Überseering: Analysis and Outlook

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The European Court of Justice's *Überseering* decision of November 5, 2002[1] has let slip the dogs of hell in the form of what Germany used to disparagingly refer to as pseudo-foreign corporations: corporations organised under the law of a foreign jurisdiction that, economically speaking, have nothing to do with their place of incorporation. These anathemas used to be struck dead upon detection by the German authorities, but are now streaming into Germany – and presumably the other six European Union jurisdictions that also follow the seat-of-management rule. While many hail the fall of the last barrier to fruitful competition between the disparate corporate law régimes of the E.U. member states, others see *Überseering* as the start of a "race for the bottom" and fear there may be a Gresham's Law of business corporation acts. But perhaps *Überseering* will generate the pressure necessary to force recalcitrant E.U. member states to harmonise E.U. company law. The following article takes a German viewpoint in exploring a pivotal ECJ judgment.

I. Introduction

A. Place of Incorporation vs. Seat of Management

In *Überseering*,[2] the European Court of Justice (ECJ) effectively requires member states of the European Union to follow the place-of-incorporation rule and recognise the legal capacity of foreign corporations duly formed under the laws of another E.U. member state even if such corporations have only a token presence in their nominal home jurisdiction.[3]

The *place-of-incorporation rule*[4] is one of the two principal choice-of-law approaches to determining the substantive law applicable to a corporation or other business association. Under the place-of-incorporation rule, a corporation is governed by the substantive law of the jurisdiction where it was formed (home jurisdiction). Its existence as such is determined by the law of this jurisdiction. As long as the home jurisdiction recognises the legal personality of the corporation, other jurisdictions do also, since they apply the home jurisdiction's law to the entity. The place-of-incorporation rule is followed in Anglo-Saxon countries, such as the U.S., the U.K., and Ireland, and the Netherlands.[5] Proponents of the place-of-incorporation rule argue that it is objective and hence promotes legal certainty because of its easy application (no analysis of complex factual circumstances).[6]

The *seat-of-management rule*[7] is the primary alternative to the place-of-incorporation rule. Under the seat-of-management rule, which is applied in one form or another by Germany[8] and six other E.U. countries,[9] applicable law is determined with reference to the jurisdiction in which the "seat of management"[10] is located. Germany defines this as the place where fundamental management decisions are effectively translated into externally recognisable actions, generally the place at which the managing body and its members are located.[11]

Proponents of the seat-of-management rule argue that it ensures that all corporations centred in the same jurisdiction as a factual matter will be subject to the same law with regard to such matters as minimum capital and protection of creditors, protection of minority shareholders, employee co-determination, registration and disclosure obligations, and the law regulating corporate names.[12]

The 7th Civil Chamber of the Federal Court of Justice and many German lower civil courts have already handed down judgments holding that *Überseering* requires application of the place-of-incorporation rule when determining the legal capacity of a foreign E.U. corporation,[13] at least where it is incorporated in a jurisdiction that follows the place of incorporation rule.[14]

B. Dual Resident Corporations Under Tax Law

A corporation's seat of management generally coincides with its principle place of management for tax purposes.[15] Under Section 1 (1) KStG (Corporation Tax Law), a corporate entity is subject to German corporation tax on its worldwide income if it has either its legal seat (registered office)[16] or its principle place of management in Germany. The principle place of management is generally defined as the place from which the persons charged with overall management responsibility exercise their functions. The principle place of management thus focuses on the location from which high-level management decisions are made, whereas the seat of management looks more to the place where these decisions first manifest themselves.

A corporation with its registered office in, for instance, the United States and its principal place of management in Germany is a dual resident corporation (DRC) subject to tax on its worldwide income in two different jurisdictions.

Conceivably, a corporation may have its registered office and seat of management in a foreign jurisdiction, but its principle place of management in Germany.[17] Such structures ensure German recognition of the corporation for civil and corporate law purposes under the seat-of-management rule while permitting it to function as a German resident corporation for tax purposes. Planning of this sort is unnecessary for DRCs whose corporate existence is protected by *Überseering*.[18]

II. Facts and Tenor of *Überseering*

Überseering B.V. was formed as a limited liability company under Netherlands law in 1990. In 1992, the B.V. commissioned a German limited liability company (NCC GmbH) to renovate a German motel owned by the B.V. In late 1994, all shares in the B.V. were purchased by two German resident individuals, who also became the company's general managers. From this time onwards, the company was administered and managed from Germany as a factual matter. The B.V.'s Netherlands address and telephone number were that of an independent auditing firm.[19]

In 1996, the B.V. filed suit before a German court against NCC seeking damages for alleged defects in the work performed. The German courts dismissed the suit as inadmissible because the 1994 change in ownership had resulted in a transfer of the B.V.'s seat of management from the Netherlands to Germany. Under the seat-of-management theory, the B.V. as an association was governed by German company law from this time onwards. Since the B.V. had failed to re-incorporate in Germany according to German corporate law, it could not be recognised as a limited liability company. The lower German courts dismissed the suit on the grounds that, after loss of corporate status, the B.V. lacked legal capacity (capacity to enjoy rights and be the subject of obligations). Without legal capacity, it likewise lacked the capacity to sue (capacity to be a party to legal proceedings).[20]

The case was appealed to the 7th chamber of the German Federal Court of Justice (*Bundesgerichtshof*). It stayed proceedings and requested preliminary rulings by the European Court of Justice on the following issues:[21]

1. Are Articles 43 E.C. and 48 E.C. 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 the first question is affirmative:Does the freedom of establishment of companies (Articles 43 E.C. and 48 E.C.) require that a company's legal capacity and capacity to be a party to legal proceedings be determined according to the law of the state where the company is incorporated?

The tenor of the ECJ's decision is as follows:[22]

1. Where a company formed in accordance with the law of an E.U. member state (Member State A), in which it has its registered office, is deemed, under the law of another member state (Member State B), to have moved its actual centre of administration to Member State B, Articles 43 E.C. and 48 E.C. preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.
2. Where a company formed in accordance with the law of an E.U. member state (Member State A), in which it has its registered office, exercises its freedom of establishment in another member state (Member State B), Articles 43 E.C. and 48 E.C. require Member State B to respect[23] the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its state of incorporation (Member State A).

III. Centros as Precursor of *Überseering*

In its 1999 *Centros* decision,[24] the ECJ held that Denmark could not refuse to register a branch office of a U.K. corporation even if the corporation conducted all of its business in Denmark and had only been formed in the U.K. to avoid the stricter Danish standards for forming limited liability companies (*e.g.*, minimum capitalisation). While Centros Ltd. had admittedly been formed in the U.K. solely to evade Danish law on the formation of corporations (*e.g.*, minimum capitalisation requirements), the ECJ held that this was not abusive because nationals of member states were entitled to form corporations under the law of the member state of their choosing and thus avail themselves of the law they found least restrictive even if the corporation had no economic tie to the jurisdiction of incorporation.[25]

The Danish government also sought to defend its rules on public policy grounds,[26] arguing that it was necessary to force Centros Ltd. to incorporate in Denmark and hence comply with Danish minimum capital law in order to protect creditors. The ECJ agreed that protecting creditors was a valid public policy objective, but stated that the measure was not well suited to achieving the ostensible objective because English corporations with substantial ties to the U.K. were freely permitted to register branch offices and do business in Denmark despite failure to comply with Danish minimum capitalisation rules.[27]

While many commentators regarded *Centros* as the end of the seat-of-management theory, others argued that, since Denmark applied the place-of-incorporation rule, no conclusions could be drawn from the case with respect to the conflict of a member state's choice-of-law rules with the freedom-of-establishment clause of the E.C. treaty.[28]

IV. Inspire Ltd. as Successor to *Überseering*

On January 30, 2003, the Advocate General presented his Opinion *in re* Inspire Art Ltd. vs. the Amsterdam Commercial Register.[29] The case concerns

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an attempt by an English limited company to register a *secondary* establishment in the Netherlands although its entire business activity is carried out in the Netherlands. Netherlands law establishes conditions for registration of secondary establishments by foreign companies that lack any material connection with the country in which they were formed. Such "formal foreign corporations" are required, among other things, to have and maintain minimum capital equivalent to that required of a comparable Netherlands corporation. The corporation's senior management is personally liable for business transacted before meeting the minimum capital requirements and, upon determination by a court, for business transacted after stated capital later falls below the minimum limit, for example due to losses or distributions to shareholders.[30] Personal liability is apparently imposed in case of other infractions as well.[31]

In the view of the Advocate General, the Netherlands provisions cannot be justified as necessary to prevent abuse, because under *Centros* E.U. nationals are free to form corporations in whatever jurisdiction they please.[32] The Advocate General further argues that anti-abuse provisions must be limited to instances in which there is specific evidence of abuse and cannot be applied to generalised situations in which there is merely potential for abuse.[33]

The Advocate General considers the Netherlands law to violate the freedom-of-establishment clause of the E.C. Treaty primarily because the Netherlands do not impose personal liability on the management of Netherlands corporations that fail to maintain their minimum capital. While Netherlands law does threaten such corporations with dissolution by court order, the Advocate General apparently regards dissolution as a less severe sanction than personal liability for senior management. It is admitted that the Netherlands is powerless to dissolve a formal foreign corporation, it being subject by definition to the law of another jurisdiction, which the Netherlands apply under the place-of-incorporation rule.[34]

The Advocate General's Opinion also contains a sweeping statement that competition amongst the various corporate law régimes in the E.U. is mandated by the freedom-of-establishment clause and cannot be stifled by protective legislation.[35] Taken to its logical extreme, this would negate the ability of E.U. member states to place any restrictions on corporations formed in other member states.[36] However, the Opinion may also be interpreted as holding that restrictions imposed on corporations validly formed under the law of other E.U. jurisdictions must be narrowly drawn so as to be no more onerous than the restrictions imposed on domestic corporations.

In either case, *Inspire Ltd.* is a logical extension of *Überseering*. While *Überseering* requires E.U. member states to recognise foreign E.U. corporations as a basic matter, *Inspire Ltd.* poses the question of the extent to which, despite fundamental recognition, foreign E.U. corporations without a substantial presence in their home jurisdiction may be subjected to specific regulations, such as minimal capitalisation rules, in their host jurisdiction.

V. Reasoning of ECJ in *Überseering*

A. Freedom of Establishment vs. Choice of Law

Article 293 E.C.[37] reads in pertinent part as follows:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals … the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48[38] [and] the retention of legal personality in the event of transfer of their seat from one country to another ….

Based on Article 293 E.C., Germany, Italy, and Spain argued before the ECJ that the recognition of a company formed under the laws of another E.U. member state was a matter reserved to the member states for resolution by treaty or convention. They called attention to the differences in company law between the member states at the time of adoption of the E.C. Treaty and stated that Article 293 E.C. reflected the intent of the framers to resolve those differences by negotiation or Community legislation. They noted that Article 293 E.C. specifically accepts the possibility that, in the absence of a convention, a company may lose its legal personality in the event of transfer of its seat to another member state. This, it was argued, meant that the question of mutual recognition of companies could not be resolved under the treaty's freedom-of-establishment clause (Article 43 E.C.). Were this the case, Article 293 would be superfluous.[39]

Instead of focusing on the fact that the ostensible exercise of freedom of establishment here at issue – transfer of the seat of management – affected a nexus ("connecting factor") to which numerous member states attached fundamental choice-of-law significance, the ECJ cast the issue as the limitation of a core freedom-of-establishment right by choice-of-law doctrine. Framing the issue as if the very inner fabric of the freedom of establishment was threatened,[40] the court held that that realisation of this freedom could not be contingent on adoption of a convention on the mutual recognition of companies.[41] All arguments based on Article 293 E.C. were therefore rejected.

The ECJ also rejected arguments put forth under the 1961 General Programme for the Abolition of Restrictions on the Freedom of Establishment,[42] which required companies to have a "real and continuous link with the economy of a Member State" in order to benefit from the freedom of establishment. The ECJ interpreted this limitation as applying only to companies having their registered office inside the E.U., but otherwise having no tie with the E.U. Since Überseering B.V. had its place of management (centre of administration) in the E.U., it was not affected by the General Programme.[43]

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B. *Daily Mail*

Germany and the other states cited the ECJ's 1988 *Daily Mail* decision in support of their position.[44] This case involved efforts by a British corporation to transfer its "central management and control" from Great Britain to the Netherlands. Under the then applicable British tax law, a corporation was subject to tax on its worldwide income if resident in Great Britain, and resident in Great Britain if its central management was located there. Daily Mail PLC wished to transfer its central management to the Netherlands so as to avoid capital gains tax on appreciated assets that it planned to sell. Under Netherlands law, it would be liable to tax there only on the appreciation occurring after transfer of its central management. However, British law compelled a resident corporation to obtain permission from the British tax authorities prior to transferring its central management abroad. Transfer of the place of management without obtaining such permission apparently resulted in dissolution of the corporation (loss of legal personality) and liquidation taxation.[45]

The British tax authorities offered to give the required consent if Daily Mail PLC would sell part of the assets in question prior to transfer of its place of management and hence incur U.K. tax on the resulting capital gains. In essence, the corporation was being asked to pay a negotiated exit tax. The corporation refused and filed suit to compel unconditional consent, citing the freedom-of-establishment clause of the E.C. treaty.

The ECJ upheld the restrictions on transfer of the place of management and hence the *de facto* exit tax. Citing Article 293 E.C. (then Article 220), it stated:

> The Treaty regards the differences in national legislation concerning the connecting factor[46] required of companies incorporated thereunder and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded.[47]

C. *Daily Mail* Distinguished

In *Überseering*, the ECJ did not overtly overrule *Daily Mail*, but held that it applied only to relationships between a corporation and the country of its incorporation. Since corporations were creatures of national law, existing only by virtue of the national legislation which determines their incorporation and functioning,[48] a jurisdiction was entitled – in the view of the *Überseering* court – to impose restrictions on the freedom of establishment of corporations of its own creation.[49] However, no E.U. member state was entitled to restrict the freedom of establishment of corporations validly created and existing under the laws of another member state.[50]

The ECJ's reinterpretation of its 1988 *Daily Mail* holding is inconsistent with the 1988 holding.[51] *Daily Mail* clearly rests on a determination that the non-harmonised law of the E.U. member states on the mutual recognition of companies (choice-of-law rules) is not pre-empted by the freedom-of-establishment clause and hence cannot be overridden by the case law of the ECJ, but must rather be harmonised through mutual negotiation (convention) or legislation, in keeping with Article 293 E.C..

D. Transfer of Place of Management as Exercise of Freedom of Establishment

Überseering recognises the movement of a corporation's place of management (central administration) as an exercise of the freedom of establishment. A corporation's right of establishment might previously have been thought to extend only to the setting-up of agencies, branches, or subsidiaries in other jurisdictions, including the right to participate in the formation of new companies.[52] In *Überseering*, the ECJ rejects the contention that the seat-of-management rule involves no substantial restriction on freedom of establishment, stating that German law requiring Überseering B.V. to re-incorporate after moving its seat of management to Germany in order to retain its legal capcity was "tantamount to outright negation of the freedom of establishment".[53]

Article 48 E.C. provides that companies or firms formed in accordance with the law of a Member State and having their registered office, central administration (principal place of management), or principal place of business in the E.U. shall be treated in the same way as natural persons who are nationals of member states. If relocation of the principal place of management is protected by the freedom of establishment, similar protection must extend to relocation of the principal place of business. Only the relocation of the registered office would appear to remain an exception.

E. Corporate Emigration vs. Immigration

The ECJ's re-interpretation of *Daily Mail* leads to a surprising and dubious distinction between movement of corporations *away* from the E.U. jurisdiction in which they were incorporated (emigration) and movement of corporations *into* another E.U. jurisdiction (immigration). Whereas member states are entitled to impose conditions on their own corporations when they move their places of management elsewhere, they are forbidden from impeding the entry of an E.U. corporation that wishes to immigrate into their jurisdiction with its place of management.

The distinction between permissible conditions on departure and impermissible barriers to entry has been widely criticised, mostly by commentators who advocate prohibiting limitations on departure as well. *Wagner* argues that, under *Überseering*, corporate emigration may not be prevented outright, but merely subjected to reasonable restrictions.[54] Law such as that of Germany, which delivers a "death-blow at the border"[55] to emigrating corporations, violates the freedom-of-establishment clause, under this view.[56]

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Similar arguments are made by *Schnitger* and *Forsthoff*.[57]

While most authors are inclined to interpret *Überseering* as permitting a corporation's home jurisdiction to impose any restrictions on emigration that it wants, this holding is frequently deplored.[58] There is also speculation that the ECJ will abandon this position in the future and affirm a "freedom to emigrate" *vis-à-vis* the home jurisdiction.[59] Finally, there are predictions that jurisdictions that fail to permit their corporations to emigrate, that is, shift their place of management to another jurisdiction, will be at a serious competitive disadvantage against jurisdictions that allow such flexibility.[60]

The Federal Tax Court decision of January 29, 2003[61] reads *Überseering* as creating a sharp distinction between corporate emigration (*Wegzug*), which the home jurisdiction may limit or make subject to conditions, and E.U. corporate immigration (*Zuzug*), which the host jurisdiction may not restrict.

F. Mobility of the Seat of Management after *Überseering*

The referring German court asked the ECJ whether, in the event European law precluded Germany from denying the legal capacity of Überseering B.V. under the seat-of-management rule, European law required the host jurisdiction to apply the place-of-incorporation rule to determine legal capacity. The ECJ refused to couch its answer to this question in choice-of-law terminology and instead said that the host jurisdiction must respect

> "the legal capacity … which the company enjoys under the law of its state of incorporation".[62]

In its decision on the merits, the German court complied with this injunction by applying the law of the Netherlands to the issue of the B.V.'s existence and legal capacity.[63] Remembering that the Netherlands follows the place-of-incorporation rule, there are two possible readings of this decision:[64]

- It presages *general abandonment of the seat-of-management rule* by Germany.[65] Henceforth, Germany will apply the place-of-incorporation rule to all E.U. corporations, whether formed in Germany or in another E.U. member state – unitary approach.
- Germany will follow what has been referred to in the German literature as the "*European place-of-incorporation rule*".[66] This means that Germany will apply the choice-of-law rules of the E.U. jurisdiction in which an immigrating E.U. corporation was formed, yet at the same time retain the seat-of-management rule as Germany's basic choice-of-law rule. Under this approach, an immigrating E.U. corporation would continue to exist if formed in a jurisdiction – such as the Netherlands – that itself uses the place-of-incorporation rule as its basic choice-of-law rule and cease to exist if formed in a jurisdiction that, like Germany, retains the seat-of-management rule as modified by the European place-of-incorporation rule – dualistic approach.[67]

The implications of the two approaches are quite different. Assuming the first possibility is the correct one and that all other E.U. states that previously followed the seat-of-management rule[68] likewise adopted it, this would secure the free mobility of seat of management for all E.U. corporations within the E.U.

The dualistic approach assumes that, after *Überseering*, E.U. states remain free to apply the seat-of-management rule to their own corporations with the result that these corporations may be dissolved if they shift their seat of management outside of their home jurisdiction.[69]

Example 1: Unitary approach: emigration

X-GmbH is a German limited liability company with both its registered office and seat of management in Germany at the time of formation. After formation, X moves its seat of management to France. Since Germany now applies the place-of-incorporation rule to all E.U. corporations including those formed under German law, the transfer of the seat of management has no effect on the continued existence of the corporation from a German perspective. Even if France retains the seat-of-management rule as its basic choice-of-law rule (French dualistic approach), France is compelled by *Überseering* to apply the "European place-of-incorporation rule" and refer first to German law. German law, being based on the place-of-incorporation rule, accepts this referral. German substantive law therefore controls the existence of the GmbH from a French perspective as well.[70] The emigration from Germany to France is "successful".

Example 2: Dualistic approach: emigration to seat-of-management jurisdiction

As in Example 1, except Germany continues to apply the seat-of-management rule as its basic choice of law rule. France, as before, applies the European place-of-incorporation rule and refers first to German law. This referral is an inclusive one, that is, it is a referral first to German choice-of-law principles. German law in this case refuses the referral because Germany follows the seat-of-management rule. Since *Überseering* requires only that France refer first to German law, France is free, after Germany refuses to accept the referral back to its law, to apply its own basic choice-of-law rule, that is, the seat-of-management rule. Hence, after the transfer of the seat of management to France, French law controls the corporate existence of X. X is in principle dissolved from the perspective of both Germany (country of emigration) and France (country of immigration).

Example 3: Dualistic approach: emigration to place-of-incorporation jurisdiction

As in Example 2, except X moves its seat of management to England. England is likewise required by *Überseering* to apply the European place-of-incorporation rule and refer first to German law, which again refuses the reference.

England is then free to apply its basic choice-of-law rule, that is, the place-of-incorporation rule. Since X was validly formed under German law, it retains its corporate existence from an English perspective. Germany – again applying the seat-of-management rule – accepts the result reached under English law and likewise continues to recognise the GmbH. As in Example 1, the emigration is "successful", though the reasoning is different and more complex.[71]

Example 4: Dualistic approach: immigration from place-of-incorporation jurisdiction

Z Ltd. is formed under the laws of England and Wales. It has no economic contacts with these countries. Its seat of management is in Germany from the time of formation. Even if Germany retains the seat-of-management rule as its basic choice-of-law rule, it must, under *Überseering*, apply the European place-of-incorporation rule and look first to English law including the English choice-of-law rules. English law accepts this referral and applies its owns substantive law, under which Z continues to be recognised as a corporation. Germany must therefore recognise Z as well.

The dualistic approach, assuming it to be permissible in the first place, is obviously more complicated than the unitary approach with regard to its practical results. This is a strong argument in favour of the unitary approach. If the unitary approach were followed by all E.U. member states that previously applied the seat-of-management rule, this would result in free mobility of the seat of management inside the E.U. for company law purposes.

The planned 14th E.U. Company Law Guideline on the transfer of the legal seat of an E.U. company from one E.U. country to another would permit corporate emigration without dissolution. This guideline is still in the draft stage, however. It must furthermore be re-written in part as the current draft is based on the seat-of-management rule.[72]

G. No Public Policy Justification for Restriction

The ECJ considered arguments that any restriction on the freedom of establishment inherent in the seat-of-management rule was non-discriminatory, justified by imperative considerations of public interest, suitable to the ends sought, and not unreasonably harsh.[73]

The ECJ did not weigh the restriction on the freedom of establishment inherent in the seat-of-management rule against the policy benefits of this rule. While stating that it was

> "not inconceivable that overriding requirements relating to the general interest ... may, in certain circumstances ... justify restrictions on freedom of establishment",

it held that the denial of legal capacity was never justified by public policy considerations.[74] The ECJ obviously considered the sanction unreasonably harsh (disproportionate).

H. Pace of European Integration

One may conjecture that the slow pace of European integration influenced the ECJ in its decision. Whereas in *Daily Mail* (1988), the court showed willingness to defer to the member states regarding the issue of the mutual recognition of corporations, the *Überseering* court holds that action by the member states is not necessary because the freedom of establishment must be guaranteed whether they act or not.

Interesting in this connection is the ECJ's statement that, "*as Community law now stands*," choice-of-law rules do not fall outside the scope of the Community provisions on freedom of establishment.[75] If one assumes that the reverse was true when the ECJ decided *Daily Mail* in 1988,[76] and considers that the applicable primary E.U. law has not changed in the interim,[77] one may conjecture that the ECJ has a dymamic conception of the basic freedoms, by which they become increasingly absolute with time where the E.U. member states fail to take suitable action to delimit them.[78]

In *Centros*, the ECJ noted that the European Council has authority under Article 44 (2) (g)[79] of the E.C. Treaty to achieve complete harmonisation of company law.[80] A draft E.U. treaty on the mutual recognition of corporations has existed since 1968, but has not yet entered into force. Germany has ratified this treaty. The planned 14th E.U. Company Law Guideline on the transfer of the legal seat (registered office) of an E.U. company from one E.U. country to another is likewise still in the draft stage.[81]

I. Societas Europaea

Überseering makes no mention of Council Regulation (E.C.) No. 2157/2001 of October 8, 2001 on the Statute for a European company. Interestingly, this regulation defining the *Societas Europaea* (SE) adopts the seat-of-management rule and provides in its Article 7 that the registered office of an SE shall be located in the same member state as its head office. In case of violation of Article 7, the member state in which the SE was incorporated must under Article 64 take appropriate action to ensure that the SE either moves its head office to the jurisdiction where the registered office is located or vice versa. An SE that fails to comply within a specified deadline must be liquidated.[82]

These provisions of Regulation (E.C.) No. 2157/2001 do not directly conflict with *Überseering* because they are implemented as provisions of the law of the SE's home jurisdiction. The SE cannot be formed unless its registered office and head office are in the same jurisdiction. If either is later moved to another jurisdiction, this is an "emigration" case legitimately subject to restrictions under *Überseering*. Furthermore, since liquidation is not automatic, but occurs only after efforts have failed to bring the registered office and head office back together, the sanctions are reasonable.

However, one must ask whether the ECJ in *Überseering* should not have shown more deference to a principle (the seat-of-management principle) that has been recognised by E.U. secondary legislation.

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VI. Reach of *Überseering*

A. E.U. and E.E.A.

Überseering requires E.U. member states to recognise the legal capacity and, by implication, legal personality of corporations formed in another E.U. member state to the extent that the state of incorporation continues to do so. Since the fundamental freedoms of Articles 39 ff. (ex Art. 48 ff.) of the E.C. Treaty are extended to Norway, Iceland, and Liechtenstein as members of the European Economic Area (E.E.A.), recognition of corporations organised in these countries is probably required as well.[83]

Furthermore, since the nationals of countries such as Poland and Hungary are entitled to claim the protection of the fundamental freedoms of the E.C. Treaty under association agreements, their corporations may be protected by *Überseering* even before their formal accession to the E.U. on May 1, 2004.[84]

B. FTC Judgment of January 29, 2003

In its judgment of January 29, 2003, the German Federal Tax Court also extends the reach of *Überseering* to a U.S. corporation. The decision rests on Article 24 – Non-discrimination – of the bilateral tax treaty between Germany and the United States.[85] At issue in the case was whether a corporation formed in the United States with its principle place of management in Germany could be the lead company (first-tier company) in a group of companies consolidated for corporation tax purposes.[86] Through the 2000 assessment period, applicable law required the lead company in a tax consolidated group to have both its legal seat (registered office) and principal place of management in Germany.[87]

Citing *Überseering*, The Federal Tax Court argued that it would violate E.U. law to refuse to permit a foreign E.U. corporation with its principal place of management in Germany to act as the lead company in a consolidated tax group for want of a German registered office.[88] Citing Article 24 of the U.S.-German tax treaty, the FTC extended the protection of *Überseering* to U.S. corporations and their German subsidiaries. The court therefore held that the double nexus requirement was invalid and that the tax consolidation must be recognised.[89]

While the change in the tax laws from 2001 onwards has rendered moot the specific issue of this case,[90] it is interpreted in the literature as prohibiting all tax discrimination against E.U.-based dual resident corporations[91] (corporations resident in another E.U. jurisdiction by reason of their incorporation and registered office and resident in Germany by reason of their place of management).[92] Furthermore, all DRCs based in a jurisdiction that has entered into a tax treaty with Germany that has a similar anti-discrimination clause should also be able to invoke the protection of *Überseering*. This makes it likely that such protected DRCs could function as consolidated companies (*Organgesellschaften*) in corporate consolidated tax groups even though German law still requires a double nexus (registered office and principal place of business in Germany) for such this purpose.[93] Structures permitting the offset of the same losses in two jurisdictions are also conceivable.[94]

It may also be inferred from the FTC's January 2003 judgment that DRCs protected by *Überseering* should in the future be classified as corporation tax entities within the meaning of Section 1 (1) no. 1 KStG, and no longer under Section 1 (1) no. 5 KStG. This distinction is primarily significant for entitlement to the dividends received exemption and capital gains tax exemption under the version of Section 8b (1) and (2) KStG in effect prior to the 2000 corporate tax reform.[95]

The anti-discrimination article in the German-U.S. tax treaty is substantially similar to Article 24 of the OECD model treaty.

C. FCJ Judgment of January 29, 2003

The 8th Civil Chamber of the Federal Court of Justice also handed down a judgment on point dated January 29, 2003.[96] The case concerned a suit brought in German court by a U.S. corporation formed under the law of the state of Florida. The defendant argued that the plaintiff lacked legal capacity and the capacity to bring an action because its seat of management was located in Germany. On appeal to the FCJ, the court affirmed that the legal capacity of a foreign juridical person is determined by the seat-of-management rule as a general matter. However, it held that the 1954 German-American Treaty of Friendship, Commerce, and Navigation changed this result and required the legal capacity of U.S. corporations to be determined under U.S. law. Hence, German courts must recognise the legal personality of the plaintiff as a U.S. corporation and permit it to bring legal actions.

The decision follows the prevailing view in the German literature that the Friendship Treaty establishes the place-of-incorporation rule as between the U.S. and Germany.[97]

The court relied primarily on the Preamble to the Convention and Art. XXV (5) sentence 2, Art. VI (1), and Art. VII of the Convention. These provisions gave companies of a contracting state most-favoured-nation status in the other state, required the parties to respect the legal status of companies formed under the law of the other state, guaranteed these companies access to the courts, and granted them freedom of establishment. The court cited *Überseering* for the principle that freedom of establishment entailed full recognition of the legal capacity and right to be a party to litigation of a corporation of the other contracting state.

The FCJ judgment of January 29, 2003 indicates, however, that the German courts continue to apply the seat-of-management rule where the exceptions created by *Überseering* or a bilateral convention do not apply.

VII. Developments in Germany

A. Pseudo-Foreign Corporations

Prior to *Überseering*, the German seat-of-management rule operated in the following situations to deny corporate status to foreign corporations:[98]

- A corporation formed under the law of a foreign jurisdiction has its seat of management in

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Germany at the time of formation or later transfers it to Germany. The corporation does not exist from a German perspective for want of incorporation under German law.

- A corporation formed under German law has its seat of management outside of Germany at the time of formation or later transfers it to another jurisdiction. If the other jurisdiction follows the place-of-incorporation rule and refers back to German law (*renvoi*), Germany continues to recognise the corporation.[99] If the other jurisdiction follows the seat-of-management rule, the corporation does not exist from a German perspective for want of incorporation under the laws of the foreign jurisdiction.[100]
- A corporation formed under the law of Foreign Jurisdiction A transfers its seat of management to Foreign Jurisdiction B. German international private law applies the choice-of-law rules of Jurisdiction B. If Jurisdiction B follows the place-of-incorporation rule, Germany applies the substantive law of Jurisdiction A and continues to recognise the corporation. If Jurisdiction B follows the seat-of-management rule and applies its own substantive law of business associations to the corporation, Germany likewise applies the substantive law of Jurisdiction B. This results, from a German standpoint, in non-recognition of corporate status for want of re-incorporation in accordance with the law of Jurisdiction B.

The entity whose corporate status is denied, although it continues to do business under its corporate name, is a *pseudo-foreign corporation*[101] from a German perspective.

B. FCJ Judgment of July 1, 2002

A long line of German cases treats pseudo-foreign corporations as non-entities that lack legal capacity and the ability to sue, though not always the ability to be sued.[102] This harsh practice was justified as a punitive measure to deter pseudo-foreign corporations from doing business in Germany.[103]

On July 1, 2002, while *Überseering* was pending before the ECJ, the 2nd chamber of the Federal Court of Justice[104] delivered a judgment abandoning this practice and held that pseudo-foreign corporations as a rule constituted a German business association with legal capacity and the capacity to be a party to legal proceedings.[105] This is known as the "substitution theory" because a German business association takes the place of the foreign corporation.[106] Several distinctions follow from the judgment:[107]

- A pseudo-foreign corporation with more than one shareholder that carries on a commercial business constitutes a commercial general partnership[108] and, as such, has legal capacity and the capacity to sue and be sued under Section 124 (1) HGB.[109]
- A pseudo-foreign corporation with more than one shareholder that does not carry on a commercial business constitutes a civil law general partnership.[110] As such, it has legal capacity and the capacity to sue and be sued under the Federal Court of Justice's judgment of January 29, 2001.[111]
- A pseudo-foreign corporation with a sole shareholder has the legal status of this shareholder, whether a corporation, a partnership, or an individual.[112] In all cases, the pseudo-foreign corporation has legal capacity and the capacity to sue and be sued.

As a result of the judgment of July 1, 2002, the issue in *Überseering* – whether a suit in the name of Überseering B.V. would lie in a German court – had been resolved in the affirmative by the German courts by the time the ECJ rendered its judgment.[113] The July 2002 judgment by the 2nd Civil Chamber of the FCJ was viewed as a last-minute attempt to rescue the German seat-of-management theory from the clutches of the ECJ.

Since the July 2002 judgment treated pseudo-foreign corporations as general partnerships or sole proprietorships, the shareholders of such entities would have continued to be subject to personal liability for the debts of the pseudo-foreign corporation. Whether this would violate the freedom-of-establishment clause of the E.C. Treaty was disputed in the German literature.[114] The predominant opinion was that it would.[115]

C. FCJ Judgment of March 13, 2003

Based on the change in German case law discussed in Section VII.B above, some commentators advocated a narrow reading of *Überseering* under which Germany would continue to apply the seat-of-management theory with regard to foreign E.U. corporations, but grant them legal capacity and the capacity to sue and be sued as German law partnerships under the substitution theory articulated by the FCJ judgment of July 1, 2002.[116]

This approach was flatly rejected by the 7th Civil Chamber of the German Federal Court of Justice in its decision on the merits in *Überseering*. The 7th Civil Chamber held in its judgment of March 13, 2003 that Überseering B.V. had legal capacity *as a limited liability company formed under Netherlands law*.[117] The 7th Civil Chamber explicitly rejected the approach taken by the 2nd Civil Chamber of the FTC in its judgment of July 1, 2002, stating that treating *Überseering* as a German general partnership would expose it to liability risks, which would likewise contravene the freedom-of-establishment clause of the E.C. Treaty.[118]

Accordingly, the 7th Civil Chamber held that the place-of-incorporation rule was the proper German choice-of-law principle for deciding whether a corporation formed under the laws of another E.U. member state possessed legal capacity. In the case of Überseering B.V., the question of legal capacity was therefore controlled by the law of the Netherlands. Since Überseering B.V. had legal capacity under Netherlands law, it had legal capacity from a German standpoint, and, having legal capacity, it had the capacity to sue and be sued.[119]

While the 7th Civil Chamber's remarks on liability risks may be regarded as *obiter dicta*, the court apparently believes that the liability of the shareholders of a corporation formed under the laws of another E.U.

member state must likewise be decided by applying the law of the place of incorporation. One should note, however, the decision of the Hamburg District Court of May 14, 2003.[120] Ruling on a petition to open bankruptcy proceedings over an English limited company with no economic ties to England, the District Court held that the shareholders of the limited company were personally liable in the manner of partners in a German commercial general partnership because the formation of the limited company in England constituted an abuse of law. The court therefore applied the July 2002 decision of the 2nd Chamber of the FCJ.[121]

As has already been noted,[122] the FTC judgment of March 13, 2003 does not make clear whether the place-of-incorporation rule will henceforth apply to all immigrating E.U. corporations or only to E.U. corporations formed in a jurisdiction that applies the place-of-incorporation rule as its standard choice of law rule. Our reading of the decision is that the place-of-incorporation rule will henceforth apply to all immigrating E.U. corporations irrespective of the choice-of-law in their home jurisdiction.

D. Lower Court Decisions

A considerable number of decisions by Regional and Higher Regional Courts also conclude from *Überseering* that the seat-of-management rule can no longer be applied in determining the legal capacity of a corporation formed in another E.U. member state.[123] These lower court decisions by and large ignore of fail to apply the FCJ judgment of July 1, 2002.

For instance, the Bavarian Higher Regional Court noted in its decision of December 19, 2002[124] that, since a civil law partnership could not be entered as the owner of record in the Land Records Register, application of the substitution theory (FCJ judgment of July 1, 2002) would lead to a denial of the petition of an English PLC for entry as owner of record where the PLC's seat of management was located in Germany from its inception. The court therefore applied the place-of-incorporation rule and U.K. law in determining that the PLC had legal capacity and could therefore be entered as owner in the Land Records Register.

Citing *Überseering* and *Centros,*[125] the Higher Regional Courts of Zweibrücken and Celle have held that English private limited companies may register secondary establishments (branches) in Germany even if they carry on no business in Great Britain, have no primary establishment at another location, and have their seat of management in Germany from their inception.[126]

E. Trend of German Law

As explained above, the 7th Civil Chamber of the Federal Court of Justice[127] has abandoned the seat-of-management rule as a choice-of-law principle for identifying the substantive law governing the legal capacity of a foreign E.U. corporation. In an *obiter dictum*, the 7th Civil Chamber indicated that the liability of shareholders of a foreign E.U. corporation is also governed by the law of the place of incorporation. Numerous lower court rulings have followed the 7th Civil Chamber. The 8th Civil Chamber has indicated that it agrees with the 7th Civil Chamber's reading of *Überseering*,[128] as has the 1st Chamber of the Federal Tax Court.[129]

Whether the 2nd Civil Chamber of the FCJ will seek to apply its substitution theory[130] to foreign E.U. corporations is unclear. In view of the opposing views of 7th and 8th Civil Chambers, the 1st Chamber of the FTC,[131] and numerous lower courts, we consider this unlikely. In order to depart from the holding of the 7th Civil Chamber, the 2nd Civil Chamber would have to convene an all-chamber panel of the court (*Großer Senat*). The all-chamber panel would in all probability agree with the 7th Chamber.

Voices in the German literature advocate the general abandonment of the seat-of-management rule as a result of *Überseering*.[132] They argue, among other things, that adherence to the seat-of-management rule will place German corporations at a competitive disadvantage by preventing them from emigrating (transferring their seat of management to another jurisdiction). Besides permitting German corporations to emigrate, general abandonment of the seat-of-management rule by Germany would permit corporations organised anywhere in the world to immigrate into Germany.

There is, to date, no indication that the German courts are prepared to abandon the seat-of-management rule as a general matter. In particular the Federal Court of Justice judgment of January 29, 2003[133] indicates continued application of the seat-of-management rule where it is not overridden by E.U. law or a bilateral treaty.

The Federal Tax Court judgment of January 29, 2003 indicates willingness to abandon the seat-of-management rule for tax purposes both as regards foreign E.U. corporations and as regards foreign corporations entitled to the protection of an anti-discrimination clause equivalent to that of the German-American tax treaty or the OECD model treaty. The tax implications of *Überseering* are discussed in Section IX below.

VIII. Limits of *Überseering*?

A. Basic Issue

Based on *Überseering*, Germany's civil courts have abandoned a century-old practice and begun recognising the legal existence of corporations formed in other jurisdictions (mostly England), but which will be managed from Germany and do business only in Germany. In these cases, a foreign corporation has been preferred over a German corporation as a vehicle for German business ventures so as to avoid provisions of German corporate law that the German legislature deemed to be in the public interest, but which the corporation's founders considered undesirable.

Überseering prohibits the outright refusal by a host jurisdiction to recognise corporations duly formed and existing under the law of another E.U. jurisdiction. *Überseering* and *Centros* together make clear that this refusal is unconditional and thus applies no matter how strong the corporation's ties may be to the host jurisdiction and no matter how tenuous they may be to its home jurisdiction. In the name of freedom of establishment for corporations, the ECJ thus invalidates the long-standing choice-of-law doctrine of a majority of the E.U.'s member states.[134]

However, *Überseering* and *Centros* do not say that an E.U. host jurisdiction may never apply any aspect of its company law to a foreign E.U. corporation doing business in its territory.[135] The forthcoming ECJ ruling in *Inspire Art*[136] will be the first to address this issue directly.

It is noted that, in the United States, where each of the 50 separate states represents a separate company law jurisdiction, all of which follow the place-of-incorporation rule, states will apply their own law to a corporation organised under the laws of another state where they find that a minimum nexus or genuine link of the corporation to the nominal home jurisdiction is lacking. The "genuine link" or "pseudo-foreign-corporation" doctrine is only invoked to justify the application of local protective legislation and never results in a denial of the existence of the corporation in question.[137]

Another approach to the problem might be to require foreign corporations to re-incorporate in another E.U. jurisdiction under certain circumstances, but to structure such re-incorporation so that no dissolution of the corporation occurs. The corporation's legal capacity and the limited liability of its shareholders and officers would have to be respected at all times. The sanctions for non-compliance would have to be carefully designed to pass E.U. muster. This option is explored by *Großerichter*.[138] She does not view it as a complete solution to the problem, however. Apparently, the change in controlling law would only occur in extreme cases or would be merely an option open to an immigrating corporation.

The focus of the discussion in the German literature is therefore on the selective application of German law to foreign corporations.

B. German Discussion

At the risk of over-simplification, one may identify three different answers by German commentators to the issues posed in *Inspire Art*:

1. Every salient aspect of the host jurisdiction's legislation and case law (host jurisdiction law) regulating its own corporations may be applied to foreign E.U. corporations conducting business in its territory, at least where the foreign corporation has minimal ties ("mailbox" registered office address) to its home jurisdiction. With regard to each regulatory aspect, the courts or legislature of the host jurisdiction must define the specific nexus that justifies imposition of the host jurisdiction's law.[139]
2. One must weigh the benefits of each salient aspect host jurisdiction law regulating its own corporations against the impact that application of such law to foreign E.U. corporations would have on the freedom of establishment. Applying the proportionality criteria established by the E.U. in *Cassis-de-Dijon* and *Centros*,[140] certain aspects of host jurisdiction law are applicable to foreign E.U. corporations, whereas others are not.[141]
3. While the second approach is correct in principle, application of the proportionality criteria established by the E.U. in *Cassis-de-Dijon* and *Centros* will almost never permit host country law to be applied to a foreign E.U. corporation. Furthermore, no application of host country corporate law to foreign E.U. corporations is legitimate unless pursuant to a specific statute. Judge-made-law is impermissible in this area.[142]

C. Salient Aspects of German Domestic Law

A non-exclusive list of salient aspects of German domestic law that are potentially applicable to foreign corporations doing business in Germany is as follows.

- Minimum capitalisation requirements of Euro 25,000 and Euro 50,000 for limited liability companies (GmbH) and stock corporations (AG) respectively.
- Requirements concerning the extent to which capital must be paid in before a corporation may commence business.
- Capital maintenance requirements requiring a company to go into insolvency if actual capital falls below stated capital.[143]
- Registration and disclosure requirements analogous to those for the German branches of foreign corporations.
- Co-determination provisions entitling employees of German corporations with over 500 employees to representation on the Supervisory Board, including equal representation where the corporation has more than 2,000 employees.[144]
- If foreign corporations whose activities are centred in Germany can escape the above co-determination provisions, doctrines are advocated to bar German corporations from re-incorporating in another jurisdiction to escape the reach of these provisions.
- Law regulating the names of corporations and the information that must be disclosed on their letterhead; law requiring foreign corporations to do business under their full legal name including the unabbreviated designation of the type of business association they represent and to disclose the country in which they are registered.
- German commercial tort and criminal law, to the extent applicable by reason of the place where the tortious or criminal conduct occurred and/or the place where the damage was inflicted.
- German law doctrines of pre-contractual duties in contractual negotiations (*culpa in contrahendo*), good faith dealing, and estoppel (*Treu und Glauben, venire contra factum proprium*), to the extent applicable by reason of the place of action or performance, the parties' own choice of law, or the contractual focal point.
- Internal relationships amongst shareholders including protection of minority shareholders; in this connection, German securities and prospectus laws.
- German law on liability of shareholders and senior management (piercing the corporate veil, *Durchgriffshaftung*).

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- German stock corporation law (Sections 311 ff. AktG) on the protection of dependent corporations.
- German doctrine of equity substitute loans under Sections 32a, 32b GmbHG.[145]
- Insolvency law. Here, it is noted that the European Convention on Insolvency Proceedings provides in Art. 3 (1) that jurisdiction over the proceedings is vested in the courts of the country where the debtor's principal interests are centred.[146] This will generally not be the country of mere incorporation, but rather the country where business is conducted.

IX. Tax Issues After *Überseering*

A. DRCs for Tax Purposes

The German tax code provides for three types of tax on income: personal income tax, trade tax, and corporation tax. Unlike the trade tax, which falls on both individuals engaged in commercial businesses and on corporations, income tax and corporation tax are mutually exclusive, that is, they cannot be levied on the same tax subject. Sections 1 - 3 KStG define the entities subject to corporation tax. When confronted by a foreign entity, Germany determines whether it is to be taxed as a corporation or treated as transparent like a partnership depending on its degree of resemblance in legal structure and economic role to the corporate tax subjects defined by German law.

The application of the above rules to a DRC with its registered office in a foreign jurisdiction and principal place of management in Germany was long unsettled. In 1992, the Federal Tax Court held that a DRC was taxable as a German resident corporation.[147] Since the DRC lacked legal capacity under the seat-of-management theory, it could not be analogised to the German corporations listed in Section 1 (1) no. 1 KStG. Instead, the FTC likened the DRC to certain associations without legal capacity that were subject to corporation tax under Section 1 (1) no. 5 KStG. The tax authorities acquiesced in this decision and, under certain conditions, even permitted DRCs to participate in the German corporation tax credit system in force through 2000/01.[148]

B. Treatment of DRCs Before and After *Überseering*

The impact of *Überseering* on the treatment of DRCs is summarised in the table overleaf, in which the term "protected DRC" is used to refer to a corporation that can directly or indirectly rely on the ECJ's *Überseering* judgment.[149]

C. Emigration of German Corporations after *Überseering*

As noted above, the prevailing reading of *Überseering* is that Germany is free to impose restrictions on the emigration of its own corporations, that is, corporations formed under its law. It is also argued, however, that there are suggestions in *Überseering* that the freedom-of-establishment clause of the E.C. Treaty should permit a corporation to move its seat of management from its home jurisdiction to another jurisdiction.

The tax law on point is contained in Sections 11, 12 KStG. Section 11 KStG provides for liquidation taxation of a corporation if it is dissolved. Section 12 provides for liquidation taxation if a corporation transfers its registered office and/or principal place of management and thereby ceases to be subject to German tax on its worldwide income.

At present, there is no German law or E.U. law permitting corporations to transfer their registered office to a foreign jurisdiction. Such transfers can therefore dissolve the corporation and trigger tax under Section 11 KStG. A pending E.U. Guideline would provide a legal framework for such transactions.[150]

A German corporation that transfers its seat of management to a foreign jurisdiction that follows the seat-of-management rule is dissolved and subject to liquidation taxation under Section 11 KStG. Transfer of the seat of management to a foreign jurisdiction that follows the place-of-incorporation rule would not lead to dissolution, however, because the law of the new jurisdiction refers back to German law (*renvoi*). Even if the principal place of management were deemed to be transferred with the seat of management, no taxation would result under Section 12 KStG because the corporation remains subject to German tax by virtue of its German registered office.

X. Concluding Remarks

In *Überseering*, the ECJ asserts the primacy of the freedom-of-establishment clause of the E.C. Treaty over the choice-of-law rules of the member states. Although the court was less clear than one would have wished, the decision has been interpreted by the German courts as requiring the recognition of foreign E.U. corporations when a corporation "immigrates" to Germany by locating its seat of management there. Numerous German court decisions have already abandoned the seat-of-management rule and applied the law at the immigrating corporation's place of incorporation in determining its legal capacity and separate legal personality. It seems almost certain that the limited liability shield of these foreign E.U. corporations will be recognised in Germany as well.[151]

The jurisdiction into which an E.U. corporation immigrates need, however, only recognise the corporation to the extent that its home jurisdiction (the jurisdiction in which it was formed) continues to do so. According to the ECJ's new reading of its *Daily Mail* decision, the home jurisdiction is entitled to place restrictions on the transfer of the seat of management.[152] Whether the home jurisdiction has unfettered discretion in shaping these restrictions is unclear. Many commentators read *Überseering* in this way, whereas others assert that the freedom-of-establishment clause limits the rights of the home jurisdiction as well, though perhaps not to the same extent as those of the host jurisdiction.

Assuming an unfettered right of the home jurisdiction to prevent its corporations from locating their

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management elsewhere, E.U. countries are free to continue to apply the seat-of-management rule to their own corporations. If such corporations nevertheless move their seats of management, they are "struck dead" at the border while trying to flee to another jurisdiction that follows the seat-of-management rule.[153] These corporations are then likewise "dead" from the perspective of the E.U. jurisdiction which they have entered. Under this approach, only corporations in jurisdictions that follow the place-of-incorporation rule can move their seats of management freely.[154]

If one assumes a limited right of the home jurisdiction to prevent its corporations from locating their management elsewhere, then the seat-of-management rule may violate E.U. law even as applied to a member state's own corporations. Countries like Germany may, for instance, no longer be free to treat their own corporations as dissolved if they move their seat-of-management to another country.

The immediate practical consequence of *Überseering* is that a considerable number of investors have started to use English corporations as vehicles for doing business exclusively in Germany.[155] Theoretically, English corporations could replace German corporations entirely since, after *Überseering*, there are no circumstances in which Germany may compel an E.U. corporation doing business within its territory to organise under German law. While no one expects matters to go quite this far, many find the trend and prospects alarming. And if English corporations did make German corporations extinct, this would not be the end of the matter. Some day, English corporations might be supplanted by Slovenian, Hungarian or Maltese corporations.

Since Germany cannot keep foreign E.U. corporations out even when they operate exclusively in Germany and have nothing but a mailbox presence in their home jurisdiction, the question arises as to whether Germany may impose certain aspects of its

	Before *Überseering*	**After *Überseering***
1	Because DRCs were pseudo-foreign corporations from a civil law perspective,[a] they lacked legal capacity, could not sue in the courts, could (theoretically) not be entered in the Commercial Register, and might encounter difficulties in being entered as the owner of record in the Lands Records Register.[b]	Protected DRCs must be recognised in Germany as corporations under the law of their place of incorporation. They have legal capacity, may be parties to litigation, may register branches with the Commercial Register, and may be the owner of record of land.
2	Because DRCs lacked corporate existence from a civil law perspective, the shareholders and officers of DRCs were exposed to personal liability.	The recognition of protected DRCs as foreign corporations implicitly means the application of the law of the place of incorporation with regard to the liability of shareholders and officers.[c] German law on piercing the corporate veil may apply, however.[d]
3	DRCs could not function as the lead (top tier) company in a consolidated tax group for corporation tax purposes,[e] but were permitted to do so for trade tax purposes.[f]	The tax law was changed from 2001 onwards to eliminate the requirement that the lead company have both its registered office and its principal place of management in Germany. However, based on Überseering, a protected DRC can function as the lead company even under prior law.
4	DRCs could not be lower-tier members of tax groups consolidated for corporation tax purposes.	The tax law continues to require a double nexus (German registered office and principal place of management) for consolidated corporations.[g] This provision probably contravenes E.U. law, meaning that a protected DRC could be a second-tier member of a consolidated group.
5	It was doubtful whether DRCs holding shares in other corporations could claim the participation exemption for net worth tax purposes (§ 102 BewG).	The issue is largely moot since the net worth tax was allowed to lapse and is therefore inapplicable to years from 1997 onwards. § 102 BewG was repealed effective 1998.
6	Under the pre-2000 version of § 8b (1) KStG, DRCs could neither pay dividends out of tax-free foreign earnings that remained free of tax in the hands of domestic corporate recipients nor receive such dividends tax free. These benefits were denied to DRCs because DRCs lacked legal capacity and were subject to corporation tax under § 1 (1) no. 5 KStG. By law, the benefits did not extend to this type of entity.	The 2000 corporation tax reform eliminated this discrimination from 2000/2001 onwards by exempting all dividends received. However, since the legal personality of protected DRCs must be recognised, they are now properly classifiable as entities subject to corporation tax under § 1 (1) no. 1 KStG. As such, they qualify for the benefits in question even under prior law.
7	DRCs did not qualify for the capital gains exemption under the pre-2000 version of § 8b (2) KStG.	For the reasons given in connection with § 8b (1) KStG, protected DRCs qualify for the capital gains exemption under prior law. Under new law, all corporate entities enjoy the exemption.
8	DRCs were arguably not subject to Germany's thin capitalisation rules (§ 8a KStG) because they were only pesudo-foreign corporations.[h] The tax authorities took the opposite view, however.[i]	Classification of protected DRCs as entities subject to corporation tax under § 1 (1) no. 1 KStG brings them squarely under the thin capitalisation rules. These were, however, declared by the ECJ to contravene E.U. law in Lankhorst-Hohorst.[j]
9	Some tax treaties (cf. Article 4 (3) of the U.S.-German tax treaty) provide that DRCs shall not be treated as a resident of either contracting state and therefore have no entitlement to treaty protection unless the tax authorities of the two states can agree as to the state of residence. By contrast, Article 4 (3) of the OECD model treaty treats DRCs as resident in the state in which their place of effective management is situated.	This is unchanged by Überseering. Note, however, that at least under the U.S.-German tax treaty, DRCs are still entitled to the protection of the anti-discrimination article.[k]

laws on foreign E.U. corporations. This discussion is just getting under way. The ECJ decision in *Inspire Ltd.* will illuminate the issue, but by no means resolve its every detail.[156]

The pressures put on the German seat-of-management theory by *Überseering* are immense and may lead to its collapse, that is, to German adoption of the place-of-incorporation rule. Some commentators see the seat-of-management rule as an obstacle to the mobility of German corporations and hence an additional disadvantage in competition with other business corporation laws.

Überseering has tax ramifications as well. Essentially, the position of a dual resident corporation with its registered office and place of management in different jurisdictions has been considerably improved. This makes DRCs better planning options for cross-border mergers and cross-border loss-sharing schemes. *Überseering* also raises questions about the liquidation taxation imposed on DRCs and German corporations leaving Germany. This tax may be too harsh and hence unenforceable under E.U. law.

The reach of *Überseering* extends beyond the E.U. to countries in the European Economic Area. Moreover, bilateral treaties such as the Friendship Convention between the U.S. and Germany may in some cases give non-E.U. foreign corporations the same right of freedom of establishment in Germany as is enjoyed by E.U. corporations. The German Federal Tax Court has also relied on the anti-discrimination clause of Germany's tax treaty with the United States to extend a tax benefit of *Überseering* to U.S. corporations.

While *Überseering* may also energise efforts towards harmonisation of European company law, the obstacles to such harmonisation are immense and will only grow when ten new members are added next year.

Lastly, one should not forget that, while this article has been written from a German perspective, the issues it discusses must be addressed by every jurisdiction in the E.U. that previously applied the seat-of-management rule in a pure or modified form, in other words, by nine E.U. member states,[157] not counting the ten new members as of May 1, 2004.[158]

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	Before *Überseering*	**After *Überseering***
10	Arguably, transfer of a foreign corporation's principal place of management to Germany was a tax realisation event with respect to any unrealised appreciation in the assets of a pre-existing German permanent establishment because, under the seat-of-management theory, the transfer ended the legal existence of the foreign corporation that had previously owned the assets and caused them to pass to new owners. Under the prevailing view, no taxation occurred, however, since the assets remained in the German tax sphere.[l]	In the case of protected DRCs, the transfer cannot trigger tax because the legal personality of the DRC is unaffected by the transfer, hence there is no change in ownership of the assets.
11	Re-transfer of the place of management from Germany to another jurisdiction (emigration) subjected the DRC to liquidation taxation in Germany under § 12 KStG (transfer of the place of management terminating liability to German tax on worldwide income).	Emigration of this sort is not covered by the Daily Mail doctrine as reinterpreted by Überseering because the DRC was not formed under German law. This fact has been overlooked by some commentators, who consider the imposition of tax justified by Überseering.[m] Since the tax in question obviously constitutes a considerable hindrance to emigration, there is a good chance that it contravenes E.U. law. If at all, the tax is justified on fiscal policy grounds, but not under the new Daily Mail doctrine. Arguably, the exit tax should be drawn more narrowly to provide for taxation of so much of the unrealised appreciation inherent in the DRC's assets as accrued while it was resident in Germany. Furthermore, the time of such taxation should be deferred until the gain in question has been realised.

a. See Section VII. A.

b. See generally *KPMG German News* no. 4/1995 = Article 40.

c. Dictum of FCJ March 13, 2003 (Article Fn. 11).

d. See Section VIII above.

e. FTC November 13, 1991 (BStBl II 1992, 263).

f. FTC November 10, 1998 (I R 102/97 - BStBl II 1999, 306).

g. § 14 (1) sent. 1 KStG and § 17 KStG.

h. Cf. Arthur Andersen Commentary on the Corp. Tax Act, marg. no. 52 on § 8a KStG and marg. no. 64 ff. on § 1 KStG.

i. Federal Ministry of Finance directive of November 17, 1994 (IV B 7 - S 2742 - BStBl II 1995, 25); *Deininger* IStR 2003, 214 at his Fn. 24.

j. ECJ *Lankhorst-Hohorst* December 12, 2002 (Case C-324/00).

k. See FTC January 29, 2003 (Article Fn. 85).

l. Cf. *Eilers/Wienands* IStR 1999, 289; *Sörgel* DB 1999, 2236, 2237/1, 2238/1.

m. E.g. *Deininger* IStR 2003, 214, his sec. 2.3.2.

1 ECJ *Überseering*, November 5, 2002 (C-208/00). See also *KPMG German News* no. 1/2002 p. 21 = Article 244.

2 ECJ *Überseering* (Fn. 1).

3 The same issues were hotly discussed in connection with the ECJ's *Centros* decision of March 9, 1999 (C-212/97); see *KPMG German News* no. 3-4/1999 p. 27 = Art. no. 190 for a discussion of *Centros* and references to prior discussion of the relevant issues in *German News*.

4 In German, *Gründungstheorie*. Referred to as the "incorporation principle" in the official English translation of *Überseering* (Fn. 1 par. 15).

5 *Geyrhalter/Gänßler* NZG 2003, 409, their Fn. 19. Italy and Denmark use mixed approaches under which the legal existence and capacity of a foreign corporation is determined under the place-of-incorporation rule. However, if the foreign corporation has its seat of management in these countries, it is subject to mandatory provisions of their domestic law.

6 See *Überseering* (Fn. 1) par. 51. Cf. *Großerichter* DStR 2003, 159, 167 (her sec. 5.1.3), who considers that the place-of-incorporation rule is the rule best suited to the European Union.

7 In German, *Sitztheorie*. Referred to as the "company seat principle" in the official English translation of *Überseering* (Fn. 22 par. 4, 44).

8 Germany's application of the seat-of-management rule is not statutory, but rather based on long-standing case law.

9 Belgium, France, Luxembourg, Spain, Portugal, and Greece; cf. *Kindler*, NJW 2003, 1073, his Fn. 8. *Geyrhalter/Gänßler* (Fn. 5, their Fn. 3) and *Großerichter* (DStR 2003, 159, 160) note that Spain, Portugal, and Belgium have provisions in their corporate law that permit a corporation to move its seat of management to the local jurisdiction and assume the status of a local corporation (change of controlling law – *Statutenwechsel*) without being dissolved, i.e. without giving up its prior legal personality and assuming a new one (*identitätswahrender Zuzug*). Germany has no such provision in its law. The proposed 14th E.U. Company Law Guideline on the transfer of a company's seat to another member state with a change in the company's controlling law (last draft dated April 22, 1997) would create similar provisions at the E.U. level. Cf. text at Fn. 72 below.

10 In German, *Verwaltungssitz*. Referred to as the "centre of administration" in the official English translation of *Überseering* (Fn. 1) par. 4. "Centre of administration" or "seat of administration" render the German term more literally, but obscure the management focus of the concept.

11 Cf. FCJ (*Bundesgerichtshof* = Federal Court of Justice) March 21, 1986 (V ZR 10/85 – BGHZ 97, 269, 272; *Schmidt/Sedemund* DStR 1999, 2057, 2060.

12 See *Überseering* (Fn. 2) par. 16; *Kindler* NJW 2003, 1073 sec. VI.

13 FCJ March 13, 2003 (VII ZR 370/98 – BGHR 2003, 691); see sections VII.C, VII.D below.

14 See section V.F below.

15 In German, *Ort der Geschäftsleitung*. Cf. § 10 AO, § 1 (1) KStG.

16 In German, *Sitz* or *statuarischer Sitz*. The legal seat in German corporate and tax law is similar to the concept of a registered office in Anglo-Saxon tax law.

17 Cf. *Eilers/Wienands* IStR 1999, 289.

18 See section VI below.

19 See statement of facts by *Kindler* (Fn. 9) and in *Überseering* (Fn. 22) par. 6.ff.

20 Cf. *Überseering* (Fn. 1) par. 9. Under § 50 ZPO (German Code of Civil Procedure), a party with legal capacity has the capacity to be party to litigation. Capacity to be a party to litigation is a procedural question determined under German choice-of-law rules by the law of the forum in which suit is brought (*lex fori* – FCJ March 13, 2003 Fn. 13).

21 FCJ referral ruling of March 30, 2000 (VII ZR 370/98 – DB 2000, 1114).

22 *Überseering* (Fn. 1), rulings of the court, found at end of the decision in official versions.

23 The official English translation of *Überseering* (Fn. 1) reads "to *recognise* the legal capacity ...". However, this is a translation error, as is apparent from the French version ("*respecter la capacité juridique*") and the German version ("*die Rechtsfähigkeit … zu achten*"). ECJ decisions are first drafted in French and then translated from the French into the other official languages (*Knapp* DNotZ 2003, 85, his Fn. 2).

24 ECJ *Centros*, March 9, 1999 (C-212/97); see *KPMG German News* no. 3-4/1999 p. 27 = Art. no. 190.

25 *Centros* (Fn. 24) par. 27.

26 *Centros* (Fn. 24) par. 34: "imperative requirements in the general interest".

27 *Centros* (Fn. 24) par. 35. This comment by the ECJ makes one wonder how the ECJ would view host country legislation subjecting all foreign corporations that conduct business from a permanent establishment in its territory to its minimum capital requirements.

28 See *KPMG German News* no. 3-4/1999 p. 27 under sec. 3 = Article 190.

29 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General Siegbert Alber of January 30, 2003.

30 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 2-4, 135.

31 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 137.

32 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 118; *Centros* (Fn. 24) par. 27.

33 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 117 citing *Centros* (Fn. 24) par. 25.

34 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 129-137. The Netherlands followed the place-of-incorporation rule as matter of general practice even before *Überseering*.

35 *Inspire Ltd.* (Case C-167/01), Opinion of Advocate General par. 138.

36 Cf. section VIII below.

37 Treaty Establishing the European Community or Treaty of Rome.

38 Article 48 defines the companies that enjoy the protection of the basic freedoms guaranteed by the E.C. Treaty: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including

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co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

39 *Überseering* (Fn. 1) par. 24 - 28.

40 *Überseering* (Fn. 1) par. 59: "A necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves."

41 *Überseering* (Fn. 1) par. 60. The court relied here on the "so far as is necessary" language in Article 293 E.C.. One wonders whether the court believes its own case law to be a full and adequate substitute for agreement among the member states on all non-harmonised aspects of their law. Cf. *Überseering* (Fn. 1) par. 37, argument of the Commission: "If in 1968 there had been a relevant body of case-law, it would have not been necessary to have recourse to Article 293 E.C."

42 General Programme for the Abolition of Restrictions on the Freedom of Establishment of December 18, 1961 (OJ, English Special Edition, Second Series (IX) p. 7, no longer in force.

43 *Überseering* (Fn. 1) par. 34, 35, 74, 75. The court might instead have held that a corporation lacking a real and continuous link to the economy of the E.U. jurisdiction in which it was formed was not entitled to rely on the freedom-of-establishment clause of the E.C. Treaty with regard to another E.U. jurisdiction to which a real an continuous link existed.

44 ECJ September 27, 1988 *Daily Mail* (Case 81/87 – Slg. 1988, 5483).

45 See *Daily Mail* (Fn. 44) par. 2 - 7.

46 Registered office, central administration (principal place of management), or principal place of business; cf. Art. 48 E.C.

47 *Daily Mail* (Fn. 44) 1st headnote; cf. par. 23.

48 *Überseering* (Fn. 1) par. 67, citing *Daily Mail* (Fn. 44) par. 19.

49 *Überseering* (Fn. 1) par. 70: *Daily Mail* held, in the view of the *Überseering* court, that "a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country".

50 *Überseering* (Fn. 1) par. 72: The *Daily Mail* court "did not intend to recognise a Member State as having the power, *vis-à-vis* companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law".

51 *Kindler* NJW 2003, 1073 sec. II.3 and *Dubovizkaja* GmbHR 2003, 694, 695-696 see *Überseering* as a reversal of the position taken in *Daily Mail* on the relationship of the freedom-of-establishment clause to the choice-of-law rules of the various member states.

52 Cf. Art. 43 E.C. and *Daily Mail* (Fn. 44) par. 17, 18, where the ECJ notes that the U.K. did not attempt to limit the exercise of these freedoms by Daily Mail PLC.

53 *Überseering* (Fn. 1) par. 80, 92.

54 Cf. *Wagner* GmbHR 2003, 684 sec. III.

55 *Lutter* BB 2003, 7 under sec. IV, citing *Knobbe-Keuk* ZHR 154 (1990) 325, 350 ff.

56 See, however, OLG Hamm April 30, 1997 (DB 1997, 1865), administering the "death blow" to a German limited liability company that sought to emigrate from Germany to Luxembourg.

57 *Schnitger* IStR 2002, 818; *Forsthoff* BB 2002, 320.

58 See e.g. *Großerichter* DStR 2003, 159, 164 (her sec. 4.2) and 166.

59 E.g. *Dubovizkaja* GmbHR 2003, 694, 696, 697

60 *Lutter* (Fn. 55) speaks of a "drastic competitive disadvantage".

61 FTC judgment of January 29, 2003 (I R 6/99 – IStR 2003, 422, 424). See section VI.B below for more discussion of this judgment.

62 See tenor of *Überseering*, quoted in section II above. See also Fn. 23 above.

63 See FCJ judgment of March 13, 2003 (Fn. 13) on the merits in *Überseering*, discussed in section VII.C below.

64 The following discussion follows the analysis of *Leible/Hoffmann* RIW 2002, 925 in translating the holdings of *Überseering* into choice-of-law terminology. While other variations are conceivable, they all have as their consequence that corporations formed in jurisdictions that continue to apply the place-of-management rule are not free to move their place of management, whereas corporations formed in jurisdictions that follow the place-of-incorporation rule are free do to so.

65 General abandonment of the seat-of-management rule is widely considered desirable, largely because of the greater simplicity and hence legal certainty inherent in the place-of-incorporation rule. Cf. *Leible/Hoffmann* RIW 2002, 925, 935 ff.

66 Cf. *Leible/Hoffmann* RIW 2002, 925, 930 ff.

67 See *Geyrhalter/Gänßler* (Fn. 5) at 411, citing *Leible/Hoffmann* RIW 2002, 925, 934-935.

68 Cf. Fn. 9 above.

69 See the discussion of possible limitations on the home jurisdiction in section V.E above.

70 If France likewise abandoned the seat-of-management rule entirely, the analysis would be simplified because the choice-of-law rules of both countries would then point directly to German substantive law.

71 Prior to *Überseering* and the "European place-of-incorporation rule", the result was the same on different reasoning. Under its seat-of-management rule, Germany referred to English law, including English choice-of-law rules (inclusive reference – *Gesamtverweisung*). These choice-of-law rules (place-of-incorporation rule) referred back to German law (*renvoi*). Germany accepted the referral back and applied its own substantive law. Hence, emigration of a German corporation from Germany to a place-of-incorporation jurisdiction was possible even prior to *Überseering*. Cf. *Leible* in *Michalski* GmbH 2002 *Syst. Darstellung* 2 marginal no. 47.

72 Cf. *Leible/Hoffmann* RIW 2002, 925, 933/1.

73 *Überseering* (Fn. 1) par. 83 - 91; cf. *Centros* (Fn. 24) par. 34.

74 *Überseering* (Fn. 1) par. 92, 93.

75 *Überseering* (Fn. 1) par. 52, emphasis added.

76 See section V.B above.

77 Art. 43, 48, 293 E.U.

78 Similar thoughts are voiced by *Großerichter* DStR 2003, 159, 164 (her sec. 4.1), 166.

79 Then Article 54 (3) (g) E.C.

80 *Centros* (Fn. 24) par. 28.

81 Cf. Fn. 72 above.

82 Cf. *Kindler* NJW 2003, 1073 under sec. II.1.

83 Cf. *Sedemund* BB 2003, 1362, 1363 citing *Meilicke* DB 1999, 627.

84 Cf. *Meilicke* DB 1999, 627, 628/1 (writing on *Centros*, Fn. 24). As of May 1, 2004, the following 10 countries will accede to the E.U.: Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, and Malta.

85 FTC judgment of January 29, 2003 (I R 6/99 – IStR 2003, 422).

86 The FTC held in its judgment of November 10, 1998 (I R 102/97 – BStBl II 1999, 306) that a double nexus was not required of the lead company in a tax consolidated group for trade tax purposes. See *KPMG German News* no. 4/1997 p. 2 = Article 94.

87 The Business Tax Reform Act of December 20, 2001 amended § 14 KStG with effect from the 2001 assessment period to eliminate the double nexus requirement. From 2001 onwards, the lead company need only have its principal place of management in Germany. See *KPMG German News* 1/2002 p. 31 sec. 4.2 = Article 248.

88 While the FTC does not elaborate on this point, the refusal of German law to permit a foreign corporation with a German principle place of management, but not a German registered office, to act as the lead company in a consolidated tax group was based on the seat-of-management theory. German law has consistently permitted the domestic permanent establishment of a foreign corporation to act as the lead company of a consolidated group (§ 18 KStG). Having a principal place of business in Germany is a stronger nexus than having a mere permanent establishment. However, under the seat-of-management theory, pseudo-foreign corporations lacked legal capacity, hence could arguably not enter into a valid profit-and-loss pooling agreement with the corporations to be consolidated under them. Beyond this, the refusal of the tax law to permit a pseudo-foreign corporation to act as lead company was motivated by a policy of penalising such corporations to deter their entry into Germany (see text at Fn. 103 below). Such punitive legislation was plainly inapplicable against foreign E.U. corporations after *Überseering*.

89 This overruled the contrary decision of November 13, 1991 (BStBl II 1992, 263). The court's argument is complicated and perhaps not entirely persuasive.

90 See Fn. 87 above.

91 *Sedemund* BB 2003, 1362, 1364.

92 See section I.B above.

93 §§ 14 (1) sent. 1, 17 KStG.

94 Cf. *Sedemund* BB 2003, 1362, 1363.

95 *Sedemund* BB 2003, 1362, 1363. The FTC's Jan. 2003 decision thus implicitly overrules the FTC's *Liechtenstein* decision of June 23, 1992 (IX R 182/87 – BStBl II 1992, 972). Interestingly, the 1st Chamber of the FTC does not believe that it should refer the question of departure from the case law of another Chamber of the court to a combined chamber (*Großer Senat)* in accordance with normal procedure. Instead, it, like the 7th Chamber of the Federal Court of Justice (see section VII.C below), it apparently regards the ECJ's *Überseering* decision as a substitute for a ruling by a combined chamber of the court.

96 FCJ January 29, 2003 (VIII ZR 155/02 – DStR 2003, 948).

97 *Großerichter* DStR 2003, 159, 167 (her sec. 5.1.3 and her Fn. 73).

98 Cf. examples of *Leible/Hoffmann* DB 2002, 2203 sec. I.

99 Cf. Fn. 71 above.

100 Cf. OLG Hamm April 30, 1997 (DB 1997, 1865).

101 In German, a *Scheinauslandsgesellschaft*.

102 See *Leible/Hoffmann* DB 2002, 2203 sec. III with further references. The ability to be sued was recognised at least where the pseudo-foreign corporation was entered as the owner of record in the German Land Records Register (*Grundbuch*). Cf. BGHZ 97, 269, 270 ff.

103 See *Leible/Hoffmann* DB 2002, 2203 sec. V, citing *Staudinger/Großfeld*, IntGesR marginal no. 431.

104 *Überseering* was referred to the ECJ by the 7th Chamber of the FCJ. There are probably major differences of opinion between the 2nd and 7th Chambers. Cf. commentary by *Goette*, a judge sitting on the 2nd Chamber, on the FCJ decision of July 1, 2002 (DStR 2002, 1679) and *Leible/Hoffmann* DB 2002, 2203, text at their Fn. 36.

105 FCJ judgment of July 1, 2002 (II ZR 380-00 – DStR 2002, 1678).

106 Cf. *Geyrhalter/Gänßler* NZG 2003, 409, 410.

107 The analysis follows that of *Leible/Hoffmann* DB 2002, 2203 sec. IV and *Kindler* NJW 2003, 1073 sec.II.2.

108 In German, *offene Handelsgesellschaft* or OHG. *Leible/Hoffmann* note that, while a pseudo-foreign corporation that carries on a commercial business under its prior name (e.g. X-Corp.) is acting in violation of German law governing the name of business associations, this does not affect the validity of the business it contracts. While a suit filed in the name of X-Corp. improperly designates the plaintiff, this will not prevent the suit from going forward as long as it is clear who the plaintiff really is (i.e. the OHG). The court will amend the suit on its own motion (*ex officio*) to name the correct plaintiff.

109 German Commercial Code.

110 In German, *Gesellschaft bürgerlichen Rechts* (*BGB-Gesellschaft*).

111 FCJ judgment of January 29, 2001 *Weißes Roß* (II ZR 331/00 – NJW 2001, 1056). This judgment overturned a long line of decisions denying legal capacity to civil law partnerships and paved the way for the judgment of July 1, 2002 (Fn. 105)

112 Cf. *Leible/Hoffmann* RIW 2002, 925, 927/1.

113 There was controversy in the German literature as to whether the 7th Chamber of the FCJ should retract its request to the ECJ for a preliminary ruling because of the July 2002 judgment from the FCJ's 2nd Chamber. The consensus is that the 7th Chamber could have retracted its request, but was not compelled to do so. Cf. *Leible/Hoffmann* DB 2002, 2203 sec. VI.2.

114 See e.g. *Leible/Hoffmann* DB 2002, 2203 sec. VI.2.

115 See e.g. *Großerichter* DStR 2003, 159, 166 (her sec. 5.1.1): loss of the corporate liability shield would be an "intolerable sanction".

116 See *Kindler* NJW 2003, 1073 sec. IV.2 and V. *Kindler* noted that the ECJ's reply to the second question referred to it (see section II above) did not track the language of the question and that the Advocate General

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in his Opinion of 4 Dec. 2001 (C-208/00) advised against taking any position at all on the second question. *Knapp* DNotZ 2003, 85, 88 likewise finds the ECJ's decision ambiguous. Whereas par. 59 thereof seems to say that other E.U. states must recognise foreign E.U. corporations *as such*, the second part of the tenor of the decision is cautiously worded and seems to say only that the legal capacity of foreign E.U. corporations must be respected. Whether this is accomplished by recognising the foreign corporation as such or by other means, e.g. the substitution theory, is an open question, in *Knapp's* view. While Germany seems to have rejected this reading of *Überseering*, it is possible that other seat-of-management jurisdictions will adopt it.

117 FCJ judgment of March 13, 2003 (VII ZR 370/98 – BGHR 2003, 691).

118 Interestingly, the 7th Civil Chamber of the FCJ does not believe that it should refer the question of departure from the case law of the 2nd Civil Chamber to a combined chamber (*Großer Senat)* in accordance with § 132 GVG (Court Procedure Act). Instead, it apparently regards the ECJ's *Überseering* decision as a substitute for a ruling by a combined chamber of the court. Prior to issuance of the March 2003 judgment, *Kindler* NJW 2003, 1073 sec. V.1 argued that the 7th Civil Chamber of the FCJ could in effect not decide itself to abandon the seat-of-management rule and must refer the issue to a combined panel of the Federal Court of Justice, which must then refer the issue to a joint panel of all the German high courts because the Federal Tax Court also followed the seat-of-management rule. In BB 2003, 610, *Kindler* accuses the 7th Civil Chamber of having violated § 132 GVG by rendering its judgment of March 13, 2003.

119 § 50 ZPO.

120 Amtsgericht Hamburg, May 14, 2003 (67g IN 358/02 – BB 2003, 1457).

121 See section VII.B above. The Hamburg court indicated that mere under-capitalisation of the Limited was grounds enough to deny the shareholders the protection of limited liability, but cited additional evidence of abuse, such as systematic division of receivables and liabilities from certain transactions and use of the Limited as a repository for liabilities only. The lower court rendered its decision with knowledge of that of the 7th Chamber of the FCJ on the merits in *Überseering.* (Fn. 117)

122 See section V.F above.

123 OLG Zweibrücken March 26, 2003 (3 W 21/03 – GmbHR 2003, 530); OLG Celle December 10, 2002 (9 W 168/01 – GmbHR 2003, 532); BayObLG December 19, 2002 (2Z BR 7/02 – GmbHR 2003, 299). A large number of similar unpublished decisions exist. See *Wagner,* GmbHR 2003, 13, his Fn. 38 - 40. OLG Zweibrücken overruled a lower court decision that went the other way (LG Frankenthal December 6, 2002 – 1 HK.T. 9/02 – BB 2003, 542). Note also the decision of the Hamburg District Court of May 14, 2003 (Fn. 120).

124 BayObLG 19 Dec. 2002 (Fn. 123).

125 *Überseering* (Fn. 1); *Centros* (Fn.24); see section III above.

126 OLG Zweibrücken March 26, 2003 and OLG Celle December 10, 2002, both (Fn. 123).

127 FCJ judgment of March 13, 2003 (VII ZR 370/98 – BGHR 2003, 691).

128 FCJ January 29, 2003 (Fn. 96).

129 FTC January 29, 2003 (Fn. 85).

130 FCJ July 1, 2002 (Fn. 105).

131 FTC January 29, 2003 (Fn. 85).

132 Cf. *Sieb* GmbHR 2003, 529, 530 (short review of FCJ of March 13, 2003 – Fn. 117); *Dubovizkaja* GmbHR 2003, 694, 698.

133 FCJ January 29, 2003 (Fn. 96).

134 See Fn. 5 and 9 above.

135 Cf. *Überseering* (Fn.1) par. 92: "It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment."

136 See section IV above.

137 Cf. *Bungert* DB 1995, 963, 966.

138 *Großerichter* DStR 2003, 159, 167, her sec. 5.1.2.

139 E.g. *Kindler* NJW 2003, 1073, 1078 ff. = sec. VI; *Großfeld* RIW-Kommentar issue 12/2002 p. 1.

140 ECJ *Cassis-de-Dijon* (Case 120/78 – EuGHE 1979, 649); cf. *Centros* (Fn. 24) par. 34: "National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".

141 E.g. *Großerichter* DStR 2003, 159; *Paefgen* DB 2003, 487; *Geyrhalter/Gänßler* NZG 2003, 409.

142 E.g. *Geyrhalter/Gänßler* NZG 2003, 409, 413: the nexus required to apply certain German law must be specified by amendments to Germany's statutory choice-of-law rules (EGBGB); see also Anon. BGHR 2003, 692.

143 Minimum capital has three major aspects: nominal minimum amount, the extent to which the minimum capital must be actually paid in, and whether the minimum capital must be maintained throughout the company's corporate existence. When half of stated capital has been consumed by losses, § 92 AktG requires the Board of Management of a stock corporation to call an extraordinary meeting of shareholders and initiate insolvency proceedings against the corporation if effective measures cannot be taken to avert insolvency. Under § 64 GmbHG, the general managers of a limited liability company must commence insolvency proceedings without delay and in no event more than three months after a limited liability company becomes insolvent in the sense of an excess of liabilities over assets or of inability to pay debts as they fall due. See *Schmidt Gesellschaftsrecht* 4th ed. 2002 p. 816, 1083, 1089.

144 In German, *unternehmerische Mitbestimmung*. Germany also has local office or shop-level co-determination laws (*betriebliche Mitbestimmung*) distinct from those applying to large German corporations. The local co-determination laws apply to all businesses irrespective of legal form.

145 In German, *eigenkapitalersetzende Darlehen.*

146 *Geyrhalter/Gänßler* NZG 2003, 409, 413.

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147 *Liechtenstein* decision of June 23, 1992 (IX R 182/87 – BStBl II 1992, 972). See also *Ebenroth/Auer,* RIW 1992, 998, 1005); FTC 1st Chamber of July 1, 1992 (BStBl II 1993, 222) – Swiss AG, and June 23, 1993 (BFH/NV 1994, 661) – Spanish S.A.

148 See co-ordinated directives e.g. FM NRW of October 4, 1993, OFD Hanover of January 17, 1994.

149 See sections V.F and VI above.

150 14th E.C. Company Law Guideline on the transfer of legal seat between E.U. member states. Cf. Fn. 72 above.

151 See, however, AG Hamburg (Fn.120) above.

152 The ECJ's reasoning is formalistic: A corporation must submit to the law of the jurisdiction in which its founders chose to organise it.

153 See section V.F above; movement to a place-of-incorporation jurisdiction was allowed before *Überseering* and should remain possible after *Überseering* (see Example 3 at Fn. 71).

154 Note, however, that *Daily Mail* concerned a place-of-incorporation jurisdiction (England), so that exit restrictions may exist even in such jurisdictions. Essentially, England wished to use the threat of dissolution to enforce payment of a negotiated exit tax based on appreciation that had accrued while the corporation was resident in England for tax purposes. Instead of reading *Daily Mail* formalistically (cf. Fn. 152), one may argue that it involves a restraint on the freedom of establishment that was legitimate for fiscal policy reasons and not overly burdensome (not disproportionate).

155 The restrictions involved in *Daily Mail* do not apply. The corporations in question are managed from and centred in Germany from the beginning, hence the issue of transfer of their place of management out of England never arises.

156 See Sec. 4 above and AG Hamburg (Fn. 120).

157 Germany, Belgium, France, Luxembourg, Spain, Portugal, and Greece as well as Denmark and Italy. See Fn. 5 and 9 above.

158 Cf. Fn. 84.