the objectives pursued*' (paragraph 84). While protecting the interests of creditors, minority shareholders, employees, and taxation authorities can be legitimate objectives, such measures cannot justify denying legal capacity and the ability to be a party to legal proceedings to a company that is validly incorporated in another Member State. Such a measure would violate the freedom of establishment guaranteed by Articles 43 and 48 EC Treaty (paragraphs 92-93).

The court reached the following conclusions. Firstly, if a company incorporated in a Member State ('A') exercises its freedom of establishment in another Member State ('B'), then Articles 43 and 48 EC Treaty require that state to recognise the legal capacity and ability to be a party to legal proceedings that the company enjoys under the law of its state of incorporation ('A'). Secondly, Articles 43 and 48 EC Treaty prohibit a Member State ('B') from denying the company's (incorporated in another state with its registered office there) legal capacity and the ability to bring legal proceedings before its national courts to enforce rights under a contract with a company established in Member State if that state considers that the company has moved its actual centre of administration to that Member State (paragraphs 94-95).

One of the significant aspects of the Überseering decision is that it establishes a conflict-of-laws rule. This rule states that the law of the state in which the company was incorporated applies to determine the company's legal capacity.[294] As a result, the Überseering ruling prohibits any EU member state court from using the 'real seat' doctrine to determine the personal law of a company incorporated in another member state. Instead, the legal personality of a company must be determined according to the laws of the state in which it was incorporated. The decision has reduced the impact of the 'real seat' doctrine in the EU. This had a major effect on the conflict of laws framework in the EU, and especially on the law of the countries which adhered to the 'real seat' doctrine, such as Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal, and Spain.[295]

The primary justification for the 'real seat' doctrine is to safeguard the interests of creditors, minority shareholders, employees, and tax authorities. After Überseering, member states seeking to adopt regulations that safeguard the concerns of these groups have to ensure that they are formulated in a manner that takes into account foreign corporations registered in other member states.[296]

[294] PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé. [European Private International Law]*. 2nd edition. Prague: C.H. Beck, 2013, p. 71.
[295] EBKE, F. Werner. The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond. *The International Lawyer*, Vol. 38, No. 3, 2004, pp. 828-829. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/40708225.
[296] MICHELER, Eva. Recognition of Companies Incorporated in Other EU Member States. *The International and Comparative Law Quarterly*, Vol. 52, No. 2, 2003, p. 529. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/3663122.

5.2.4. Inspire Art Ltd, C-167/01, 30 December 2003

Inspire Art Ltd case[297] relates to the limitation of freedom of establishment due to the recognition of a company as a pseudo-foreign company. It concerns the interpretation of Articles 43, 46, and 48 EC Treaty.

Inspire Art was incorporated on 28 July 2000 as a private company limited by shares under the law of England and Wales. The company's registered office is located in Folkestone, United Kingdom, while its sole director was domiciled in The Hague, Netherlands, and has full authority to act on behalf of the company independently. Inspire Art Ltd dealt in *objets d'art* and commenced trading on 17 August 2000 exclusively throughout its branch in Amsterdam (paragraph 34).

According to Article 1 of the Dutch Law on Formally Foreign Companies of December 17 1997, No. 697 (*Wet op de Formeel Buitenlandse Vennootschappen* or WFBV), companies like Inspire Art, controlled by Dutch nationals and exclusively trading in the Netherlands, are considered formally foreign companies (*formeel buitenlandse vennootschap*). Such companies are required to indicate this status when registering their branch in the Chamber of Commerce. However, Inspire Art failed to do so (paragraph 35).

As a result, on 30 October 2000, the Chamber of Commerce applied to the Amsterdam District Court (*Kantongerecht te Amsterdam*) to include a statement in the company's registration in the commercial register, acknowledging it as a formally foreign company under Article 1 of the WFBV. This status imposed additional legal obligations, including minimum capital and personal liabilities (paragraphs 25 and 27).

Inspire Art has challenged the Chamber of Commerce's application, arguing that its registration is not incomplete since it does not satisfy the conditions outlined in Article 1 of the WFBV and this provision conflicts with Community law, specifically articles 43 and 48 EC Treaty (paragraph 37).

Amsterdam District Court has suspended proceedings and 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 to 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

[297] CJEU judgment no C-167/01: Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.

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?

First of all, the Court held that the justification of the Dutch Government for the minimum capital provisions, including the protection of creditors, the prevention of abuse of freedom of establishment, and the provision of fair business practices and effective tax audits, must be assessed based on overriding public interest reasons (paragraph 132).

The Court established a four-factor test, to consider whether such measures can be justified or not. According to the Court's case law (including Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Centros, paragraph 34), national measures that could impede or reduce the exercise of fundamental freedoms under the Treaty must satisfy four conditions to be justified: (1) they must not discriminate, (2) they must be necessary to achieve an imperative public interest, (3) they must be appropriate for achieving their objective, and (4) they must not go beyond what is necessary to achieve it (paragraph 133).

The Court evaluated the conditions. In particular, regarding creditor protection, the Court stated that Inspire Art is governed by English law, and potential creditors are aware of its subject to different legislation. Community law also protects creditors (paragraph 135). The Court concluded that the measures were not justified as they did not meet the criteria of efficacy, proportionality, and non-discrimination (paragraph 140).

Secondly, the Court referred to settled case law (Centros, paragraphs 24, 26, 29) and *inter alia* pointed out that a Member State can implement measures to prevent 'improper recourse to freedom of establishment, however, is inherent in the freedom of establishment guaranteed by the EC Treaty in a single market that individuals from a Member State who wish to establish a company may choose to do so in the Member State with the least restrictive company law regulations and subsequently establish branches in the other Member States, as well as simply because a company does not carry out any activities in the Member State where it is registered and mainly operates in the Member State where it has established its branch does not automatically indicate that the company is engaging in fraudulent or abusive behaviour (paragraphs 136-139).

In conclusion, the Court came to the following decision. Firstly, national legislation, such as the WFBV, that imposes on the branch of a company formed under the laws of another member state disclosure obligations is contrary to Article 2 of the Eleventh Directive.[298] Secondly, national legislation that imposes conditions on the exercise of freedom of secondary establishment for a company established under the law of another Member State, such as minimum capital and liability of directors, is contrary to Articles 43 and 48 of the EC Treaty. 'The reasons for which the company was formed in that 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 it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, except where the existence of an abuse is established on a case-by-case basis' (paragraph 143).

Based on the Überseering judgment, the Inspire Art case established the principle that the internal affairs of a company incorporated in one EU state but trading in another, such as minimum capital requirements and directors' liability, should be governed by the laws of the state of incorporation.[299]

Furthermore, Inspire Art clarifies how national laws can restrict nationals or companies from other member states to prevent circumvention of their laws and limit freedom of establishment. The judgment introduced a four-factor test to determine whether or not such restrictions were justified, with the Court of Justice of the European Union being the ultimate authority.

5.2.5. Cartesio Oktató és Szolgáltató bt., C-210/06, 16 December 2008

The Cartesio case involved CARTESIO Oktató és Szolgáltató bt (Cartesio), a Hungarian limited partnership, which sought to transfer its 'real seat' from Hungary to Italy, wishing that its registration would remain in Hungary and the company would remain a company of Hungarian law.[300]

Cartesio applied to the Bács-Kiskun Regional Court to register the relocation to Italy. However, the application was rejected due to Hungarian law prohibiting the transfer of the company's seat abroad while maintaining Hungarian law as *lex societatis* (paragraphs 23-24).

[298] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.
[299] EBKE, F. Werner. The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond. *The International Lawyer*, Vol. 38, No. 3, 2004, p. 841. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/40708225.
[300] CJEU judgment no C-210/06: Cartesio Oktató és Szolgáltató bt. [2008] ECR I-09641.

Cartesio appealed the rejection to the Szeged Court of Appeal, arguing with the reference to SEVIC Systems case[301] that Hungarian law does not adhere to articles 43 and 48 EC Treaty and cannot require Hungarian companies to have a seat in Hungary (paragraphs 25-26).

Szeged Court of Appeal further stated that the resolution of the dispute depended on the interpretation of community law, therefore it to refer the following questions to the European Court of Justice (the Court) for a preliminary ruling (paragraph 40):

(1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration [of a company] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is inter partes?

(2) In so far as an appeal court is included in the concept of a 'court or tribunal which is entitled to make a reference for a preliminary ruling' under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities?

(3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?

(4) (a) If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?

(b) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?

(c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise

[301] CJEU judgment no C-411/03: SEVIC Systems [2005] ECR I-10805.

of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?

[(d)] May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?

In this case, the Court had to determine primarily whether Cartesio was subject to freedom of establishment guaranteed by Article 43 EC Treaty, as there is no uniform definition of companies that can exercise the right of establishment based on a single connecting factor. The Court stated that, given the current state of Community law, whether a company can enjoy the fundamental freedom is a matter that can only be resolved by the national law (paragraph 109).

Hence, a Member State could not permit a company governed by its law to retain that status if the company intends to reorganise itself in another member state by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the state of incorporation (paragraph 110). This should apply in the situation where the seat of a company incorporated under the law of one member state is transferred to another, without any change to the governing law of that company.

The Court ruled that Articles 43 and 48 EC Treaty 'do not preclude legislation of a Member State that prohibits a company incorporated under its law from transferring its seat to another Member State while retaining its status as a company governed by the law of incorporation'.

Thus, the CJEU did not meet the expectations raised by the preliminary questions regarding whether a cross-border transfer of a company's registered office is already possible under the provisions of the EC Treaty, and whether a national regulation or practice that prevents such a transfer is incompatible with EC law.302 Instead, the ruling in the Cartesio case reaffirmed the position stated in the Daily Mail case that, as well as EU member states retained the authority to decide the necessary connecting factor for companies to be established and continue under their laws.[303]

---

[302] PAUKNEROVÁ M., Obchodní společnosti v evropském mezinárodním právu soukromém – nové trendy (Companies in European Private International Law – New Trends, in Czech), in In: EICHLEROVÁ, K. a kol. *Rekodifikace obchodního práva – pět let poté* (Recodification of Commercial Law – five years after, in Czech). Tome II, Praha: Wolters Kluwer, 2019, pp. 105-106.

[303] BORG-BARTHET, Justin. European Private International Law of Companies after Cartesio. *The International and Comparative Law Quarterly*, Vol. 58, No. 4, 2009, p. 1025. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/25622256.

5.2.6. VALE, C-378/10, 12 July 2012

VALE case refers to a preliminary ruling on the interpretation of Articles 49 and 54 TFEU on the issue of a cross-border conversion of a company governed by Italian law into a company governed by Hungarian law.[304]

VALE Costruzioni Srl, a limited liability company governed by Italian law, was registered in 2000. In 2006, VALE requested to be removed from the register because it planned to transfer its seat and business to Hungary and stop operating in Italy. Consequently, the commercial register authority deleted VALE's entry from the register and recorded the transfer of the company to Hungary under the following headings: 'removal and transfer of seat' and 'the company had moved to Hungary' (paragraph 9). The director of VALE Costruzioni and another person then adopted the articles of association of VALE Építési kft (VALE), intending to register it in the Hungarian commercial register. A representative of VALE then applied to the Budapest Metropolitan Court (*Fővárosi Bíróság*), to register the company under Hungarian law, and stated in the application that VALE Costruzioni Srl was the predecessor in law to VALE (paragraph 11).

Budapest Metropolitan Court rejected VALE's application for registration because it could not include VALE Costruzioni Srl as a predecessor since it was incorporated in Italy. VALE then appealed to the Regional Court of Appeal of Budapest (*Fővárosi Ítélőtábla*), but the court upheld the rejection order. The court held that under Hungarian company law, a company incorporated and registered in Italy cannot transfer its seat to Hungary and obtain registration there in the requested form (paragraph 12). Then VALE brought an appeal on a point of law before the Hungarian Supreme Court (*Legfelsőbb Bíróság*), seeking the annulment of the order rejecting registration. VALE argue that the order the contested order infringes Articles 49 TFEU and 54 TFEU and it fails to recognize the fundamental difference between the international transfer of the seat of a company without changing the national law which governs that company, on the one hand, and the international conversion of a company, on the other (paragraphs 13-14).

Hungarian Supreme Court decided to refer to the European Court of Justice for a preliminary ruling. In essence, the Supreme Court asked, whether Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which, although enabling a company established under national law to convert, does not allow a company established under the law of another member state to convert to a company governed by national law by incorporating such a company (paragraph 16). The following questions were asked:

[304] CJEU judgment no C-378/10: Vale Építési kft. [2012] EU:C:2012:440.

1. Must the host Member State pay due regard to Articles [49 TFEU and 54 TFEU] when a company established in another Member State (the Member State of origin) transfers its seat to that host Member State and, at the same time and for this purpose, deletes the entry regarding it in the commercial register in the Member State of origin, and the company's owners adopt a new instrument of constitution under the laws of the host Member State, and the company applies for registration in the commercial register of the host Member State under the laws of the host Member State?

2. If the answer to the first question is yes, must Articles [49 TFEU and 54 TFEU] be interpreted in such a case as meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State?

3. With regard to the response to the second question, is the basis on which the host Member State prohibits the company from registration of any relevance, specifically:

- if, in its instrument of constitution adopted in the host Member State, the company designates as its predecessor the company established and deleted from the commercial register in the Member State of origin, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host Member State?

- in the event of international conversion within the Community, when deciding on the company's application for registration, must the host Member State take into consideration the instrument recording the fact of the transfer of company seat in the commercial register of the Member State of origin, and, if so, to what extent?

4. Is the host Member State entitled to decide on the application for company registration lodged in the host Member State by the company carrying out international conversion within the Community in accordance with the rules of company law of the host Member State as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions (e.g. drawing up lists of assets and liabilities and property inventories) laid down by the company law of the host Member State in respect of domestic conversion, or is the host Member State obliged under Articles [49 TFEU and 54 TFEU] to distinguish international conversion within the Community from domestic conversion and, if so, to what extent?'

The Court first defined a cross-border conversion as a transfer of the seat of a company with a change of the applicable national law while maintaining the legal personality of the company (paragraph 15).

Then it referred to the Daily Mail case stating that companies are creatures of a national law and their incorporation is determined by the applicable national law (paragraph 27). Therefore, each member state has the power to define the connecting factor required for a company to be recognized as such under national law, which is not infringed by the obligation to allow cross-border conversions under Articles 49 and 54 TFEU (paragraph 30). However, the situation where national law permits domestic companies to convert but prohibits the same for companies incorporated under another member state's law should fall within the scope of TFEU (paragraph 36).

The court consequently found that Hungarian law, by providing differential treatment, impeded the freedom of establishment of foreign companies and limited cross-border conversions. The Court noted that differences in treatment depending on whether a domestic or cross-border conversion is at issue cannot be justified by the absence of rules laid down in secondary European Union legislation. Even though such rules are indeed useful for facilitating cross-border conversions, their existence cannot be made a precondition for the implementation of the freedom of establishment laid down in Articles 49 and 54 TFEU.

Answering the first two questions the Court ruled that Articles 49 and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company (paragraph 41).

In answering questions three and four, which concerned the facts of the case regarding the restrictions that the host state permitted imposing on cross-border conversion, the court proceeded on the basis of the following three provisions. First, since the secondary law of the European Union, as it currently stands, does not provide specific rules governing cross-border conversions, the provisions which enable such an operation to be carried out can be found only in national law, namely the law of the Member State of origin of the company seeking to convert and the law of the host Member State in accordance with which the company resulting from that conversion will be governed (paragraph 43). Second, although specific rules capable of substituting national provisions cannot be inferred from Articles 49 TFEU and 54 TFEU, the application of such national provisions cannot escape all review in the light of those Treaty provisions (paragraph 45). Third, in so far as concerns the questions of the referring court concerning the implementation of the operation at issue in the main proceedings, it is necessary to clarify the obligations resulting from the principles of equivalence and effectiveness which govern the application of national law (paragraph 53).

The court concluded in this matter that Articles 49 and 54 TFEU should be interpreted that the host Member State has the right to determine the national law applicable to cross-border company conversions and thus apply the provisions of its national law on the conversion of national companies governing the registration and operation of companies, such as requirements concerning lists of assets and liabilities and inventories of assets. However, the principles of equivalence and efficiency respectively prevent the host Member State from (1) refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and (2) refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin (paragraph 62).

Therefore, the Court in the VALE case clarified that rules of the member state of incorporation fall within the scope of the TFEU provisions on the right of establishment, and clarified the limitations of the national law of a member state regarding cross-border conversions. Firstly, a member state may not distinguish between whether a conversion is made by a domestic or a company incorporated by the legislation of another member state. Secondly, national law must comply with the principles of equivalence and efficiency by obliging the host state to recognise, *inter alia*, a predecessor registered in another jurisdiction or documents showing the assets and liabilities of the company being converted as required by national law'.[305]

5.2.7 Polbud, C-106/16, 5 October 2017

In 2011, the shareholders' meeting of Polbud-Wykonawstwo spółka z o.o. ('Polbud'), a limited liability company incorporated and having a registered office in Poland, decided, according to Article 270 of the Code of Commercial Companies (*Kodeks spółek handlowych*), to relocate the company's registered office to Luxembourg and convert its legal form to a limited liability company (*société à responsabilité limitée*) under Luxembourg law.[306] In 2013, the registered office of Polbud was relocated to Luxembourg, and the company subsequently changed its name to Consoil Geotechnik (paragraphs 8-12).

Following the cross-border transfer of the company's seat to Luxembourg, Polbud submitted an application to the Polish Registry Court for removal from the register. The company

[305] GERNER-BEUERLE, Carsten. Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in VALE. *Gore-Browne on Companies, Special Release*, 2013, p. 7. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=2249182.
[306] CJEU judgment no C-106/16: Polbud-Wykonawstwo sp. z o.o. [2017] EU:C:2017:804.

argued that it should be removed, as it is no longer incorporated under Polish law. However, the Registry Court requested documents necessary for the completion of the liquidation process, such as financial accounts and a resolution from shareholders approving the liquidation report. Polbud failed to provide these documents, and as a result, the application was rejected. Furthermore, the court deemed the company's transfer of its seat insufficient and found that the decision to transfer should have been made in accordance with Polish provisions on domestic conversions, specifically Articles 551 to 580 of the Code of Commercial Companies, rather than Article 270.[307]

After the dismissal of Polbud's appeal by the Regional Court (*sąd okręgowy*) in Bydgoszcz, the company lodged a cassation appeal with the Supreme Court of Poland (*Sąd Najwyższy*). In light of this, the Supreme Court decided to refer three questions to the Court of Justice of the European Union for preliminary ruling (paragraph 18). The questions were as follows:

*1. Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholder*s' *decision to continue the legal personality acquired in the State of initial incorporation? If the answer to that question is in the negative:*

2. Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out – including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted – which precedes the winding-up of the company that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?

3. Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which – for the purpose of its conversion to a company of another Member State – a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?

[307] MUCHA, Ariel – OPLUSTIL, Krzysztof. Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud. *European Company and Financial Law Review*, Vol. 15, No. 2, 2018, pp. 275-276. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=3100156, http://dx.doi.org/10.2139/ssrn.3100156.

The Court ruled on the third question first, which seeks clarification on the interpretation of Articles 49 and 54 TFEU (paragraph 29). The Court stated that according to paragraph 17 of the Daily Mail case, freedom of establishment includes the right of a company formed under the laws of one Member State to convert itself into a company governed by the laws of another Member State, as long as the conditions set by the legislation of the latter state are met and the connection of the company to its national legal order is satisfied. Therefore, Polbud, a company incorporated under Polish law, had the right to convert itself into a company governed by Luxembourg law, subject to meeting the conditions set by Luxembourg legislation and satisfying the test used by Luxembourg to determine the connection of a company to its national legal order (paragraph 35). In light of the above, the Court concluded that Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment applies to the transfer of the registered office of a company incorporated under the law of one member state to the territory of another, for the purpose of its conversion into a company governed by the law of the latter member state, provided that the conditions imposed by the legislation of the latter state are met and there is no change in the location of the company's real head office of that company (paragraph 44).

As for the first and second questions, the Court examined two aspects of the issue. First of all, whether there is a restriction on freedom of establishment and, second, whether the restriction on freedom of establishment is justified.

Concerning the first aspect, the Court found that although the transfer of the registered office of a company incorporated under Polish law to another member state does not, under Article 19(1) of the Polish Private International Law Act, result in the loss of legal personality, under Articles 270(2) and 272 of the Companies Code, a decision by shareholders to transfer the registered office to another member state leads to winding-up of the company on the conclusion of a liquidation procedure. In those circumstances, the Court held that Polish legislation constitutes a restriction on freedom of establishment by requiring the liquidation of the company (paragraphs 47-51).

With regard to the second aspect, the Court holds that any restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest and that it must be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective. The court further emphasised that it must also be determined whether the restriction on the issue is appropriate for securing the attainment of the objective of protecting the interests of creditors, minority shareholders, and employees and does not go beyond what is necessary to achieve that objective. The court concluded that the mandatory liquidation required by the national legislation goes beyond what is necessary to achieve the

objective of protecting the interests and preventing abusive practices. Therefore, the court held that legislation that imposes a general obligation to implement a liquidation procedure is disproportionate and imposes a general presumption of the existence of abuse (paragraphs 52-64).

The answer to the first and second questions is that Articles 49 and 54 TFEU must be interpreted as precluding legislation of a member state which provides that the transfer of the registered office of a company incorporated under the law of one member state to the territory of another member state, for the purposes of its conversion into a company incorporated under the law of the latter member state, following the conditions imposed by the legislation of that member state, is subject to the liquidation of the first company (paragraph 65).

The Polbud decision clarifies whether an emigrant company must relocate its actual headquarters to the state of arrival. The decision eliminates the requirement for permanent and continuous participation in the economic life of the host member state, enabling companies to choose their governing law freely. The decision takes a pragmatic approach to overcome difficulties in distinguishing between companies that pursue sufficient economic activity in the host country and those that do not. It is uncertain whether this approach is consistent with the spirit of freedom of establishment. Companies have the right to undertake isolated cross-border conversion (transfer of registered office with an attendant change as regards the national law applicable) unless the host country's legislation requires the transfer of the actual headquarters. The freedom to choose corporate law is broadened, but it is restricted by the abuse of law doctrine and proportionality tests. The abuse of law doctrine allows countries to intervene in cross-border restructuring when it is not economically justified or circumvents national rules, while proportionality tests empower EU member states to implement necessary measures to protect stakeholders during cross-border conversion procedures.[308]

5.3 Cross-border Conversions under Directive (EU) 2019/2121

The principal legal framework for company law in the EU is the codified Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (Directive (EU) 2017/1132). More recently, this directive has undergone modifications through Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions,

[308] MUCHA, Ariel – OPLUSTIL, Krzysztof. Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud. *European Company and Financial Law Review*, Vol. 15, No. 2, 2018, pp. 306-307. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=3100156, http://dx.doi.org/10.2139/ssrn.3100156.

mergers and divisions (Directive (EU) 2019/2121). According to Article 3 of the directive, member states must bring into force the laws, regulations, and administrative provisions required to comply with the directive by 31 January 2023.

Directive (EU) 2019/2121 encompasses approaches that have found reflection in the mentioned case law of the Court of Justice of the European Union. The amendments to Directive 2017/1132 are contained in Article 1 of Directive (EU) 2019/2121. All further references to rules are made to Directive 2017/1132 with the amendments introduced by Directive (EU) 2019/2121.

The regulations governing cross-border conversion have a limited scope, applying specifically to the conversions of limited liability companies that are established under the law of a member state and have their registered office, central administration, or principal place of business within the EU, into limited liability companies governed by the law of another member state. Companies undergoing liquidation, insolvency proceedings, or preventive restructuring measures fall beyond the purview of the directive (Article 86a).

The term 'company' pertains to a limited liability company of a type enumerated in Annex II to the directive (Article 86b). This encompasses both private and public limited liability companies, such as s*ociété anonyme, société en commandite par actions*, and *société de personnes à responsabilité limitée* for Belgium; *společnost s ručením omezeným* and *akciová společnost* for the Czech Republic; *die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien*, and *die Gesellschaft mit beschränkter Haftung for Germany*, and so forth. The confined scope of this directive is justified by the fact that limited liability companies are the most widely employed company forms for cross-border operations within the EU and that legal provisions concerning limited liability companies have been satisfactorily harmonised across the EU, unlike other forms of companies.[309]

A 'cross-border conversion' is the process through which a company alters its legal form from the one registered in the departure state (departure Member State) to the legal form of a destination state (destination Member State), without dissolving, winding up, or liquidating the company while retaining its legal personality. The term 'departure Member State' alludes to the Member State in which a company is registered before a cross-border conversion, while the term 'destination Member State' pertains to the Member State in which a converted company is registered as a result of a cross-border conversion (Article 86b).

[309] LABUSCH, Janine. *Cross-Border Conversions – Why Now and Not Later?* In: American Bar Association. Business Law Section [online]. [Accessed 6 September 2023]. Available at: https://businesslawtoday.org/2022/03/cross-border-conversions-why-now-and-not-later/.

To perform a conversion, the application of two legal systems is required: the law of the departure state and the law of the destination state. The procedures and formalities required to obtain the pre-conversion certificate are governed by the law of the departure state, whereas the procedures and formalities following the receipt of the pre-conversion certificate are governed by the law of the destination state (Article 86c).

The cross-border conversion process takes place across two countries and includes three principal stages: (1) the preparation of necessary documents by company management to present them at the general meeting for approval, (2) the expertise of the proposed conversion and issuance of the pre-conversion certificate by the competent authorities of the departure state and its transfer to the destination state, and (3) the approval and registration of the cross-border conversion in the destination state.

A wide array of parties participates in the company's cross-border conversion process, including the company itself, its management and members, creditors, employees, experts, and governmental authorities of both the departure and destination states. The directive incorporates provisions for safeguarding diverse stakeholders, including members (Article 86i), creditors (Article 86j), and employees (Articles 86k and 86l).

Members of a company are protected through two means: first, they possess the right to disapprove of the cross-border conversion; second, members of a company who voted against the cross-border conversion have the right to vend their shares and receive appropriate cash compensation (Article 86i). Creditors who are dissatisfied with the safeguards provided in the terms of the conversion hold the option to apply, within three months of the disclosure of the draft terms, to the pertinent authority for adequate safeguards. Creditors whose claims predate the disclosure of the draft terms of the cross-border conversion are also entitled to initiate legal proceedings against the company in the departure state within two years from the date the conversion becomes effective (Article 86j). Employees are granted advisory, retention, and participation rights (Articles 86k and 86l).

The process of cross-border conversions begins with the company's management (administrative or management body of the company) formulating the draft of the terms of the conversion (Article 86d). Subsequently, the management assembles a report for members and employees, elucidating and justifying the legal and economic aspects of the cross-border conversion. It also underscores the repercussions of the conversion for employees and, particularly, the implications for the company's future business (Article 86e(1)).

Following this, the draft terms of the cross-border conversion and the report for members must be scrutinised by an independent expert, barring instances involving single-member

companies or when all members of the company have unanimously agreed otherwise. The expert's opinion of the adequacy of the cash compensation must be incorporated in the report. The report should be accessible to the members at least one month before the mentioned general meeting (Article 86f).

Furthermore, not less than one month before the general meeting, the company must unveil and make publicly accessible in the register of the departure Member State the subsequent documents: the draft terms of the cross-border conversion and a notice informing members, creditors, and employees that they possess the liberty to submit comments concerning the draft terms of the conversion to the company no later than five working days preceding the general meeting (Article 86g(1)).

The subsequent stage is the conversion approval by the general meeting. After considering the reports alongside any employee opinions and comments, the company's general meeting must determine, through a resolution, whether to ratify the draft terms of the cross-border conversion. The ratification of the draft terms, along with any amendments, mandates a majority vote amounting to no less than two-thirds but not exceeding ninety per cent of the votes linked to the shares or subscribed capital (Article 86h).

Following the general meeting approves the draft terms of the conversion, the competent authorities of the departure state examine the legality of the conversion process in relation to aspects governed by their law. Consequently, the competent authorities release a pre-conversion certificate, confirming compliance with all relevant conditions and the proper completion of procedures and formalities in the departure state (Article 86m).

Next, the pre-conversion certificate is transmitted to the destination state through the system of interconnection of registers (Article 86n). Subsequently, the competent authorities in the destination state scrutinise the legality of the cross-border conversion concerning aspects governed by their law and approve the conversion (Article 86o). Following this, the cross-border conversion is enrolled in the destination state, and the register in the destination state notifies the departure state that the conversion has become effective. Consequently, the company is removed from the register in the departure state upon receipt of this notification (Article 86p).

Once the cross-border conversion becomes effective, the following consequences arise: all assets, liabilities, contracts, credits, rights, and obligations of the company transform into those of the converted company; the company's members remain as members of the converted company, unless they have disposed of their shares; employment relationships existing at the date of the conversion become those of the converted company (Article 86r). The date of conversion taking effect is determined by the law of the destination state (Article 86q).

The preceding analysis demonstrates that Directive (EU) 2017/1132 outlines the complex and multi-phase nature of the cross-border conversion process. Nevertheless, its inherent consistency implies that in the presence of harmonised legislation among Member States, companies undergoing a conversion of their legal form and relocating the registered office to the destination state should confront minimal challenges. It is noteworthy that the directive has effectively safeguarded the rights of employees, creditors, and members during this process. However, it is essential to pinpoint that the directive lacks direct applicability; rather, companies should rely on the laws of each of the twenty-seven individual states, which are expected to fully implement the provisions of the directive. This might lead to a risk of practical challenges due to the complexity of the cross-border conversion regulation, given the variety of corporate law issues involved in it.[310]

5.4 Transfer of Company's Seat Under the Law of the Czech Republic

5.4.1 General Provisions on Cross-border Seat Transfer

Despite Directive (EU) 2019/2121 obligating member states to implement its text in their legislation by January 31, 2023, it has not yet been incorporated into Czech law. In fairness, Notably, the Czech Republic is not the only country facing challenges in the timely implementation of this directive.[311]

In November 2022, the Ministry of Justice proposed a draft implementation law amending Act No. 125/2008 Coll., on Transformations of Business Companies and Cooperatives (Czech Transformations Act), along with related laws.[312] However, this document remains in the draft stage.[313] Most of the existing provisions on cross-border conversions and seat transfers were introduced in the Czech Transformations Act in 2011 and have remained unchanged since then.[314]

---

[310] KOLAS, Heorhi. Cross-border Conversions in accordance with the Directive (EU) 2019/2121 and the Current Rules of Law of the Czech Republic. *Charles University in Prague Faculty of Law Research Paper No. 2024/I* (in print).

[311] *EY Guide on Directive 2019/2121 on cross-border reorganizations*. In: EY [online]. [Accessed 20 November 2023]. Available at: https://www.ey.com/en_pl/law/ey-guide-on-cross-border-reorganizations.

[312] BISKUPOVÁ, Klára – LEŠ, Adam. *K chystané novele zákona o přeměnách obchodních společností a družstev. [To the planned amendment of the Act on the Transformation of Business Companies and Cooperatives]*. In: epravo.cz [online]. [Accessed 20 November 2023]. Available at: https://www.epravo.cz/top/clanky/k-chystane-novele-zakona-o-premenach-obchodnich-spolecnosti-a-druzstev-116018.html.

[313] The full text of the draft act (Parliamentary print 459/0 – Amendment to the Act on Conversions of Commercial Companies and Cooperatives - EU) can be found on the website of the Chamber of Deputies of the Parliament of the Czech Republic at https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=459&CT1=0.

[314] Act No. 355/2011 Coll. The law that amends Act No. 125/2008 Coll., on Transformations of Business Companies and Cooperatives, as amended by subsequent regulations, and other related laws.

These provisions draw inspiration from Regulation (EC) 2157/2001 (SE) and are aligned with the circumstances outlined in the Cartesio case.[315]

Apart from incorporating the provisions of Directive (EU) 2019/2121, the draft also integrates regulations on the use of digital tools and procedures in company law (Directive 2019/1151).[316] Additionally, this draft was seen as an instrument to address specific issues associated with the existing legal framework for transformations not directly affected by the requirements of Directive (EU) 2019/2121.[317]

Czech law allows for types of cross-border conversions as outlined in Directive (EU) 2019/2121 without the need for its transposition, yet some of the existing rules and safeguards in the Czech Transformations Act do not align with the new requirements of EU law.[318] The current state of Czech legislation on this matter will be further explored, considering scenarios where a Czech company relocates its seat abroad or a foreign company seeks to transfer its seat to the Czech Republic.

As previously mentioned, cross-border conversion, as defined by Directive (EU) 2019/2121, involves two elements: changing the legal form and seat transfer. Czech law takes a slightly different approach and, as of today, does not utilise the same categories as Directive (EU) 2019/2121. For instance, the Czech Transformations Act introduced the concept of 'transformation' ('*přeměna*'), encompassing the merger, division, transfer of assets to a shareholder, change of legal form, and cross-border seat transfer (Section 1(2)). This definition covers transformations both within and outside the Czech Republic. A cross-border transformation (*přeshraniční přeměna*) includes cross-border mergers, divisions, transfers of assets, or cross-border seat transfers (Section 59a).

At first glance, it seems that cross-border conversion, as per Directive (EU) 2019/2121, is not explicitly addressed in Section 59a of the Czech Transformations Act. However, under Czech law, cross-border seat transfer (*přeshraniční přemístění sídla*) results in a change in the legal form, with certain exceptions, as elaborated later. Importantly, these exceptions do not conflict with the provisions of Directive (EU) 2019/2121. Consequently, according to current Czech law, the

---

[315] PAUKNEROVÁ, Monika – BRODEC, Jan. Czech Republic. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International La*w of Companies in Europe. Munich: Hart Publishing, 2019, pp. 325-326.

[316] *Upcoming changes to Transformation Act.* In: KPMG [online]. [Accessed 20 November 2023]. Available at: https://kpmg.com/cz/en/home/insights/2022/10/upcoming-changes-to-transformation-act.html.

[317] LASÁK, Jan – DĚDIČ, Jan. Patnáct poznámek k současné právní úpravě přeměn obchodních korporací ve světle její připravované novelizace [15 notes on the current company reorganisations regulation on the light of its envisaged amendment]. *Obchodní právo*. Wolters Kluwer ČR, a.s., 2022, vol. 31, No 5, p. 2-15. ISSN 1210-8278.

[318] *Novela zákona o přeměnách. [Amendment to the Act on Transformations]*. In: EY [online]. [Accessed 20 November 2023]. Available at: https://www.ey.com/cs_cz/tax/tax-alerts/2022/novela-zakona-o-premenach.

regulation of conversion outlined in Directive (EU) 2019/2121 will primarily be governed by provisions related to cross-border seat transfer.

Before delving into the details of cross-border seat transfer, it is crucial to define the term 'seat' in Czech law. In Czech law, the term 'seat' ('*sidlo*') refers to the statutory (registered) seat or registered office. The seat is the topographical data that a legal entity designates as its place of location in its founding documents and registers in the relevant state register. The actual seat, where the management of the legal entity occurs, may differ from the statutory one. However, under Czech private international law, only the statutory registered office is considered when assessing the legal status of the entity.[319]

According to Section 136 of the Czech Civil Code, establishing a company requires defining its seat.[320] Upon registering a company in the public register, providing the complete address of the registered office is essential. For seat purposes, it is sufficient to provide only the name of the municipality. This name constitutes the company's seat in the Czech Republic.

Section 30(3) of the Czech Private International Law Act (Czech PIL Act) specifies that a legal entity domiciled in the Czech Republic must be established under Czech law.[321] However, this does not preclude the option of moving the registered office initially established under foreign laws, with its seat abroad, to the Czech Republic, provided such a transfer is sanctioned by an international treaty, directly applicable European Union regulation, or another legal regulation.

This implies that, under Czech law, it is not possible to establish a company in the Czech Republic governed by foreign law. A company formed in the Czech Republic must adopt one of the forms prescribed by Czech law. Nevertheless, the law does permit the transfer of a company's seat from another country to the Czech Republic, which could potentially lead to a scenario where a company's seat is in the Czech Republic but it operates under foreign law. These provisions do not apply to all companies, but only to those covered by an international treaty, directly applicable EU regulation, or other legal regulation and do not encompass companies from every state.

The examples of directly applicable EU regulations referred to in Section 30(3) are, in particular, Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Council Regulation (EC) No. 1435/2003 on the Statute for

[319] PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář. [Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, p. 235.
[320] Act No. 89/2012 Coll., Civil Code.
[321] Act No. 91/2012 Coll., on Private International Law.

a European Cooperative Society (SCE), as well as provisions of primary law, including those concerning the freedom of establishment under Articles 49 and 54 TFEU.[322]

Additionally, as EU business organisations (EEIG, SE, SCE) are subject to regulation by corresponding EU regulations and the law of the country where the entity has its registered seat, if they plan to relocate their seat to another member state (e.g. the Czech Republic), their *lex societatis* will change accordingly. From the date the seat transfer takes effect, they will be regulated by the law of the host (destination) member state.[323]

Regarding ordinary foreign companies, Czech law does not permit the retention of foreign law as applicable. Currently, there are no instruments allowing this, and Section 30(3) of the Czech PIL Act largely provides a legal basis for future developments in this area, enabling foreign companies to retain their original legal form in the event of a seat transfer to the Czech Republic.

The Czech PIL Act does not regulate the transfer of the seat; it only stipulates that the restriction posed in the opening sentence can be circumvented if the registered office of a foreign legal entity is relocated to the territory of the Czech Republic, resulting in the establishment of a legal entity rooted in the Czech Republic and subject to foreign law.[324]

The transfer of a company's seat, as well as the establishment and relocation of its branches, is governed by Sections 138-143 of the Czech Civil Code and the Czech Transformations Act. While the Czech Civil Code provides general provisions, the Czech Transformations Act's scope is limited to domestic and cross-border transformations within the EU or EEA.[325] Although the draft implementation law proposes extending the scope of the Czech Transformations Act to seat transfers (conversions) to or from non-EU or non-EEA states (third countries).[326]

According to Section 3(3) of the Czech Transformations Act, a cross-border seat transfer refers to the relocation of a foreign legal entity's seat to the Czech Republic or the relocation of a Czech company or cooperative's seat to a member state other than the Czech Republic. For the purposes of the Czech Transformations Act, Section 59b defines a foreign legal person as any

---

[322] PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Rekodifikované mezinárodní právo soukromé. [Recodified Private International Law]*. 1st edition. Prague: Univerzita Karlova v Praze. Právnická fakulta, 2014, p. 71.
[323] PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář. [Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, p. 237.
[324] PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář. [Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, p. 236.
[325] PAUKNEROVÁ, Monika – BRODEC, Jan. Czech Republic. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International La*w of Companies in Europe. Munich: Hart Publishing, 2019, pp. 325-326.
[326] *Upcoming changes to Transformation Act.* In: KPMG [online]. [Accessed 20 November 2023]. Available at: https://kpmg.com/cz/en/home/insights/2022/10/upcoming-changes-to-transformation-act.html.

entity, excluding natural persons, governed by the law of a member state other than the Czech Republic, and having its seat (statutory seat), actual seat (real seat), or principal place of business in that member state. The term 'member states' refers to countries that are members of the EU or EEA, thus limiting the scope of this act to seat transfers within the EU or EEA (Section 1(1)).

In contrast to Directive (EU) 2019/2121, which focuses on changing the legal form, along with the simultaneous transfer of the company's seat to the foreign state where the corresponding legal form is sought, the Czech Transformations Act does not specifically consider a change of legal form as a requirement when transferring the seat. This leads to the cautious conclusion that, along with the general alignment of approaches with Directive (EU) 2019/2121, Czech law provides more freedom in the choice of applicable law than the directive. However, the general idea of Czech law is often that the seat transfer entails a change of legal form under the law of the host country, as will be discussed below.

5.4.2 Seat Transfer to the Czech Republic

There are several requirements that should be met before a foreign company from any country can transfer its seat to the Czech Republic. According to the Czech Civil Code, the general rule is that the company's home state should not prohibit this transfer, and the company's activities must comply with Czech Republic regulations (Section 138(1)). This includes situations where a company intends to break the law or pursue unlawful objectives, such as (1) denying or restricting personal, political, or other rights of individuals based on factors such as nationality, gender, race, origin, political beliefs, religious affiliation, or social status; (2) inciting hatred or promoting intolerance; (3) supporting violence; or (4) unlawfully managing a public authority or engaging in public administration without proper legal authorisation (Section 145).

Furthermore, the Czech Transformations Act outlines conditions under which a foreign company from a member state can relocate its seat to the Czech Republic without dissolution or creating a new legal entity. These conditions include: (1) the transfer must not be prohibited by the laws of the state where the company currently has its seat or by the laws governing its internal legal relations;[327] (2) the foreign legal entity must change its legal form to a Czech company or cooperative, and after the change of legal form, the internal relations of the legal entity relocating its registered office to the Czech Republic must be governed by Czech law;[328] (3) the foreign legal

[327] Compare with section 138(1) of Czech Civil Code, which allows a company to transfer its seat if it is permitted solely by the law of the state in which the legal person has its seat, disregarding a company's personal law.
[328] Czech Civil Code does not explicitly mention this condition for the seat transfer to the Czech Republic, however, as explained below, it does not provide the option to retain company's personal foreign law.

entity is not undergoing liquidation or insolvency proceedings, or similar proceedings have not been initiated against it in any Member State (Sections 384a and 384c).

To effect the transfer, the company must submit specific documents with its application to the public register. According to Section 138(2) of the Czech Civil Code, these documents include the decision regarding the chosen legal form of a Czech legal entity and the founding legal act (*zakladatelské právní jednání*, e.g. general meeting resolution) meets the requirements set by Czech law for this type of legal entity.

For companies transferring their seat from EU or EEA countries, additional requirements are specified in Section 384d of the Czech Transformations Act. In order for a notary to make an entry in the register, the company must provide the following documents: (1) a public document issued by the competent authority of the foreign legal entity's home state, as well as the state governing its internal legal relations (if different), demonstrating compliance with the legal requirements for transferring the registered office to the Czech Republic; (2) a founding legal act (*zakladatelské právní jednání*); (3) an expert's report or another document (if the foreign legal entity plans to change its form to a Czech limited liability company, joint stock company, or cooperative), certifying that the foreign legal entity's capital corresponds to at least the amount of the share capital specified in the founding legal act.

The transfer of the company's seat becomes effective on the day the new address is entered into the relevant public register (Section 142 of the Czech Civil Code). For companies from EU or EEA member states, it is provided that the completion of the transfer may not necessarily occur at the moment the new entry appears in the Czech register, but rather when the entry is removed from the foreign commercial register (Section 384e of the Czech Transformations Act).

From that day onward, the internal legal relations and the liability of its members or executives for the company's debts that arise after the date of the transfer are subject to Czech law, irrespective of whether the company is from an EU or EEA member state or not (Section 138(3) of the Czech Civil Code).

Therefore, despite Section 30(3) of the Czech PIL Act suggesting potential subjectivity to foreign law, Sections 138 and 142 of the Czech Civil Code, along with Section 384a of the Czech Transformations Act, prevent such an outcome by requiring the company to select a Czech legal form before registering the transfer of its seat. However, it is worth noting that paragraph 30(3) of the Czech PIL Act allows for the establishment of a different rule through an international treaty, a directly applicable European Union regulation, or any other legal regulation. Consequently, if

that is the case, a foreign legal entity may retain its current personal law even after relocating its seat to the Czech Republic.[329]

The requirement to modify personal law aligns directly with the regulations governing EU law business organisations, such as EEIG, SE, and SCE. When these entities relocate their seat, they become subject to the law of the host state. The purpose of this requirement is clear, as it aims to minimise potential conflicts of laws that may arise in such circumstances.

If, hypothetically, an international treaty, a directly applicable European Union regulation, or another legal provision were to allow a foreign company to transfer its seat without modifying its personal law (as stipulated in Section 30(3) of the Czech PIL Act), it could give rise to significant conflicts between the law of the seat (i.e., Czech law) and *lex societatis* (i.e., foreign law). These conflicts would involve a broad range of legal matters, covering both private and public law.

In this regard, as far as it concerns the transfer of the seat under Czech law, two issues should be highlighted. Firstly, there is currently no mechanism that allows a company governed by foreign law, but with its seat relocated to the Czech Republic, to subsequently convert to a Czech legal form. Secondly, the question arises as to which law should be applicable if such a company intends to transfer its seat to another foreign state or back to its state of origin or *lex societatis* (if different), as the interests of at least two legal systems coincide.

Regarding the first issue, it seems reasonable to apply the rules on internal transformations by analogy and make Czech law applicable. As for the second issue, a potential resolution could involve fragmenting the personal status and applying the general rule that the law of the country where the seat is located should apply (i.e., the Czech Republic). However, some exceptions should be made in cases where a company governed by foreign law intends to transfer its seat back to the country of its origin or *lex societatis*. These exceptions aim to prevent the company from being caught in a situation where it is stuck between the two states. Nevertheless, such exceptions should not contradict the protection of the interests of the company's members and creditors in the country where its seat is located.[330]

[329] PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář. [Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, p. 236.

[330] KOLAS, Heorhi. Cross-border Conversions in accordance with the Directive (EU) 2019/2121 and the Current Rules of Law of the Czech Republic. *Charles University in Prague Faculty of Law Research Paper No. 2024/I* (in print).

5.4.3 Seat Transfer from the Czech Republic

For Czech companies relocating their seat abroad, the Czech Civil Code, in Section 139, establishes two conditions that must be met: (1) the transfer should not contravene public order, and (2) it must be permitted by the legal system of the receiving country.

Additionally, the Czech Transformations Act introduces two conditions for relocating a Czech company's seat within EU or EEA states. Firstly, if a company is subject to supervision or monitoring by an administrative authority or the Czech National Bank, the consent of that authority is necessary (Section 384h). Secondly, similar to the situation when transferring the foreign company seat to the Czech Republic, the transfer outside of the Czech Republic is prohibited if a company is undergoing liquidation or if insolvency proceedings have been initiated against it (Section 384i).

There are two ways for relocation within the EU or EEA: one involves a change in legal form to a foreign one, and the other allows for the retention of the Czech legal form.[331] If the legal form is changed after the transfer, the form should be recognized by the laws of the receiving state, unless the law of that state prohibits it (Section 384f(2)). If the Czech legal form is retained, the personal status and legal form of the company continue to be governed by Czech law, unless the host state legal order provides otherwise (Section 384f(1)). No such regulation is provided if the company moves its seat outside the EU or EEA.

In contrast to the provisions of Directive (EU) 2019/2121 and Czech legislation governing foreign companies' seat transfer to the Czech Republic, the Czech Transformations Act does not require a Czech company to adopt a new legal form under the law of the host state. Instead, it grants the Czech company the freedom to choose the applicable law if such freedom is provided for by the law of the host state.[332]

Therefore, while the company retains its personal statute and is governed by Czech law, it is no longer registered in the Czech corporate register. Consequently, in this situation, the company would have its seat abroad, but Czech law would still be considered its *lex societatis*. However, the viability of this approach depends on the legislation of the specific member state to which the registered office is being transferred.[333]

---

[331] DVOŘÁK, Tomáš. *Přeměny a přeshraniční přeměny obchodních společností a družstev*. *[Transformations and cross-border transformations of companies and cooperatives]*. 1st edition. Prague: Wolters Kluwer Česká republika, 2013, p. 459.

[332] KOLAS, Heorhi. Cross-border Conversions in accordance with the Directive (EU) 2019/2121 and the Current Rules of Law of the Czech Republic. *Charles University in Prague Faculty of Law Research Paper No. 2024/I* (in print).

[333] PAUKNEROVÁ, Monika – BRODEC, Jan. Czech Republic. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International Law* of Companies in Europe. Munich: Hart Publishing, 2019, p. 326.

Alternatively, the company has to modify its form according to the host state law. A minor contradiction arises when considering Section 384f(2) of the Czech Transformations Act in conjunction with Section 30(1) of the Czech PIL Act. Section 30(1) of the Czech PIL Act stipulates that a company is governed by the legal order of the state under which it was incorporated (*právním řádem státu, podle něhož vznikla*), whereas Section 384f(2) of the Czech Transformations Act states that the transfer of a Czech company's seat will neither lead in its dissolution (*jejímu zániku*) nor the incorporation of a new legal entity (*vzniku nové právnické osoby*). Consequently, under a literal interpretation of these provisions, even after the transfer, the country of incorporation remains the Czech Republic, implying that such a company should still be governed by Czech law. The draft of the implementation law does not resolve this terminological issue. Therefore, future amendments to the wording of these provisions should be considered as an effective solution.[334]

Since the relocation of a company's registered office directly affects the interests of its members and creditors, Czech law pays great attention to ensuring their rights and guarantees. Firstly, the Czech Civil Code establishes an obligation for a company planning to transfer its seat abroad to announce this intention, including the new address and legal form after the relocation, at least three months before the planned transfer date. Creditors have the right to demand sufficient security for their outstanding claims within two months of the announcement of the relocation could potentially hinder their ability to enforce those claims in the Czech Republic (Section 140(1)). Secondly, if there is no agreement regarding the method and extent of security, the court decides on adequate security and its scope, taking into account the nature and amount of the claim. If the legal entity fails to provide the required security according to the court's decision, the members of the governing (statutory) body, unless they can demonstrate that they made sufficient efforts to comply with the decision, are personally liable for the unsecured debts (Section 140(2)). Thirdly, a member of the company who disagrees with the relocation of the registered office has the right to terminate their membership in the entity, effective from the date of the relocation. If a member is entitled to a settlement upon termination of their membership, the company must fulfil its obligations no later than the effective date of the relocation. The members of the governing (statutory) body are responsible for ensuring compliance with this obligation (Section 141(1)). Additionally, the members of the company and its governing body have joint and several liabilities for debts that arose before the effective date of the relocation (Section 141(2)).

[334] KOLAS, Heorhi. Cross-border Conversions in accordance with the Directive (EU) 2019/2121 and the Current Rules of Law of the Czech Republic. *Charles University in Prague Faculty of Law Research Paper No. 2024/I* (in print).

These provisions also apply when a Czech company intends to relocate its seat to an EU or EEA member state. However, the Czech Transformations Act provides more detailed regulations regarding the obligations required to protect the interests of creditors, partners, members, and other authorised individuals, including experts. These provisions can be found in Sections 33-51 of the Czech Transformations Act. According to Section 384l, the Czech company must demonstrate that the obligations required by these provisions have been fulfilled before the notary certifies the company's seat transfer.

The moment when the relocation of the seat is deemed complete, similar to a transfer to the Czech Republic, is when the new address is recorded in the relevant foreign commercial register (Section 142 of the Czech Civil Code). According to the Czech Transformations Act, this occurs on the day when the seat relocation is entered into the respective foreign commercial register unless a foreign legal order provides for a different procedure. Otherwise, the date of the transfer is a day when a Czech company was excluded from the commercial register (Section 384o).

The entire process of relocating the registered office of a Czech company from the Czech Republic to another EU or EEA member state, according to the Czech Transformations Act, can be divided into the following twelve steps: (1) drawing up a proposal for the transformation and a report on the transformation; (2) informing the company's employees about seat relocation; (3) filing the transformation proposal and publishing it, (4) delivering the notice of the general meeting and the relevant documents to the creditors, members, shareholders, including the proposal, the report on the transformation, financial statements; (5) obtaining a decision from the general meeting to approve the transformation; (6) requesting a notary to issue a certificate for the cross-border transformation; (7) the notary issuing the certificate for the cross-border transformation; (8) filing an application for the registration of the seat transfer in the foreign commercial register; (9) receiving the foreign authority's decision on the registration; (10) the notary issuing a certificate for the registration of the seat transfer in the commercial register; (11) filing an application for the company to be struck off the commercial register; (12) obtaining the court's decision confirming the striking off of the company from the commercial register.[335]

[335] PAUKNEROVÁ, Monika – BRODEC, Jan. Czech Republic. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International La*w of Companies in Europe. Munich: Hart Publishing, 2019, p. 326.

Conclusions of Part 5

1. The European Union is founded on four fundamental principles, collectively known as the four freedoms: the freedom of movement of goods, the freedom of movement of persons, the freedom of movement of services, and the freedom of movement of capital. A crucial aspect arising from the freedom of movement of persons is the freedom of establishment, which covers both primary and secondary establishments. A significant challenge in implementing the freedom of establishment has been the longstanding issue of cross-border conversions, crucial to the proper functioning of the European Union's single market.

2. Over time, the EU law's responses in this realm have been predominantly reactive, with the Court of Justice of the European Union delivering judgments to tackle evolving challenges. For example, in the Überseering BV case (C-208/00), it was established that EU member states cannot employ the 'real seat' doctrine to determine the law applicable to companies incorporated in other member states. Furthermore, cases like Inspire Art Ltd (C-167/01), VALE (C-378/10), and Polbud (C-106/16) have addressed state intervention issues in imposing restrictions on cross-border conversions, establishing criteria limiting the extent to which national laws restrict the freedom of establishment.

3. Directive (EU) 2019/2121, amending Directive (EU) 2017/1132, represents a significant development in harmonising regulations for cross-border conversions within the EU. However, its effectiveness heavily relies on member states adopting its provisions, which may pose practical challenges due to the complexity of implementing the directive in twenty-seven legal systems. A year after the deadline for all member states to implement this directive, it is evident that the implementation process faces difficulties and exhibits a mosaic character.

4. While Directive (EU) 2019/2121 has not yet been incorporated into Czech law, the current Czech legislation concerning cross-border seat transfers allows the procedure. It incorporates all the basic procedures outlined in the directive, enabling a foreign company to transfer its seat to the Czech Republic and a Czech company to transfer its seat within the EU. However, the content of these procedures does not fully align with the directive's requirements. The draft of the implementation law, aiming to bring Czech legislation into compliance with the directive, is currently under consideration.

Conclusions

The research conducted on companies in private international law has provided important insights into understanding corporate relationships complicated by foreign elements. The aim of this research was to identify and conduct a comparative analysis of the current problems of private international law concerning the determination of the law applicable to companies and to identify and analyse ways of solving these specific problems. To achieve this aim, comprehensive studies were undertaken on civil, corporate, and private international law doctrines, exploring various theories and approaches, accompanied by thorough comparative analyses of legislation from various states, with a primary emphasis on the law of the Czech Republic and the European Union.

The research was structured into five parts, each dedicated to a distinct issue related to the research topic, and addressed the tasks essential to achieving the research aim.

The first part of the research covered the fundamentals of private international law and provided an overview of the broader context concerning the regulation of companies in private international law. It studied the history of private international law, its foundations, sources, harmonisation, unification, and the general framework of European private international law.

It has been recognized that private international law has undergone significant evolution, adapting to the changing conditions of international business and trade. From a legal system exclusively focused on foreigners, it has transformed into a distinct branch of law that governs private legal relationships involving a foreign element, using a unique conflict-of-laws method. Private international law is an integral part of each state's legal system and encompasses domestic legislation, EU law, international treaties, and customary international law. The diversity of sources and approaches in different national legal systems can be reconciled through harmonisation and unification of laws.

In the second part of the research, the concepts of 'person', 'legal person', and 'company' were examined. The theoretical foundations related to these concepts, as well as their usage across legal systems, were studied.

It was concluded that the lack of uniformity in defining 'person', 'legal person', and entities without legal personality across various legal systems necessitates a deep understanding of these concepts to ensure the correct interpretation of foreign law. The concept of 'company' in private international law is employed to cover all forms of entities, including all associations of individuals and assets, regardless of their legal form or purpose, whether governed by private or public law.

In this part of the research, the issue of recognising foreign companies was explored, leading to the conclusion that the matter of recognition often entails the determination of applicable law. Two approaches can be taken to resolve this matter: either establishing a unified criterion for

determining applicable law or adopting international treaties based on mutual recognition among participating countries. As an illustration of addressing the challenge posed by various approaches in corporate law, European Union regulations on supranational business organisations such as European Economic Interest Grouping (EEIG), European Company, or Societas Europaea (SE), and European Cooperative Society (SCE) were analysed, as well as the proposal for Societas Unius Personae (SUP) was considered.

In the third part of the research, a holistic analysis of multiple concepts, including '*lex societatis*', 'nationality', and 'residency', relating to the applicable law of companies, as well as a distinction between the terms '*lex societatis*' and 'nationality' was conducted.

The *lex societatis* is the legal order governing the legal personality and capacity of a company in the area of private law. The *lex societatis* entails the application of the conflict-of-laws method. On the other hand, nationality has been defined as the connection of a company with a particular state in public law. It is established in accordance with the substantive law applicable to foreigners.

The fourth part of the research was devoted to the theories of determining the applicable law to companies. A comparative analysis of the approaches employed in the legislation of various legal systems and in the doctrine of private international law was carried out, and the main advantages and disadvantages of these approaches were considered.

The results of this part of the research revealed that the two main theories of determining the applicable law to companies – the incorporation theory and the 'real seat' theory – have their advantages and weaknesses. While the incorporation theory provides predictability and simplicity, the 'real seat' theory protects the interests of creditors and host states. The research conducted has highlighted the potential of the company's statutory seat criterion as a unified approach that, on the one hand, is convenient to use and consistent with cross-border conversions in the European Union and, on the other hand, remains adaptable if the law allows for the transfer of the statutory seat.

The fifth part of the study focused on freedom of establishment in the European Union, particularly in the area of cross-border conversions. The case law of the Court of Justice of the European Union, Directive (EU) 2019/2121, and Czech legislation were studied on this issue. Based on the study, the following conclusions can be drawn.

The fifth part of the study focused on the freedom of establishment in the European Union, particularly in the area of cross-border conversions. The case law of the Court of Justice of the European Union, Directive (EU) 2019/2121, and Czech legislation were studied on this issue. Based on the study, the following conclusions can be drawn. Firstly, the Court of Justice of the

European Union has played a crucial role in shaping and harmonising European Union law on that matter. It has unified approaches to determining the law applicable to companies, eliminated barriers to the transfer of company activities between different EU member states, and reduced restrictions for cross-border conversions. Secondly, Directive (EU) 2019/2121, largely grounded in these approaches, represents a significant step forward in regulating cross-border conversions and facilitating the functioning of the single market. However, its effectiveness depends largely on its implementation in all EU Member States. Thirdly, although Czech law has not yet incorporated the directive into its legal framework, the existing regulations regarding the cross-border transfer of seats already authorise such procedures within the EU.

In conclusion, as the world becomes more interconnected, the role of private international law in regulating cross-border business activities becomes increasingly important, necessitating innovative and comprehensive solutions to these complex problems. Through the exploration of the complexities surrounding *lex societatis*, theories related to determining applicable laws, and European Union instruments concerning cross-border conversions, the adaptation of effective and consistent regulations to the constantly evolving international trade landscape can be achieved.

Policymakers, legal scholars, and practitioners should collaborate to adopt legal regulations that encourage international business operations, safeguard stakeholders' interests, and stimulate both national and global economic growth. The pursuit of harmonisation and unification of law remains paramount in achieving these objectives. This research could serve as a foundation for further studies in this area. The findings of this research contribute to the development of new theories and approaches to address the issues of private international law in corporate relations involving a foreign element.

A list of abbreviations

CJEU	Court of Justice of the European Union
EEA	European Economic Area
EC	European Commission
EC Treaty	Treaty Establishing the European Community
EEC Treaty	Treaty Establishing the European Economic Community
EEIG	European Economic Interest Grouping
EU	European Union
Member State	European Union Member State
SCE	Societas Cooperativa Europaea (European Cooperative Society)
SE	Societas Europaea (European Company)
TEU	Treaty on European Union (Maastricht Treaty) of 1992
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UK	The United Kingdom of Great Britain and Northern Ireland
US	The United States of America

A list of references

1. A list of literature

ANUFRIEVA, Lyudmila Petrovna. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]. Volume 1: Obshchaya chast'. [General Part]*. Moscow: Izdatel'stvo BEK, 2000, 288 pages. ISBN 5-85639-263-9.

ANUFRIEVA, Lyudmila Petrovna. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]. Volume 2: Osobennaya chast'. [Special Part]*. Moscow: Izdatel'stvo BEK, 2000, 645 pages. ISBN 5-85639-277-9.

ASOSKOV, A.V. Retsenziya na stat'i Dzh. Demmanna, posvyashchennye kontseptsii svobody vybora prava, primenimogo k korporativnym otnosheniyam. [Review of J. Dammann's articles devoted to the concept of freedom of choice of law applicable to corporate relations]. *Vestnik grazhdanskogo prava. [Journal of Civil Law]*, Vol. 7, No. 4, 2007, pp. 271-280.

AUHATOV, A. Ya. Modifitsirovannye teorii opredeleniya lichnogo zakona yuridicheskogo litsa. [Modified Theories of Determining the Personal Law of a Juridical Person]. *Mezhdunarodnoe publichnoe i chastnoe pravo. [International Public and Private Law]*, No. 2, 2005, pp. 21-26.

BEITZKE, Günther. *Kollisionsrecht von Gesellschaften und juristischen Personen. [Conflict of Laws for Companies and Juristic Persons]*. In: LAUTERBACH, Wolfgang. *Vorschläge und Gutachten zur Reform des deutschen internationalen Personen- und Sachenrects. Vorgelegt im Auftrag der 2. Kommission des Deutschen Rates für internationales Privatrecht von Wolfgang Lauterbach. [Proposals and Opinions on the Reform of German International Personal and Property Law. Presented on behalf of the 2nd Commission of the German Council for International Private Law by Wolfgang Lauterbach]*. Tübingen: Mohr, 1972, pp. 94-126. ISBN 3166329811.

BERAN, Karel. *The concept of juristic person*. Praha: Wolters Kluwer ČR, 2020, 259 pages. ISBN 978-80-7598-188-2.

BOGDAN, Michael, Marta PERTEGÁS SENDER. *Concise introduction to EU private international law*. 4th edition. Groningen: Europa Law Publishing, 2019, 246 pages. ISBN 9789089522085.

BOGUSLAVSKII, Mark Moiseevich. *Mezhdunarodnoe chastnoe pravo [International Private Law]*. 5th edition. Moscow: Yurist, 2005. 604 pages. ISBN 5-7975-0648-3.

BORISOV, Vitalii Nikolaevich et al. – MARYSHEVA, Natal'ya Ivanovna, ed. *Mezhdunarodnoe chastnoe pravo: Uchebnik. [International Private Law: Textbook]*. 4th edition. Moscow: Institut zakonodatel'stva i sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federatsii [Institute of Legislation and Comparative Law under the Government of the Russian Federation], 2018, 848 pages. ISBN 5-6040212-7-9.

CALSTER, van Geert. *European Private International Law*. 2nd edition. Oxford: Hart Publishing, 2016, 576 pages. ISBN 978-1849466721.

ČERVENKOVÁ, Lenka. *Europeanization and Unification of Private International Law*. In: DÁVID, Radovan, ed., et al. *COFOLA 2008 Conference: Key Points and Ideas*. 1st edition. Brno: Masarykova univerzita, 2008, p. 56. ISBN 978-80-210-4629-0.

CHESHIRE, Geoffrey – NORTH, P. M. – BOGUSLAVSKII, Mark Moiseevich, ed. *Mezhdunarodnoe chastnoe pravo. [Private International Law]*. Moscow: Progress, 1982 [1979]. 496 pages.

DAVID, René – JAUFFRET-SPINOSI, Camille – GORE, Marie. *Les grands systèmes de droit contemporains. [Major legal systems in the world today]*. 12th edition. Paris: Dalloz, 2016, 542 pages. ISBN 978-2247090501.

DĚDIČ, Jan – ČECH, Petr. *Evropská (akciová) společnost. [European (stock) company]*. 1st edition. Prague: BOVA POLYGON, 2006, 619 pages. ISBN 80-7273-133-5.

DORORINA, Natal'ya Georgievna. *Mezhdunarodnye organizatsii, zanimayushchiesya unifikatsiei prava*. *[International Organisations Involved in Legal Unification]*. In: MAKOVSKII Aleksandr L'vovich – HLESTOVA, Irina Olegovna, eds. *Problemy unifikatsii mezhdunarodnogo chastnogo prava: Monografiya*. *[Problems of Unification of International Private Law: Monograph]*. Moskov: Institut zakonodatel'stva i sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federatsii, 2012, pp. 59-187. ISBN 978-5-9516-0610-5.

DUBOVITSKAYA, Elena Alekseevna. Pravosposobnost' yuridicheskih lits po pravu Evropeiskih soobshchestv (praktika Evropeiskogo suda). [Legal Capacity of Juridical Persons under European Communities Law (Practice of the European Court)]. *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*. *[Bulletin of the Higher Arbitration Court of the Russian Federation]*, No. 12, 2000, pp. 99-108.

DVOŘÁK, Tomáš. *Přeměny a přeshraniční přeměny obchodních společností a družstev*. *[Transformations and cross-border transformations of companies and cooperatives]*. 1st edition. Prague: Wolters Kluwer Česká republika, 2013, 486 pages. ISBN 978-80-7357-970-8.

GEIMER, Reinhold. *Internationales Zivilprozessrecht*. *[International Civil Procedure]*. 8th edition. Cologne: Verlag Dr. Otto Schmidt, 2020, 1616 pages. ISBN 978-3504471149.

GERNER-BEUERLE, Carsten – MUCCIARELLI, M. Federico – SCHUSTER, Edmund-Philipp – SIEMS, M. Mathias. *Study on the law applicable to companies. Final Report*. Luxembourg: Publications Office of the European Union, 2016, 365 pages. ISBN 978-92-79-58018-5.

GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International Law of Companies in Europe*. Munich-Oxford: C.H. Beck; Nomos; Hart Publishing, 2019, 769 pages. ISBN 978-3-406-71457-3.

GILL, Christopher. Personhood and personality: The Four-Personae Theory in Cicero, De Officiis I. *Oxford Studies in Ancient Philosophy*, Vol. 6, 1988, pp. 169-199.

GOLODENKO, Irina Aleksandrovna. *Ponyatie i sushchnost' yuridicheskogo litsa*. *[The Concept and Essence of a Juridical Person]*. In: VAS'KOVSKII, Evgenii Vladimirovich et al – KANZAFAROVA, Ilona Stanislavovna, ed. *Pravovoe regulirovanie otnoshenii v sfere chastnogo prava: traditsii i sovremennost': k 150-letiyu so dnya rozhdeniya E. V. Vas'kovskogo*. *[Legal Regulation of Relations in the Field of Private Law: Traditions and Modernity: On the 150th Anniversary of the Birth of E. V. Vaskovsky]*. Odessa: Astroprint, 2016, pp. 301-321.

GRASMANN, Günther. *System des internationalen Gesellschaftsrechts. Aufien- un Innenstatut der Gesellschaften im Internationalen Privatrecht. [System of International Company Law. Foreign and Domestic Statutes of Companies in International Private Law].* Berlin: Herne, 1970, 668 pages.

GROSSFELD, Bernhard. *Internationales und Europäisches Unternehmensrecht: Das Organisationsrecht transnationaler Unternehmen*. *[International and European Business Law: The Organisational Law of Transnational Companies]*. 2nd edition. Heidelberg: C. F. Müller GmbH, 1995, 347 pages. ISBN 9783811443952.

GROTHE, Helmut. *Die "ausländische Kapitalgesellschaft & Co.": Zulässigkeit grenzüberschreitender Grundtypvermischungen und Anknüpfung des Gesellschaftsstatuts unter besonderer Berücksichtigung des europäischen Gemeinschaftsrechts*. *[The 'Foreign Capital Company & Co.': Permissibility of Cross-Border Basic Type Mixtures and the Connection of Corporate Statutes with Special Consideration of European Community Law]*. Hamburg: Heymann, 1989, 364 pages. ISBN: 978-3452215567.

GUILLAUME, Florence. *"Lex societatis": Principes de rattachement des sociétés et correctifs institués au bénéfice des tiers en droit international privé suisse. Schweizer Studien zum internationalen Recht*. *[Lex societatis: Principles of Connecting Companies and Corrective Measures Established for the Benefit of Third Parties in Swiss Private International Law.*

Swiss Studies in International Law]. Zürich: Schulthess, 2001, 383 pages. ISBN 978-3725543106.

HAY, Peter – BORCHERS, J. Patrick – FREER, D. Richard. *Conflict of Laws, Private International Law, Cases and Materials*. 16th edition. Foundation Press, 2021, 1253 pages. ISBN 978-1647085995.

JOHNSTON, Andrew – SYRPIS, Phil. Regulatory competition in European company law after "Cartesio". *European Law Review*, Vol. 34, Issue 3, 2009, pp. 378-404.

JUENGER, K. Friedrich. A Page of History. *Mercer Law Review*, Vol. 35, Issue 2, 1984, pp. 419-460.

JUENGER, K. Friedrich. Need for a Comparative Approach to Choice-of-Law Problems. *Tulane Law Review*, Vol. 73, Issue 4, 1999, pp. 1309-1336.

KADYSHEVA, Ol'ga Vladimirovna. *Natsional'nost' yuridicheskih lits v mezhdunarodnom chastnom prave: Avtoreferat kandidatskoi dissertatsii po spetsial'nosti 12.00.03 - Grazhdanskoe pravo; predprinimatel'skoe pravo; semeinoe pravo; mezhdunarodnoe chastnoe pravo (yuridicheskie nauki)*. *[Nationality of Juridical Persons in International Private Law: Abstract of the Candidate Dissertation in the Specialty 12.00.03 - Civil Law; Entrepreneurial Law; Family Law; International Private Law (Legal Sciences)]*. Moscow, 2003, 23 pages.

KALENSKÝ, Pavel. Universalismus a "nacionalismus" v doktríně mezinárodního práva soukromého. [Universalism and 'Nationalism' in the Doctrine of Private International Law]. *Časopis pro mezinárodní právo*. *[Journal of International Law]*, Vol. 12, No. 4, 1969, pp. 45-62.

KOLAS, Heorhi. Cross-border Conversions in accordance with the Directive (EU) 2019/2121 and the Current Rules of Law of the Czech Republic. *Charles University in Prague Faculty of Law Research Paper No. 2024/I* (in print).

KOLAS, Heorhi. Lex societatis and Nationality in Private International Law. In: KNOLL, Vilém – HABLOVIČ, Jakub – VNENK, Vladislav, eds. *Naděje právní vědy 2020: Právní věda v praxi: Sborník příspěvků ze stejnojmenné mezinárodní konference pořádané Fakultou právnickou Západočeské univerzity v Plzni on-line dne 27. listopadu 2020. [The Hope of Legal Science 2020: legal science in practice: proceedings of the international conference of the same name organized by the Faculty of Law of the University of West Bohemia in Pilsen online on 27 November 2020]*. Pilsen: Západočeská univerzita v Plzni, 2021, pp. 794-806. ISBN 978-80-261-1007-1.

KOZLOVA, Natal'ya Vladimirovna – EM, Vladimir Saurseevich, ed. *Ponyatie i sushchnost' yuridicheskogo litsa. Ocherk istorii i teorii: Uchebnoe possie*. *[The Concept and Essence of Legal Entity: A Outline of History and Theory: Textbook]*. Moscow: Statut, 2003, 318 pages. ISBN 5-8354-0169-8.

KOZLOVA, Natal'ya Vladimirovna. *Pravosub''ektnost' yuridicheskogo litsa: Uchebnik*. *[Legal Personality of a Juridical Person: Textbook]*. Moscow: Statut, 2005, 220 pages. ISBN: 5-8354-0257-0.

KUČERA, Zdeněk – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. *[Private International Law]*. 8th edition. Pilsen: Aleš Čeněk, s.r.o.; Brno: Doplněk, 2015, 430 pages. ISBN 978-80-7380-550-0; 978-80-7239-321-3.

KUČERA, Zdeněk. *Mezinárodní právo soukromé*. *[Private International Law]*. 5th edition. Brno: Doplněk, 2001, 427 pages. ISBN 80-7239-100-3.

LASÁK, Jan – DĚDIČ, Jan. Patnáct poznámek k současné právní úpravě přeměn obchodních korporací ve světle její připravované novelizace [15 notes on the current company reorganisations regulation on the light of its envisaged amendment]. *Obchodní právo*. Wolters Kluwer ČR, a.s., 2022, vol. 31, No 5, p. 2-15. ISSN 1210-8278.

LAURENT, Levy – GOLDMAN, Berthold. *La nationalité des sociétés*. *Bibliothèque de droit privé*. *[The nationality of companies]*. Paris: Librairie générale de droit et de jurisprudence, 1984, 319 pages. ISBN 978-2275009919.

LUNTS, Lazar' Adol'fovich. *Kurs mezhdunarodnogo chastnogo prava: Obshchaya chast'*. *[Course of International Private Law: General Part]*. Moscow: Yuridicheskaya literatura, 1973, 384 pages.

McLAUGHLIN, Susan. *Unlocking Company Law*. 4th edition. Abingdon: Routledge, 2018, 582 pages. ISBN 978-1138308558.

MEHREN, von Arthur Taylor. The Contribution of Comparative Law to the Theory and Practice of Private International Law. *The American Journal of Comparative Law*, Vol. 26, Issue 1, 1978, pp. 31-41.

MÜLLER-DRIVER, Andreas. *Grenzüberschreitende Restrukturierungen von Kapitalgesellschaften zwischen Deutschland und England*: *Dissertation*. *[Cross-Border Restructuring of Capital Companies between Germany and England: Dissertation]*. Frankfurt/M.: Peter Lang GmbH - Internationaler Verlag der Wissenschaften, 2002, 240 pages. ISBN 978-3631386538.

NAPPENBACH, Celina. *Parteiautonomie im internationalen Gesellschaftsrecht: Dissertation*. *[Party Autonomy in International Company Law: Dissertation]*. Berlin: Logos-Verl, 2002, 250 pages. ISBN 978-3-89722-940-2.

NORTH, Peter – FAWCETT, J. James. *Cheshire and North's Private International Law*. 13th edition. Oxford: Oxford University Press, 2004, 1188 pages. ISBN 978-0406905963.

PASCHALIDIS, Paschalis. *Freedom of Establishment and Private International Law for Corporations*. 1st ed. Oxford: Oxford University Press, 2012, 288 pages. ISBN 978-0199698042.

PAUKNEROVÁ, Monika, Obchodní společnosti v evropském mezinárodním právu soukromém – nové trendy [Companies in European Private International Law – New Trends]. In: EICHLEROVÁ, K. a kol. *Rekodifikace obchodního práva – pět let poté* [*Recodification of Commercial Law – Five Years after*]. Volume II, Prague: Wolters Kluwer, 2019, pp. 101-111. ISBN 978-80-7598-426-5.

PAUKNEROVÁ, Monika – BRODEC, Jan. Czech Republic. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The Private International Law of Companies in Europe*. Munich: Hart Publishing, 2019, pp. 308-333. ISBN 978-3-406-71457-3.

PAUKNEROVÁ, Monika – ROZEHNALOVÁ, Naděžda – ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. *[Private International Law Act: commentary]*. 1st edition. Prague: Wolters Kluwer ČR, 2013, 853 pages. ISBN 978-80-7478-368-5.

PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav et al. *Rekodifikované mezinárodní právo soukromé*. *[Recodified Private International Law]*. 1st edition. Prague: Univerzita Karlova v Praze. Právnická fakulta, 2014, 193 pages. ISBN 978-80-87146-94-1.

PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. *[European Private International Law]*. 2nd edition. Prague: C.H. Beck, 2013, 304 pages. ISBN 978-80-7400-504-6.

PAUKNEROVÁ, Monika. *Společnosti v mezinárodním právu soukromém*. *[Companies in private international law]*. 1st edition. Prague: Karolinum, 1998, 219 pages. ISBN 80-7184-598-1.

PERETERSKII, Ivan Sergeevich – KRYLOV, Sergei Borisovich. *Mezhdunarodnoe chastnoe pravo: Uchebnik dlya yuridicheskih institutov i fakul'tetov*. *[International Private Law: Textbook for Legal Institutes and Faculties]*. 2nd edition. Moscow: Gosudarstvennoe izdatel'stvo yuridicheskoi literatury, 1959. 227 pages.

PFEIFFER, Magdalena. Kde bydlí právnická osoba? Obvyklý pobyt a bydliště právnických osob z perspektivy evropského mezinárodního práva soukromého. [Where Does a Legal Person

Live? Habitual Residence and Domicile of Legal Persons from the Perspective of European Private International Law]. In: *Právník. [Lawyer]*, Vol. 153, No. 7, 2014, pp. 521–536.
PFEIFFER, Magdalena – PAUKNEROVÁ, Monika – RŮŽIČKA, Květoslav a BRODEC, Jan. *Mezinárodní obchodní právo [International Commercial Law]*. Pilsen: Vydavatelství a nakladatelství Aleš Čeněk, 2019, 412 pages. ISBN 978-80-7380-764-1.
RAMMELOO, Stephan. *Corporations in Private International Law: A European Perspective*. Oxford: Oxford University Press, 2001, 349 pages. ISBN 0-19-829925-7.
ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University. Faculty of Law, 2015, 315 pages. ISBN 978-80-210-8122-2.
SANDROCK, Otto. Centros: ein Etappensieg für die Überlagerungstheorie. [Centros: A Partial Victory for the Overlap Doctrine]. *Betriebs-Berater. [Business Advisor]*, Vol. 26, 1999, pp. 1337-1345.
SANDROCK, Otto. *Die Konkretisierung der Uberlagerungstheorie in einigen zentralen Einzelfragen. Ein Beitrag zum internationalen Gesellschaftsrecht. [The Concretization of the Overlapping Theory in Some Key Specific Issues. A Contribution to International Company Law]*. In: SANDROCK, Otto. *FESTSCHRIFT FUR GUNTHER BEITZKE ZUM 70. GEBURTSTAG am 26. April 1979. [Festschrift for Günter Beitzke on His 70th Birthday on April 26, 1979]*. Walter de Gruyter: Berlin; New York, 1979. pp. 669-696.
SANDROCK, Otto. *Die multinationalen Korporationen im Internationalen Privatrecht. [Multinational Corporations in International Private Law]*. In: WILDHABER, Luzius et al. *Internationalrechtliche Probleme multinationaler Korporationen. [International Legal Problems of Multinational Corporations]*. Karlsruhe, 1978. pp. 168-262.
SVOBODA, Pavel. *Úvod do evropského práva. [Introduction to European Law]*. 5th edition. Prague: C.H. Beck, 2013, 412 pages. ISBN 978-80-7400-488-9.
TICHÝ, Luboš et al. *Evropské právo. [European Law]*. 5th edition. Prague: C.H. Beck, 2014, 756 pages. ISBN 978-80-7400-546-6.
TOMÁŠEK, Michal. Lesk a bída "europeizace" občanského práva. [The Splendor and Misery of the "Europeanization" of Civil Law]. In: *Právník. [Lawyer]*, Vol. 143, No. 1, 2004. pp. 1-15.
WERLAUFF, Erik. *EU-Company Law. Common business law of 28 states*. 2nd edition. Copenhagen: DJØF Publishing, 2003, 672 pages. ISBN 87-574-0332-5.
ZIMMER, Daniel. *Internationales Gesellschaftsrecht: das Kollisionsrecht der Gesellschaften und sein Verhältnis zum internationalen Kapitalmarktrecht und zum internationalen Unternehmensrecht. [International Company Law: The Conflict of Laws of Companies and its Relationship with International Capital Market Law and International Corporate Law]*. Heidelberg: Verlag Recht und Wirtschaft, 1996, 487 pages. ISBN 3800511665.

2. A list of internet sources

A Short History of Corporations. In: New Internationalist [online]. [Accessed 15 June 2023]. Available at: https://newint.org/features/2002/07/05/history.
ARLT, Agnes – BERVOETS, Cécile – GRECHENIG, R. Kristoffel – KALSS, Susanne. The Societas Europaea in Relation to the Public Corporation of Five Member States (France, Italy, Netherlands, Spain, Austria). *European Business Organization Law Review*, Vol. 3, Issue 4, 2002, pp. 733-764. In: SSRN [online]. [Accessed 15 June 2023]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404620.
BAELZ, Kilian – BALDWIN, Teresa. The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law. *German Law Journal*, Vol. 3, Issue 12, 2002. In: Cambridge University Press [online]. [Accessed 22 August 2023]. Available at: https://doi.org/10.1017/S2071832200015674.

BATIFFOL, Henri – LAGARDE, Paul. International Privé Droit. In: Encyclopædia Universalis France [online]. [Accessed 14 April 2023]. Available at: https://www.universalis.fr/encyclopedie/droit-international-prive/.

BERAN, Karel. The Person at Law from the Point of View of Pure Legal Science. *The Lawyer Quarterly*, Vol. 3, No. 1, 2013. In: The Lawyer Quarterly: International Journal for Legal Research [online]. [Accessed 15 June 2023]. Available at: https://tlqnew.ilaw.cas.cz/index.php/tlq/article/view/59.

BIKTAGIROV, Raif Terent'evich. Sub''ekt prava kak opornaya kategoriia yurisprudentsii. [Subject of Law as a Support Category of the Legal Science]. *Grazhdanin. Vybory. Vlast'*. [Citizen. Elections. Power], No. 2, 2018, pp. 46-63. In: RTSOIT pri TSIK Rossii [online]. [Accessed 15 June 2023]. Available at: https://www.rcoit.ru/upload/iblock/5dc/ГВВ_2_2018_Субъект%20права%20как%20опорная%20категория%20юриспруденции.pdf.

BISKUPOVÁ, Klára – LEŠ, Adam. *K chystané novele zákona o přeměnách obchodních společností a družstev. [To the planned amendment of the Act on the Transformation of Business Companies and Cooperatives]*. In: epravo.cz [online]. [Accessed 20 November 2023]. Available at: https://www.epravo.cz/top/clanky/k-chystane-novele-zakona-o-premenach-obchodnich-spolecnosti-a-druzstev-116018.html.

BORG-BARTHET, Justin. European Private International Law of Companies after Cartesio. *The International and Comparative Law Quarterly*, Vol. 58, No. 4, 2009, pp. 1020-1028. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/25622256.

BOUDERHEM, Rabaï. *La nationalité des sociétés en droit français*. *[The Nationality of Companies in French Law]*. Université de Bourgogne, 2012. 418 pages. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-00960318.

BRINZ, von Aloys. *Lehrbuch der Pandekten [Textbook of Pandects]. Volume 1.* Erlangen: A. Deichert.1857. 651 pages. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/lehrbuchderpand00bringoog/page/n5/mode/2up.

BUTAKOVA, Yana. *Lichnyi zakon yuridicheskogo litsa. Nu ne to chtoby ochen' lichnyi i sokrovennyi ... [The Personal Law of a Legal Entity. Well, Not Exactly Personal and Intimate]*. In: Yurist kompanii. Prakticheskii zhurnal dlya yurista [Company Lawyer. Practical Journal for a Lawyer] [online]. [Accessed 22 August 2023]. Available at: https://www.law.ru/news/36552-chetyre-sposoba-istolkovat-dogovor-s-nestykovkami-v-polzu-vashey-kompanii.

CARSWELL, R. D. The Doctrine of Vested Rights in Private International Law. *The International and Comparative Law Quarterly*, Vol. 8, No. 2, 1959, pp. 268-288. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/755805.

Commission Staff Working Document. Impact Assessment. Accompanying the document. Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies. In: EUR-Lex [online]. [Accessed 15 June 2023]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0124&from-=en

Directive of the European Parliament and of the Council on single-member private limited liability companies. In: EUR-Lex [online]. [Accessed 15 June 2023]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=&uri=CELEX:52014PC0212.

DMITRIEVA, Galina Kirillovna. Istoriya nauki mezhdunarodnogo chastnogo prava. [History of International Private Law Doctrine], *Vestnik Universiteta imeni O. E. Kutafina. [Bulletin of the O.E. Kutafin University]*, No. 2, 2015, pp. 22-41. In: CyberLeninka [online]. [Accessed 14 April 2023]. Available at: https://cyberleninka.ru/article/n/istoriya-nauki-mezhdunarodnogo-chastnogo-prava.

DRURY, R. Robert. The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome". *The Cambridge Law Journal*, Vol. 57, No. 1, pp. 165-194. In: JSTOR [online]. [Accessed 15 June 2023]. Available at: https://www.jstor.org/stable/4508425.

EBKE, F. Werner. The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond. *The International Lawyer*, Vol. 38, No. 3, 2004, pp. 813-853. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/40708225.

EIDENMÜLLER, Horst. *Shell Shock: In Defence of the "Real Seat Theory" in International Company Law*. In: University of Oxford. The Faculty of Law. Oxford Business Law Blog [online]. [Accessed 22 August 2023]. Available at: https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/03/shell-shock-defence-real-seat-theory-international-company-law.

Entity. In: Cambridge Advanced Learner's Dictionary & Thesaurus. Cambridge University Press [online]. [Accessed 15 June 2023]. Available at: https://dictionary.cambridge.org/dictionary/english/entity.

ERPYLEVA, Nataliya Yur'evna. *Mezhdunarodnoe chastnoe pravo: Uchebnik dlya vuzov. [International Private Law: Textbook for Universities]*. Moscow: Izdatel'skii dom Vysshei shkoly ekonomiki, 2015, 655 pages. ISBN 978-5-7598-1149-7. In: Izdatel'skii dom VSHE [online]. [Accessed 14 April 2023]. Available at: https://id.hse.ru/data/2015/04/18/1105085330/%D0%95%D1%80%D0%BF%D1%8B%D0%BB%D0%B5%D0%B2%D0%B0-%D1%82%D0%B5%D0%BA%D1%81%D1%82-litres.pdf.

EU law. In: EUR-Lex [online]. [Accessed 14 April 2023]. Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/eu-law.html.

EY Guide on Directive 2019/2121 on cross-border reorganizations. In: EY [online]. [Accessed 20 November 2023]. Available at: https://www.ey.com/en_pl/law/ey-guide-on-cross-border-reorganizations.

GERNER-BEUERLE, Carsten – SIEMS, Mathias. *The Private International Law of Companies in Germany*. In: GERNER-BEUERLE, Carsten – MUCCIARELLI, Federico – SCHUSTER, Edmund – SIEMS, Mathias, eds. *The* Private International Law of Companies in Europe. Munich: Hart Publishing, 2019, pp. 385-414. In: SSRN [online]. [Accessed 17 June 2023]. Available at: https://ssrn.com/abstract=3355688, http://dx.doi.org/10.2139/ssrn.3355688.

GERNER-BEUERLE, Carsten. Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in VALE. *Gore-Browne on Companies, Special Release*, 2013. 7 pages. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=2249182.

GIERKE, von Otto. *Die Genossenschaftstheorie und die deutsche Rechtsprechung*. *Making of Modern Law: Foreign, Comparative and International Law, 1600-1926*. *[Making of modern law: Foreign, comparative and international law, 1600-1926]*. Berlin: Weidmann, 1887. 1024 pages. In: Google Books [online]. [Accessed 15 June 2023]. Available at: https://books.google.com/books?id-=rqs3AAAAMAAJ&printsec=frontcover&hl=ru#v=onepage&q&f=true.

HJI PANAYI, Christiana. Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths. *Queen Mary University of London*. *School of Law Legal Studies Research Paper*, No. 26, 2009. 79 pages. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/-abstract=1437555.

HJI PANAYI, Christiana. Corporate Mobility in the European Union and Exit Taxes. *Bulletin for International Taxation*, Vol. 459, No. 63, 2009, pp. 459-473. In: SSRN [online]. [Accessed 22 August 2023]. Available at: https://ssrn.com/abstract=1529488.

HOLBROOK, Tate, – CLARK, Rebecca. *Secrets of a Superorganism*. In: Arizona State University [online]. [Accessed 15 June 2023]. Available at: https://askabiologist.asu.edu/explore/secrets-superorganism.

JACKSON, O. Matthew – NEI, Stephen. *Networks of Military Alliances, Wars, and International Trade*. In: SSRN [online]. [Accessed 14 April 2015]. Available at: https://ssrn.com/abstract=2389300, http://dx.doi.org/10.2139/ssrn.2389300.

KING, Fung Tsang. Applicable Law in Piercing the Corporate Veil in the United States: A Choice With no Choice. *Journal of Private International Law*, Vol. 10, No. 2, 2014, pp. 227-264. In: Taylor & Francis Online [online]. [Accessed 14 April 2023]. Available at: https://www.tandfonline.com/doi/abs/10.5235/17441048.10.2.227.

KOESSLER, Maximilian. The Person in Imagination or Persona Ficta of the Corporation. *LA Law Review*, Vol. 9, No. 4, 1949, pp. 435-449. In: LSU Law Digital Commons [online]. [Accessed 15 June 2023]. Available at: https://digitalcommons.law.lsu.edu/lalrev/vol9/iss4/2/.

KURKI, A. J. Visa. A Short History of the Right-Holding Person. In: KURKI, A. J. Visa. *Theory of Legal Personhood*. Oxford: Oxford University Press, 2019, pp. 31-54. ISBN 978-0198844037. In: Oxford Academic [online]. [Accessed 15 June 2023]. Available at: https://academic.oup.com/book/35026/chapter/298855110.

LABUSCH, Janine. *Cross-Border Conversions – Why Now and Not Later?* In: American Bar Association. Business Law Section [online]. [Accessed 6 September 2023]. Available at: https://businesslawtoday.org/2022/03/cross-border-conversions-why-now-and-not-later/.

LASSON, von Adolf. *Princip und Zukunft des Völkerrechts*. *[Principle and Future of International Law]*. Berlin: Verlag von Wilhelm Hertz, 1871. 195 pages. In: Münchener DigitalisierungsZentrum. Digitale Bibliothek [online]. [Accessed 15 June 2023]. Available at: https://www.digitale-sammlungen.de/de/view/bsb10812235?page=5.

Legal status. In: Eustat [online]. [Accessed 17 June 2023]. Available at: https://en.eustat.eus/documentos/elem_1831/definicion.html#:~:text=Legal%20status%20Refers%20to%20the%20legal%20identity%20by,full%20legal%20responsibility%2C%20regarding%20themselves%20and%20third%20parties.

MEISELLES, K. Michala. The European Economic interest grouping – A chance for multinationals? *European Business Law Review*, Vol. 26, Issue 3, pp. 391-415. In: University of Derby [online]. [Accessed 15 June 2023]. Available at: https://repository.derby.ac.uk/item/937zw/the-european-economic-interest-grouping-a-chance-for-multinationals.

MICHELER, Eva. Recognition of Companies Incorporated in Other EU Member States. *The International and Comparative Law Quarterly*, Vol. 52, No. 2, 2003, pp. 521-529. In: JSTOR [online]. [Accessed 6 September 2023]. Available at: https://www.jstor.org/stable/3663122.

MILLS, Alex. Connecting Public and Private International Law. In: RUIZ ABOU-NIGM, Veronica – French, Duncan, eds., et al. *Linkages and Boundaries in Private and Public International Law*. Oxford: Hart Publishing, 2018. 16 pages. ISBN 978-1509918652. In: UCL Discovery [online]. [Accessed 14 April 2023]. Available at: https://discovery.ucl.ac.uk/id/eprint/10038205/1/Mills%20%20Connecting%20Public%20and-%20Private%20International%20Law%20(final).pdf.

MILLS, Alex. The Private History of International Law. *The International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006. 49 pages. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/3663311.

MUCHA, Ariel – OPLUSTIL, Krzysztof. Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud. *European Company and Financial Law Review*, Vol. 15, No. 2, 2018, pp. 270-307. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract=3100156, http://dx.doi.org/10.2139/ssrn.3100156.

NEFEDOV, Boris Ivanovich. The Emergence of International Private Law. Chapter I. *Moscow Journal of International Law*, No. 1, 2016, pp. 3-18. In: Moscow Journal of International Law

[online]. [Accessed 14 April 2023]. Available at: https://www.mjil.ru/jour/article/view/125?locale=en_US.

Novela zákona o přeměnách. [Amendment to the Act on Transformations]. In: EY [online]. [Accessed 20 November 2023]. Available at: https://www.ey.com/cs_cz/tax/tax-alerts/2022/novela-zakona-o-premenach.

PAUKNEROVÁ, Monika. Companies in Private International Law: Czechia, China and European Union. The Lawyer Quarterly, Vol. 10, No. 3, 2020, pp. 230-244. In: The Lawyer Quarterly [online]. [Accessed 22 August 2023]. Available at: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/411.

PEROGOVSKII, Vasilii. *O nachalah mezhdunarodnogo prava otnositel'no inostrantsev u narodov drevnego mira*. *[On the Origin of International Law on Foreigners in the Ancient World]*. Kyiv: V universitetskoi tipografii, 1859. 51 pages. In: Yaroslav Mudryi National Library of Ukraine [online]. [Accessed 14 April 2023]. Available at: https://web.nlu.org.ua/view.html?id=104.

Person. In: Cambridge University Press & Assessment. Cambridge Dictionary [online]. [Accessed 15 June 2023]. Available at: https://dictionary.cambridge.org/dictionary/english/person.

PHILLIPSON, Coleman. *The International Law and Custom of Ancient Greece and Rome*. *Volume 1*. London: MacMillan and Cº, 1911. 421 pages. In: Internet Archive [online]. [Accessed 14 April 2023]. Available at: https://archive.org/details/in-ternationallaw01philuoft/mode/1up.

PLANIOL, Marcel. *Traité élémentaire de droit civil: Conforme au programme officiel des Facultés de droit*. *[Elementary Treatise on Civil Law: In Accordance with the Official Curriculum of Law Faculties]*. *Volume 1*. Paris: Librairie Générale De Droit & De Jurisprudence, 1928. 1128 pages. In: Bibliothèque Nationale De France Gallica [online]. [Accessed 15 June 2023]. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k11599814/f1.item.

QUINTANA ADRIANO, Elvia Arcelia. The Natural Person, Legal Entity or Juridical Person and Juridical Personality. *Penn State Journal of Law & International Affairs*, Vol. 4, Issue 1, 2015. In: PennState Law: eLibrary [online]. [Accessed 15 June 2023]. Available at: https://elibrary.law.psu.edu/jlia/vol4/iss1/17.

RABEL, Ernst. *The Conflict of Laws: A Comparative Study*. *Volume 2*. Ann Arbor: The University of Michigan Press, 1960. 705 pages. In: The University of Michigan Law School [online]. [Accessed 14 April 2023]. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1011&context=michigan_legal_studies.

RATCLIFF, Christina – WOSYKA, Mathias – MARTINELLO, Barbara – FRANCO, Davide. *The internal market: General principles*. In: European Parliament. Fact Sheets on the European Union [online]. [Accessed 6 September 2023]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/33/the-internal-market-general-principles.

RATCLIFF, Christina – WOSYKA, Mathias – MARTINELLO, Barbara – FRANCO, Davide. *Freedom of establishment and freedom to provide services*. In: European Parliament. Fact Sheets on the European Union [online]. [Accessed 6 September 2023]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/-40/freedom-of-establishment-and-freedom-to-provide-services.

REIMANN, Mathias. Parochialism in American Conflicts of Laws. *The American Journal of Comparative Law*, Vol. 49, No. 3, 2001, pp. 369-389. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/840897.

RINGE, Wolf-Georg. No Freedom of Emigration for Companies? *European Business Law Review*, Vol. 16, No. 3, 2005. 33 pages. In: SSRN [online]. [Accessed 6 September 2023]. Available at: https://ssrn.com/abstract-=1085544.

ROZEHNALOVÁ, Naděžda – DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st edition. Brno: Masaryk University, 2015, 313 pages. ISBN 978-80-210-8122-2. In: Právnická fakulta. Masarykova univerzita [online]. [Accessed 14 April 2023]. Available at: https://science.law.muni.cz/knihy/monografie/Rozehnalova_Czech_private_international_-law.pdf.

SALEILLES, Raymond. *De la Personnalité Juridique: Histoire Et Théories; Vingt-Cinq Leçons d'Introduction à un Cours de Droit Civil Comparé sur les Personnes Juridiques. [On legal personality; history and theories; twenty-five introductory lessons for a comparative civil law course on legal persons].* Paris: Rousseau, 1910. 678 pages. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/delapersonnalit00saleuoft/mode/1up.

SAVIGNY, von Friedrich Carl – GUTHRIE, William, ed. *A Treatise on the Conflict of Laws, and The Limits of Their Operation in Respect of Place and Time*. Edinburgh: T.&T. Clark; Law Publishers, 1869. 387 pages. In: Google Books [online]. [Accessed 14 April 2023]. Available at: https://books.google.com/books?id=l24DAAAAQAAJ&printsec=frontcover-&hl=ru&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

SAVIGNY, von Friedrich Carl. *System des heutigen Römischen Rechts*. *[System of Contemporary Roman Law]*. *Volume 2.* Leipzig: Veit, 1863. 559 pages. In: Internet Archive [online]. [Accessed 15 June 2023]. Available at: https://archive.org/details/systemdesheutige02saviuoft/mode/2up.

SAVIGNY, von Friedrich Carl. *System des heutigen Römischen Rechts*. *[System of Contemporary Roman Law]*. *Volume 8*. Berlin: Bei Veit und Comp., 1849. 540 pages. In: Deutsches Textarchiv [online]. [Accessed 14 April 2023]. Available at: https://www.deutschestext-archiv.de/book/view/savigny_system08_1849?p=1.

SCHEINERT, Christian. *Single-member private limited liability companies (Societas Unius Personae)*. In: European Parliament. Legislative Train Schedule [online]. [Accessed 15 June 2023]. Available at: https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-single-member-companies.

SCHULTZ, Thomas – MITCHENSON, Jason. The History of Comity. *Forthcoming, Jus Gentium – Journal of International Legal History*, Vol. 5, 2019. In: SSRN [online]. [Accessed 14 April 2023]. Available at: https://ssrn.com/abstract=3405341, http://dx.doi.org/10.2139/ssrn.3405341.

Setting up a European Company (SE). In: Your Europe [online]. [Accessed 15 June 2023]. Available at: https://europa.eu/youreurope/business/running-business/developing-business/setting-up-european-company/index_en.htm.

SIMMONS, Dan. *17 Countries with GDPR-like Data Privacy Laws*. In: Comforte: Blog [online]. [Accessed 14 April 2023]. Available at: https://insights.comforte.com/countries-with-gdpr-like-data-privacy-laws.

STORY, Joseph. *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments.* Boston: Hilliard, Gray, and Cº, 1834. 557 pages. In: Google Books [online]. [Accessed 14 April 2023]. Available at: https://books.google.com/books?-id=4Ao9AAAAIAAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false.

STRAUMANN, Benjamin. Early Modern Sovereignty and Its Limits, Theoretical Inquiries in Law, Vol. 16, No. 2, 2015, pp. 423-446. In: TIL [online]. [Accessed 14 April 2023]. Available at: https://www7.tau.ac.il/ojs/index.php/til/article/view/1344/1389.

TANIMOV, O. V. Razvitie yuridicheskih fiktsii v epohu Novogo vremeni. [The Development of Legal Fictions in the Modern Era]. *Pravo. Zhurnal Vysshei shkoly ekonomiki*. *[Law. Journal of the Higher School of Economics]*, No. 4, 2014, pp. 4-18. In: Natsional'nyi issledovatel'skii

universitet “Vysshaya shkola ekonomiki” [online]. [Accessed 15 June 2023]. Available at: https://law-journal.hse.ru/data/2015/01/12/1106491465/Танимов.pdf.
VAN DER ELST, Christoph. *The New Belgian Companies Code: A Primer*. In: SSRN [online]. [Accessed 22 August 2023]. Available at: https://ssrn.com/abstract=3586278, http://dx.doi.org/10.2139/ssrn.3586278.
VOZNESENSKAYA, Ninel’ Nikolaevna. Yuridicheskie litsa v mezhdunarodnom chastnom prave Rossii i Evropeiskogo soyuza. [Legal Entity in the International Law: Russia and European Union]. *Trudy Instituta gosudarstva i prava RAN*. *[Proceedings of the Institute of State and Law of the RAS]*, Vol. 12, No. 2, 2017, pp. 109-144. In: CyberLeninka [online]. [Accessed 22 August 2023]. Available at: https://cyberleninka.ru/article/n/yuridicheskie-litsa-v-mezhdunarodnom-chastnom-prave-rossii-i-evropeysko-go-soyuza/viewer.
Upcoming changes to Transformation Act. In: KPMG [online]. [Accessed 20 November 2023]. Available at: https://kpmg.com/cz/en/home/insights/2022/10/upcoming-changes-to-transformation-act.html.
YNTEMA, E. Hessel. The Historic Bases of Private International Law. *American Journal of Comparative Law*, Vol. 2, No. 3, 1953, pp. 297-317. In: JSTOR [online]. [Accessed 14 April 2023]. Available at: https://www.jstor.org/stable/837480.
YOUBO, Lou Bouinan Sonia. *La lex societatis en droit international des affaires*. *[Lex societatis in international business law]*. Droit. Université de Bordeaux, 2015, p. 554. In: HAL [online]. [Accessed 17 June 2023]. Available at: https://theses.hal.science/tel-01253783.

3. A list of legislation

Belarus

Civil Code of the Republic of Belarus of December 7, 1998, No. 218-Z [*Грамадзянскі Кодэкс Рэспублікі Беларусь ад 7 снежня 1998 г. № 218-З]*.

Belgium

Law of 16 July 2004 on the Code of Private International Law [*Loi du 16 juillet 2004 portant le Code de droit international privé*].

Law of 23 March 2019 introducing the Code of Companies and Associations and containing various provisions [*Loi du 23 mars 2019 introduisant le Code des sociétés et des associations et portant des dispositions diverses*].

Law of 18 May 1873 on Commercial Companies [*Loi du 18 mai 1873 sur les sociétés commerciales*].

China

Civil Code of the People’s Republic of China (Adopted at the Third Session of the Thirteenth National People’s Congress on May 28, 2020) [*中华人民共和国民法典 (通过2020年5月28日第十三届全国人民代表大会第三次会议*].

People’s Republic of China Law on the Laws Applicable to Foreign-Related Civil Relations [*中华人民共和国涉外民事关系法*].

Czech Republic

Act No. 125/2008 Coll., on Transformation Companies and Cooperatives [*Zákon č. 125/2008 Sb., o přeměnách obchodních společností a družstev*].

Act No. 89/2012 Coll., Civil Code [*Zákon č. 89/2012 Sb., občanský zákoník*].

Act No. 90/2012 Coll., Business Corporations Act [*Zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích)*].

Act No. 91/2012 Coll., on Private International Law [*Zákon č. 91/2012 Sb., o mezinárodním právu soukromém*].

Egypt

Law No. 131 of the year 1948: The Egyptian Civil Code [القانون رقم 131 لسنة 1948: المجلة المدنية المصرية.].

Germany

Civil Code [*Bürgerliches Gesetzbuch*].

France

French Civil Code [*Code civil français*].

Law of May 30, 1857, which authorized legally established Belgian companies to exercise their rights in France [*Loi du 30 mai 1857 qui autorise les sociétés belges légalement constituées à exercer leurs droits en France*] (repealed by Law No. 2007-1787 of December 20, 2007).

Ordinance No. 67-821 of September 23, 1967 on Economic Interest Groups [*Ordonnance n° 67-821 du 23 septembre 1967 relative aux groupements d'intérêt économique*].

Law No. 2007-1787 of December 20, 2007, relating to the simplification of the law [*Loi n° 2007-1787 du 20 décembre 2007 relative à la simplification du droit*].

Italy

Law of May 31, 1995, No. 218/1995 'Reform of the Italian System of Private International Law' [*Legge 31 maggio 1995, n. 218 "Riforma del sistema italiano di diritto internazionale private"*].

Kazakhstan

Civil Code of the Republic of Kazakhstan, December 27, 1994, No. 268-XIII [*Қазақстан Республикасының Азаматтық Кодексі 1994 жылғы 27 желтоқсандағы № 268-XIII*].

Civil Code of the Republic of Kazakhstan (Special Part) of July 1, 1999, No. 409 [*Қазақстан Республикасының Гражданкодексі (Әрі өзге бөлім) 1999 жылдың 1 тамызындағы № 409*].

Madagascar

Ordinance No. 62-041 of September 19, 1962, concerning general provisions of domestic law and private international law [*Ordonnance n° 62-041 du 19 septembre 1962 relative aux dispositions générales de droit interne et de droit international privé*].

Netherlands

Civil Code, 1992, No. NLD-1992-L-91671 [Burgerlijk Wetboek 1992, No. NLD-1992-L-91671].

Law on Formally Foreign Companies of December, 17 1997, No. 697 [*Wet op de Formeel Buitenlandse Vennootschappen, Staatsblad 1997, No 697*].

Poland

Act of 23 April 1964 – Civil Code [*Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny*].

Russian Federation

Civil Code of the Russian Federation of November 30, 1994, No. 51-FZ [*Гражданский кодекс Российской Федерации от 30 ноября 1994 года № 51-ФЗ*].

Federal Law No. 255-FZ of July 14, 2022 (as amended on July 24, 2023), On Control Over the Activities of Persons Under Foreign Influence [*Федеральный закон от 14.07.2022 N 255-ФЗ (ред. от 24.07.2023) "О контроле за деятельностью лиц, находящихся под иностранным влиянием"*].

Spain

Royal Decree No. 1/2010 of 2 July 2010, approving the consolidated text of the Capital Companies Act [*Real Decreto 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*].

Spanish Civil Code, Royal Decree of 24 July 1889 [*Código Civil Español, Real Decreto de 24 de julio de 1889*].

Switzerland

Federal Act on Private International Law of December 18, 1987 [*Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987*].

Tunisia

Law No. 98-97 of November 27, 1998, enacting the Code of Private International Law [*Loi n° 98-97 du 27 novembre 1998, portant promulgation du code de droit international privé*].

Turkey

Act No. 5718, on Private International and Procedural Law [*5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun*].

Ukraine

Law of Ukraine of June 23, 2005, No. 2709-IV 'On Private International Law' [*Закон України від 23 червня 2005 року № 2709-IV "Про міжнародне приватне право"*].

Civil Code of Ukraine, 2003, No. 435-IV *[Цивільний кодекс України, 2003, № 435-IV].*

United Kingdom

Companies Act 1862 (repealed).

Companies Act 2006.

Income and Corporation Tax Act 1970.

Joint Stock Companies Act of 1844 (repealed).

Limited Liability Act 1855 (repealed).

Limited Liability Partnerships Act 2000.

Limited Partnership Act 1907.

Limited Partnership Act 1907.

Partnership Act 1890.

Private International Law (Implementation of Agreements) Act 2020.

Trading with the Enemy Act 1939.

United States

The Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq.

European Union primary legislation

Consolidated version of the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon in 2007, published in the Official Journal of the European Union (OJ) C 326 on October 26, 2012, pp. 47–390.

Single European Act published in the Official Journal of the European Union (OJ) L 169, June 29, 1987, pp. 1-28.

Treaty establishing the European Economic Community signed in Rome on 25 March 1957.

European Union secondary legislation

Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited-liability companies.

Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

Regulation (EC) No 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Regulation (EU) No 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

International treaties

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Oct. 19, 2019 2019/C 384 I/01.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965).

Energy Charter Treaty (Lisbon, 1994).

The Convention of 30 June 2005 on Choice of Court Agreements (Hague, 2005).

The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

4. A list of court decisions

Cesena Sulphur Company v Nicholson [1876] 35 LT 275 (United Kingdom).

CJEU judgment no 81/87: The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECLI:EU:C:1988:456.

CJEU judgment no C-106/16: Polbud-Wykonawstwo sp. z o.o. [2017] EU:C:2017:804.

CJEU judgment no C-167/01: Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.

CJEU judgment no C-208/00: Überseering BV v. Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919.

CJEU judgment no C-210/06: Cartesio Oktató és Szolgáltató bt. [2008] ECR I-09641.

CJEU judgment no C-212/97: Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459.

CJEU judgment no C-378/10: Vale Építési kft. [2012] EU:C:2012:440.

CJEU judgment no C-411/03: SEVIC Systems [2005] ECR I-10805.

CJEU judgment no C-79/85: D.H.M. Segers v Bestuur van de Bedrijfsvereniging voor Banken Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2381.

De Beers Consolidated Mines Ltd. v. Howe (1906) AC 455 (United Kingdom).

Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain), Limited, [1916] 2 AC 307 (United Kingdom).

Salomon vs. Salomon (1896) UKHL 1, (1897) AC 22 (United Kingdom).

Společnosti v mezinárodním právu soukromém

Abstrakt

Globalizace zásadně ovlivnila mezinárodní obchod a podnikání provozované za hranicemi národních států. V důsledku toho vzrostla poptávka po efektivním mezinárodním právu soukromém, neboť stále více podniků se potýká s komplexními právními vztahy zahrnujícími cizí prvek, což vede k konfliktům mezi právními systémy různých států. Korporátní vztahy nejsou výjimkou, neboť mnoho společností se nevejde do pouhého právního systému jednoho státu.

Jedním z nejpodstatnějších výzev v oblasti mezinárodního práva soukromého je určení příslušného práva pro společnosti (*lex societatis*). Přesné určení příslušného práva má obrovský význam pro řešení sporů a přímo ovlivňuje právní kapacitu a osobnost společnosti. Právní nejistoty vyplývající z konfliktů práv mohou brzdit mezinárodní obchodní vztahy a tím představovat rizika pro zájmy společností, jejich členů, věřitelů a států.

Tato práce využívá komplexní přístup, který kombinuje doktrinální analýzu, historický výzkum a srovnávací zkoumání legislativy v různých zemích. Zaměřuje se na prozkoumání problematiky stanovení příslušného práva pro společnosti a s tím souvisejících otázek.

Práce je strukturována do pěti částí: „Koncept mezinárodního práva soukromého“, „Koncept společnosti v rámci mezinárodního práva soukromého“, „Koncept lex societatis a jeho rozsah v mezinárodním právu soukromém“, „Teorie stanovení práva aplikovatelného na společnosti“ a „Mezistátní konverze v právu Evropské unie“.

Závěrem tato studie nabízí cenné vhledy do oblasti mezinárodního práva soukromého, kde právní vztahy zahrnují cizí prvek. Závěry přispívají k rozvoji nových teorií a přístupů v oblasti mezinárodního práva soukromého. Praktické důsledky této studie sahají k právním akademikům, praktikům, tvůrcům politiky a společnostem zapojeným do přeshraničních aktivit. Studie napomáhá přizpůsobení právních předpisů se měnícímu se mezinárodnímu obchodnímu prostředí, s cílem vytvořit účinné a konzistentní předpisy, které podporují mezinárodní obchodní operace, zajišťují zájmy zúčastněných stran a podněcují národní i globální hospodářský růst.

Klíčová slova: Mezinárodní právo soukromé, Aplikovatelné právo, Společnosti

Companies in Private International Law

Abstract

Globalisation has bust international trade and businesses operating beyond national borders. Consequently, the demand for efficient private international law has increased as more businesses face complex legal relationships involving a foreign element, leading to conflicts between the laws of different states. Corporate relationships are no exception, as many companies do not fit in just one state's legal system.

One of the most crucial challenges in private international law is determining the applicable law for companies (*lex societatis*). The accurate determination of the applicable law holds immense significance for dispute resolution and directly affects a company's legal capacity and personality. Legal uncertainties arising from conflicts of laws can hinder cross-border business relationships, posing risks to the interests of companies, their members, creditors, and states.

This research employs a comprehensive approach, combining doctrinal analysis, historical research, and a comparative examination of legislation across various countries. The focus is on delving into the issue of determining the applicable law to companies and questions arising from that.

The research is structured into five parts: 'The Concept of Private International Law', 'The Concept of Company in Private International Law', 'The Concept of Lex Societatis and its Scope in Private International Law', 'Theories of Determining the Law Applicable to Companies', and 'Cross-border Conversions in European Union Law'.

In conclusion, this research offers valuable insights into the field of private international law, where legal relationships involve a foreign element. The findings contribute to the development of new theories and approaches in private international law. The practical implications of this study extend to legal scholars, practitioners, policymakers, and companies involved in cross-border activities. It fosters the adaptation of legal regulations to the evolving landscape of international trade, intending to create effective and consistent regulations that promote international business operations, safeguard stakeholders' interests, and stimulate both national and global economic growth.

Key words: Private International Law, Applicable Law, Companies