

2002

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Recommended Citation

Christian Kersting, *Corporate Choice of Law - A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 Brook. J. Int'l L. (2002).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol28/iss1/1>

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CORPORATE CHOICE OF LAW — A COMPARISON OF THE UNITED STATES AND EUROPEAN SYSTEMS AND A PROPOSAL FOR A EUROPEAN DIRECTIVE

*Christian Kersting**

I. INTRODUCTION

FOREIGN corporations are corporations that are incorporated in another jurisdiction.¹ A pseudo-foreign corporation is a corporation that is incorporated in another jurisdiction but has no significant contacts with that other jurisdiction.² This creates specific problems as to the applicable law, protection of shareholders and third parties, a state's interest in legislating, etc. These questions are of special importance to jurisdictions that, as a general rule, apply the law of the state of incorporation to a corporation because that rule enables such entities to freely choose the law applicable to them. Whereas the jurisdictions in the U.S. have universally adopted this approach, the situation in the European Community ("EC") is unclear.³ Until recently, it was widely believed that the laws of

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1. CAL. CORP. CODE § 171 (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 371(a) (2001).

2. *Yates v. Bridge Trading Co.*, 844 S.W.2d 56, 61 n.2 (Mo. Ct. App. 1992); *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 857 (1982); Elvin R. Latty, *Pseudo-foreign Corporations*, 65 YALE L.J. 137, 161-62 (1955). Pseudo-foreign corporations are also referred to as "tramp-corporations." *Gries Sports Enterprises, Inc. v. Modell*, 473 N.E.2d 807, 809 (Ohio 1984); *Toklan Royalty Corp. v. Tiffany*, 141 P.2d 571, 573 (Okla. 1943); 36 AM. JUR. 2D *Foreign Corporations* §§ 82, 121 (2001); William L. M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1125-26 (1958).

3. See *infra* Part V.A.

the EC Member States governed that conflict of laws issue,⁴ and many Member States still apply the law of the jurisdiction where the company's "real seat" is located.⁵ But the recent *Centros* decision of the European Court of Justice ("ECJ")⁶ has cast doubt on this belief and led many commentators to believe that the application of the so-called "place of incorporation theory" is mandated by European law.⁷

This possible convergence of U.S. and EC law makes a comparison between both systems an interesting undertaking, especially because of the "federal" structure of both U.S. and EC company law.⁸ This Article tries to give an overview of the treatment of pseudo-foreign corporations in U.S. corporate law, to uncover differences in viewpoint between U.S. and European law, to examine the suitability of U.S. solutions for European law, and to propose legislative changes to European law.

II. APPLICABLE LAW IN THE U.S. — INTERNAL AFFAIRS RULE

Company law in the U.S. is state law.⁹ Since there are no pertinent federal rules on conflict of laws, state law also governs a conflicts situation in corporate law.¹⁰ Unlike Europe, however, the states in the U.S. have a uniform collision rule and apply the laws of the state of incorporation to a foreign corporation.¹¹

4. Case 81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*, [1988] E.C.R. 5483 (holding that such a treatment of pseudo-foreign corporations did not violate Article 43 [ex 52] and Article 48 [ex 58] of the European Community Treaty).

5. For example France, Germany, Belgium, Luxemburg, Portugal, Spain, and Greece. See *infra* note 205.

6. Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-1459.

7. See *infra* note 206.

8. See Richard M. Buxbaum, *Back to the Future? From "Centros" to the "Überlagerungstheorie,"* in *FESTSCHRIFT FÜR OTTO SANDROCK* 70, 149 (Klaus Peter Berger et al. eds., 2000).

9. FRANKLIN A. GEVURTZ, *CORPORATION LAW* §§ 1.1, 1.2 (2000).

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 104 (1971) [hereinafter RESTATEMENT].

11. The internal affairs rule also involves a "forum selection aspect." See *infra* Part III.B. Cf. generally MATTHIAS KORNER, *DAS KOLLISIONSRECHT DER KAPITALGESELLSCHAFTEN IN DEN VEREINIGTEN STAATEN VON AMERIKA* (1989).

A. Content of the Internal Affairs Rule

The so-called “internal affairs rule” is replicated by the Restatement (Second) of Conflict of Laws (“Restatement”), which provides:

§302. Other Issues with respect to Powers and Liabilities of a Corporation

(1) Issues involving the rights and liabilities of a corporation, other than those dealt with in §301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.¹²

The rationale for the internal affairs rule is that corporations should not be faced with conflicting demands regarding “matters peculiar to the relationships among or between the corporation, and its current officers, directors, and shareholders.”¹³ The U.S. Supreme Court has further emphasized the importance of the fact that “a corporation — except in the rarest situations — is organized under, and governed by, the law of a

12. RESTATEMENT § 302. *See also* REVISED MODEL BUS. CORP. ACT § 15.05(c); *Brotherton v. Celotex Corp.*, 493 A.2d 1337, 1339 n.1 (N.J. 1985); *Diedrich v. Miller & Meier & Associates, Architects and Planners, Inc.*, 334 S.E.2d 308, 310 (Ga. 1985); *Fry v. Trump*, 681 F. Supp. 252, 255–56 (D.N.J. 1988); *Hausman v. Buckley*, 299 F.2d 696, 702 (2d Cir. 1962), *cert. denied*, 369 U.S. 885 (1962); *Labovitz v. Washington Times Corp.*, 900 F. Supp. 500, 503 (D.D.C. 1995), *McDermott Inc. v. Lewis*, 531 A.2d 206, 214–219 (Del. 1987); *Rosenmiller v. Bordes*, 607 A.2d 465, 468 (Del. Ch. 1991); 36 AM. JUR. 2D *Foreign Corporations* § 78 (2001).

13. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). *See also* RESTATEMENT § 302 cmts. b, e (1971). The rule “does not apply where the rights of third parties external to the corporation are at issue.” RESTATEMENT § 301; *Resolution Trust Corp. v. Camhi*, 861 F. Supp. 1121, 1126 (D. Conn. 1994). However, the rule nevertheless applies as far as limited liability is concerned, although this undoubtedly involves the rights of third parties external to the corporation. *But see* cases cited *infra* note 30. *See* Andrea G. Nadel, Annotation, *Personal Liability of Stockholder, Officer or Agent for Debt of Foreign Corporation Doing Business in the State*, 27 A.L.R.4th 387 (1984).

single jurisdiction, traditionally the corporate law of the State [sic] of its incorporation.”¹⁴

Contrary to the European perception of the American internal affairs rule as absolute, the Restatement calls for exceptions in unusual cases.¹⁵ Moreover, the Supreme Court has put emphasis not on the application of the internal affairs rule, but on its effect that only the law of one jurisdiction applies,¹⁶ thus leaving room for other choice of law rules that “except in the rarest of situations” have the same effect.¹⁷ In fact, courts have in some cases — even absent a special outreach statute — applied forum law to the internal affairs of foreign corporations.¹⁸

In *Mansfield Hardwood Lumber Company v. Johnson*, the U.S. Court of Appeals for the Fifth Circuit held that in spite of the internal affairs rule, the law of the forum should be applied in cases in which the only contact point with the incorporating state is the “naked fact of incorporation,” and neither the corporation’s charter nor the statutory law of the state of incorporation are applicable.¹⁹ In *Francis v. United Jersey Bank*, the

14. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90 (1987) (emphasis added). *Cf.* Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 814–15 (1971) (suggesting that cases decided by the Supreme Court in this area “appear to have been decided on the ground that the rights and obligations of members should be uniform regardless of their place of residence”). Delaware courts conclude that this must lead to the application of the internal affairs rule. *See Rosenmiller*, 607 A.2d at 468. However, this is not a cogent argument. As long as only the law of one jurisdiction applies, there is no danger of conflicting demands. Yet, like the U.S. Supreme Court, the Delaware Supreme Court made an exception for the “rarest situations.” *McDermott*, 531 A.2d. at 217.

15. *See Yates v. Bridge Trading Co.*, 844 S.W.2d 56, 61 (Mo. Ct. App. 1992).

16. The Delaware Supreme Court, however, does not make this fine distinction. *See supra* note 14.

17. For example, the real seat theory would meet this requirement because a company can only have one real seat. *See infra* text accompanying note 34. However, the counter-argument could be made that courts could entertain different opinions as to where the real seat actually is, whereas such differences could not exist as to the place of incorporation. Nevertheless, this problem could be solved by instituting procedural safeguards. *See infra* Part VI.C.2.

18. Norwood P. Beveridge, Jr., *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW. 693, 699–700 (1989).

19. *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317, 321. (5th Cir. 1959). The court noted, however, that this statement is *obiter dictum* and not necessary for the disposition of the case. *Id.* at 322. *See also* Note, *Conflict of Laws — Duty of Director of Foreign Corporation to Shareholder Held to*

New Jersey Supreme Court applied New Jersey law rather than New York law to determine directors' liability, because New Jersey had more significant relationships to the parties and transactions than New York, and the parties agreed that New Jersey law should apply.²⁰ The case was followed by a federal district court in New Jersey in *In re ORFA Securities Litigation*.²¹

These cases all involved directors' or officers' liability, which means that the presumption of the internal affairs rule can be overcome under certain circumstances,²² but the exceptions to the internal affairs rule are not limited to that fact pattern. In *Gries Sports Enterprises, Inc. v. Modell*, the Ohio Supreme Court applied Ohio law to a voting agreement between shareholders of a Delaware corporation.²³ In *Jefferson Industrial Bank v. First Golden Bancorporation*, the Colorado Court of Appeals applied Colorado law to a Delaware corporation with respect to the shareholders' rights to inspect the books of the corporation.²⁴ In *Greenspun v. Lindley*, a case involving a Massachusetts business trust, the New York Court of Appeals rejected in *dictum* any automatic application of the internal affairs doctrine in cases in which there were significant contacts

be Governed by Law of Forum when Corporate Activity Centers in Forum, 108 U. PA. L. REV. 742 (1960).

20. *Francis v. United Jersey Bank*, 432 A.2d 814, 820 (N.J. 1981). However, the trial court found no difference between New York and New Jersey law. *Francis v. United Jersey Bank*, 392 A.2d 1233, 1242 (N.J. Super. Ct. 1978).

21. *In re ORFA Sec. Litig.*, 654 F. Supp. 1449, 1455 (D.N.J. 1987).

22. In cases of directors' liability, "[t]he presumption associated with the internal affairs doctrine can be overcome: (1) if the expectations of the parties involved merit the application of other law; (2) in the name of 'certainty'; (3) if the 'ease in the determination and application of the law to be applied' justify the use of another jurisdiction's law." *Resolution Trust Corp. v. Gladstone*, 895 F. Supp. 356, 363 (D. Mass. 1995) (negative treatment indicated in *F.D.I.C. v. Schuchmann*, 235 F.3d 1217 (10th Cir. 2000)); *Resolution Trust Corp. v. Everhart*, 37 F.3d 151, 153–54 (4th Cir. 1994).

23. *Gries Sports Enterprises, Inc. v. Modell*, 473 N.E.2d 807, 811 (Ohio 1984) (Brown & Holmes, JJ., dissenting on grounds that majority mistakenly relied on notions of contract law, although corporate law was at issue). See RESTATEMENT § 305.

24. *Jefferson Industrial Bank v. First Golden Bancorporation*, 762 P.2d 768, 770 (Colo. App. 1988). The Colorado statute was not an outreach statute. It was applied on conflict of laws grounds with reference to RESTATEMENT § 304 cmt. d. *Id.* at 769. *Cf. infra* note 47.

with New York that called for the application of New York law.²⁵ The court expressly left open which law it would apply in such cases and what effect it would give to a choice of law agreement between the parties.²⁶ In the subsequent cases *Skolnik v. Rose* and *Rottenberg v. Pfeiffer*, the courts referred to this decision but held that the New York contacts were insufficient to warrant the application of New York law.²⁷ In *Norlin Corporation v. Rooney, Pace Inc.*,²⁸ the U.S. Court of Appeals for the Second Circuit could have pursued the *Greenspun* approach but instead applied New York law in the mistaken belief that a false conflict existed.²⁹ All these cases indicate that New York is open to making exceptions to the internal affairs rule.

All in all, under common law, the internal affairs rule is not cast in stone but leaves room for flexible solutions and exceptions. On the other hand, courts do not go so far as to deny a foreign company's corporate existence for lack of complying with the local rules of incorporation,³⁰ but rather apply the *lex incorporationis*, even under unusual circumstances.³¹

B. The Internal Affairs Rule, a Constitutional Requirement?

The extent to which the internal affairs rule is mandated by the U.S. Constitution is unclear.³² In *Edgar v. MITE* and *CTS*

25. *Greenspun v. Lindley*, 330 N.E.2d 79, 81 (N.Y. 1975).

26. *Id.*

27. *Skolnik v. Rose*, 434 N.E.2d 251, 252 (N.Y. 1975); *Rottenberg v. Pfeiffer*, 398 N.Y.S.2d 703 (App. Div. 1977).

28. *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 262–64 (2d Cir. 1984).

29. *McDermott Inc. v. Lewis*, 531 A.2d 206, 212–15 (Del. 1987); *Beveridge*, *supra* note 18, at 700.

30. After some uncertainty, the leading case is now *Demarest v. Grant*, 28 N.E. 645 (N.Y. 1891). *See also* *Medley Harwoods, Inc. v. Novy*, 346 So.2d 1224, 1226 (Fla. App. 1977); *National Ass'n of Credit Mgmt. v. Burke*, 645 P.2d 1323, 1325 (Colo. App. 1982); *Latty*, *supra* note 2, at 145–48. However, the corporate entity has been disregarded in older cases. *See, e.g.*, *Cleaton v. Emery*, 49 Mo. App. 345, 354–55, 1892 WL 1812 *5 (Mo. App. 1892); *Hill v. Beach*, 12 N.J. Eq. 31, 35–36, 1858 WL 4982, *5 (Ch. 1858). *See also* *Nadel*, *supra* note 13. For the non-recognition of corporate existence under the real seat theory, see *infra* Part V.A.

31. For further detail, see John P. Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 15–24 (1984).

32. For a comprehensive overview of the earlier constitutional ramifications, see Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 443–60 (1968).

Corp. v. Dynamics Corp. of America, the U.S. Supreme Court emphasized the importance of only one jurisdiction's law applying to the internal affairs of a corporation.³³ This objective is fully achieved by the internal affairs doctrine, but also by the "real seat theory,"³⁴ and one could even argue that as long as a *particular* internal affair is not subjected to two different laws, the objective is met.³⁵

In *McDermott Inc. v. Lewis*, the Delaware Supreme Court held that the Commerce Clause, the Full Faith and Credit Clause, and the Due Process Clause of the U.S. Constitution required the application of the internal affairs doctrine, but still left a loophole for the "rarest situations."³⁶ Yet the case is not binding precedent on this matter, because first, the Delaware Supreme Court does not have the authority of the U.S. Supreme Court on constitutional issues, and second, the case was moot.³⁷ Thus, absent an express U.S. Supreme Court decision, the constitutional question remains unclear.³⁸

Still, it is noteworthy that the system only works reasonably well in avoiding conflicting demands on corporations because all states uniformly apply the internal affairs rule.³⁹ If one state applied the real seat theory as its choice of law rule, a Delaware

33. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

34. The "real seat theory" applies the law of the state in which the company has its "real seat." See *infra* Part V.A. and *supra* note 17.

35. Horowitz, *supra* note 14, at 819 (explicitly recognizing that the "single law" principle does not mean that the U.S. Constitution mandated the internal affairs rule as the corporate choice of law rule).

36. *McDermott Inc. v. Lewis*, 531 A.2d. 206, 216–219 (Del. 1987).

37. See *Beveridge*, *supra* note 18, at 701, 709, 711.

38. For further discussion of the constitutional aspects, see *Beveridge*, *supra* note 18, at 701, 709–714; Terence L. Blackburn, *The Unification of Corporate Laws: The United States, the European Community and the Race to Laxity*, 3 GEO. MASON INDEP. L. REV. 1, 31–33 (1994); Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Qualification*, 59 MO. L. REV. 569 (1994); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29 (1987); Horowitz, *supra* note 14; Kozyris, *supra* note 31, at 30–35; Latty, *supra* note 2, at 162–66; Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1490–96 (2002) (offering constitutional explanations for the internal affairs doctrine).

39. Cf. Practising Law Institute, PLI Order No. A4–4398, Oct. 1992, International Commercial Agreements.

corporation having its headquarters in that state would be subject to the laws of two jurisdictions. Therefore, the corporate choice of law rules must have federal constitutional implications for practical reasons: it may be up to the states to decide on the choice of law rule, but this choice can only be exercised uniformly. Thus the states are “locked in,” save for the “rarest situations.” A strong argument can be made, however, that pseudo-foreign corporations, even if their number is not insignificant, present at least in a legal sense one of those rarest situations. The law expects that corporations have the “most significant relationship with their state of incorporation.”⁴⁰ If that expectation is frustrated, this constitutes in a legal sense “one of the rarest situations” or, in the words of the Restatement, the “unusual case” in which another state has a more significant relationship.⁴¹

C. Differences between Jurisdictions

Why do the choice of law rules matter? They matter because of the differences in substantive law. Most jurisdictions go beyond pure enabling statutes that allow corporate founders to essentially draft “their statute” by exercising options to waive and to alter legal provisions in their charter or their by-laws, and provide for a certain number of mandatory rules designed to protect specific classes of people.⁴²

These mandatory rules differ from jurisdiction to jurisdiction and include provisions on cumulative voting,⁴³ the voting of shares in the parent company owned by a subsidiary,⁴⁴ share-

40. RESTATEMENT § 302 shows that the decisive issue in determining the applicable law is the “most significant relationship” and presumes the most significant relationship to be with the state of incorporation.

41. *Id.* See also *infra* note 178.

42. Blackburn, *supra* note 38, at 9–14.

43. CAL. CORP. CODE § 708 (West 1990). See Kozyris, *supra* note 31, at 10 n.31. For a comparison of California and Delaware law in light of the California outreach statute, see Michael J. Halloran & Douglas L. Hammer, *Section 2115 of the New California General Corporation Law — The Application of California Corporation Law to Foreign Corporations*, 23 UCLA L. REV. 1282, 1295–1324 (1976). For a comparison of California, New York, and Delaware law in that respect, see J. Thomas Oldham, *California Regulates Pseudo-Foreign Corporations — Trampling Upon the Tramp?*, 17 SANTA CLARA L. REV. 85, 99–100 (1977).

44. See, e.g., *McDermott Inc. v. Lewis*, 531 A.2d. 206 (Del. 1987); *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 (2d Cir. 1984).

holders' liability for obligations to employees,⁴⁵ the procedure for removing directors,⁴⁶ the inspection of corporate records,⁴⁷ etc.⁴⁸ Unlike in Europe,⁴⁹ the requirement of a minimum capital is no longer an issue in the U.S.⁵⁰

D. Jurisdiction and Service of Process

Under U.S. law, jurisdiction is acquired by service of process, which is a prerequisite to the actual exercise of jurisdiction.⁵¹ Without such service of process, a court may have subject-matter jurisdiction but still lack personal jurisdiction.⁵²

Personal jurisdiction over a foreign corporation — once acquired by service of process — can be exercised only if the foreign corporation has “certain minimum contacts” with the forum state so “that the maintenance of the action does not offend traditional notions of fair play and substantial justice.”⁵³ The mere residence or presence of an officer or agent of the corporation in the forum state is not in itself sufficient.⁵⁴ Although constitutionally only minimum contacts are required, states are

45. *Joncas v. Krueger*, 213 N.W.2d 1, 2 (Wis. 1973).

46. *See Kozyris, supra* note 31, at 11 (discussing the Bendix and Martin Marietta takeover struggle).

47. *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922 (4th App. Dist. 1983); *Toklan Royalty Corp. v. Tiffany*, 141 P.2d 571, 573 (Okla. 1943). *See also* K. M. Potraker, Annotation, *Stockholder's Right to Inspect Books and Records of Foreign Corporation*, 19 A.L.R.3d 869 (1968). It should be noted, however, that many cases cited by Potraker, especially the older ones, have been decided on procedural grounds of (lacking) jurisdiction, not on conflict of laws grounds. *Id.* at 873–74.

48. *See Beveridge, supra* note 18, at 703–09; *Kozyris, supra* note 31, at 9.

49. *See infra* Part V.E.2.

50. *But see Cleaton v. Emery*, 49 Mo. App. 345, 349–53, 1892 WL 1812 *3–4 (1892).

51. *Napier v. Hawthorn Books, Inc.*, 449 F. Supp. 576, 579 (E.D. Mich. 1978).

52. *See* 62B AM. JUR. 2D *Process* § 4 (1990).

53. *See* 36 AM. JUR. 2D *Foreign Corporations* §§ 442, 448 (2001); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Napier*, 449 F. Supp. at 579. *See also* *Sternberg v. O'Neil*, 550 A.2d 1105, 1110 (Del. 1988) (Delaware having jurisdiction over an Ohio parent corporation of a Delaware subsidiary and jurisdiction over the non-resident directors of the subsidiary).

54. *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 122 (1927); 36 AM. JUR. 2D *Foreign Corporations* § 452 (2001).

free to require more than that.⁵⁵ In some states, therefore, the exercise of personal jurisdiction over a foreign corporation depends on whether the corporation “does business” in the forum state.⁵⁶ The factors that determine this question are whether the corporation has an office in the forum state, has solicited business there, or has bank accounts or employees in the state.⁵⁷

As to subject-matter jurisdiction, courts originally applied the internal affairs rule and did not exercise jurisdiction over the internal affairs of a foreign company.⁵⁸ The general rule today is that “a court will exercise jurisdiction over an action involving the internal affairs of a foreign corporation unless it is an inappropriate or an inconvenient forum for the trial of the action.”⁵⁹ This jurisdiction extends to removing the officers of a pseudo-foreign corporation or appointing receivers, the liquidation of the corporation, the inspection of its books,⁶⁰ and other measures.⁶¹

III. EFFECTS

As a result of the internal affairs rule, founders can choose the law they want to apply to their future corporation, and corporations can change the law that applies to them by reincorporating in another state. In other words, the internal affairs rule allows founders and corporations to “go shopping” for the law they think most suitable.

55. *Elliot v. U.S. Steel Export Co.*, 186 F. Supp. 57, 59 (E.D. Pa. 1960); 36 AM. JUR. 2D *Foreign Corporations* §§ 446, 451 (2001). The law of the forum state determines personal jurisdiction over a non-resident defendant. *Photoactive Prod., Inc. v. AL-OR Int'l Ltd.*, 99 F. Supp. 2d 281, 287 (E.D.N.Y. 2000).

56. *State ex rel. Weede v. Iowa S. Util. Corp. Co. of Del.*, 2 N.W.2d 372, 389 (Iowa 1942); *Simonson v. Int'l Bank*, 200 N.E.2d 427 (N.Y. 1964); 36 AM. JUR. 2D, *Foreign Corporations*, §§ 448, 451 (2001).

57. *Photoactive Prod.*, 99 F. Supp. 2d at 288; 36 AM. JUR. 2D *Foreign Corporations* § 451 (2001). For a differentiation between general and special jurisdiction, see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985); *Sternberg v. O'Neil*, 550 A.2d at 1117; *infra* note 98.

58. See *Beveridge*, *supra* note 18, at 696–97; *Latty*, *supra* note 2, at 144.

59. RESTATEMENT § 313; *State ex rel. Weede*, 2 N.W.2d at 390.

60. See *Potraker*, *supra* note 47.

61. *Latty*, *supra* note 2, at 144 nn.22–23 (citing, *inter alia*, *State ex rel. Wurdeman v. Reynolds*, 204 S.W. 1093 (Mo. 1918)). See also *State ex rel. Wurdeman*, 204 S.W. at 1096–97; *Aston v. O'Carrol*, 66 F. Supp. 585 (M.D. Pa. 1946); *Potter v. Victor Page Motor Corp.*, 300 F. 885, 887 (D. Conn. 1924).

A. Delaware Effect

The option to shop for corporate charters has created a competition for charters among the states — the so-called Delaware Effect. States profit from incorporations under their law and therefore try to attract re-incorporations by repeatedly adapting their laws.⁶² In Europe, the Delaware Effect is widely regarded with suspicion, and many commentators fear a “race to the bottom.”⁶³ In the U.S., there has been much debate on whether this effect is beneficial or detrimental to shareholders.⁶⁴ The debate focused mainly on re-incorporations initiated by management and not on the founders’ initial decision of where to incorporate, because only in the former case is it possible that management is trying to choose a law that favors itself over the shareholders.⁶⁵ The argument in support of the Delaware Effect was that decisions by management that decrease shareholder value would result in a takeover and that this would either discourage managerial opportunism or at least rectify the situation. Supported by empirical studies, the opinion that the Delaware Effect benefits shareholders seems to have prevailed in the U.S.⁶⁶ At the very least, it can be confidently said that the

62. See Kaplan, *supra* note 32, at 433–37; John Hugh Newman, *The Pseudo-Foreign Corporation in California*, 28 HASTINGS L.J. 119, 119 (1976). With respect to the California outreach statute, see Oldham, *supra* note 43, at 104–110. See also Hanno Merkt, *Das Europäische Gesellschaftsrecht und die Idee des “Wettbewerbs der Gesetzgeber in Europa”*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ], 59 (1995), 545 (549–554); Otto Sandrock, *Ein amerikanisches Lehrstück für das Kollisionsrecht der Kapitalgesellschaften*, RABELSZ 42 (1978), 227 (233–37).

63. See *infra* note 214.

64. See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (race to the bottom); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (race to the top). See also *Ligget Co. v. Lee*, 288 U.S. 517, 559 nn.36–37 (1933) (Brandeis, J., dissenting); Blackburn, *supra* note 38, at 57–59; Stephen J. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 VA. L. REV. 961 (2001); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U.L. REV. 913 (1982) (arguing that Delaware law is detrimental to shareholders).

65. See sources cited *supra* note 64.

66. See J. Mark Ramseyer, *Corporate Law*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 503, 505 (1998); Roberta Romano, *Competition for State Corporate Law*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 364, 367 (1998); Roberta Romano, *The State Compe-*

Delaware Effect does not produce devastating results for the economy.

B. Interests of Individual States

No matter what the choice of law rule is, the host state has an interest in obtaining information on the business activity of foreign corporations within its borders. A corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law,”⁶⁷ i.e., a legal fiction, needs to be identifiable and reachable. Third parties and the state must be able to find out where the corporation is incorporated,⁶⁸ who the directors are, who is authorized to contract on behalf of the corporation, etc. In the context of the internal affairs rule, this is also necessary in order to determine the applicable law. Another related point is that the forum state must be able to serve process on and exercise jurisdiction over a foreign corporation that does business within its borders.⁶⁹

The founders' or the corporation's freedom to choose the applicable law can lead to situations in which a court is confronted with a *lex incorporationis* applicable to the internal affairs of a foreign corporation that is contrary to the public policy of the forum state.⁷⁰ The question then arises whether the court nevertheless has to respect the internal affairs rule or whether it can disregard the foreign law and at least partially apply forum law.⁷¹

tion Debate in Corporate Law, 8 CARDOZO L. REV. 709 (1987). Cf. Merkt, *supra* note 62, at 547. For new tendencies, see generally Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001); William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997); Choi & Guzman, *supra* note 64.

67. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). See also *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839).

68. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40–41, 41 n.6, 41 nn.7–8 (Rehnquist, J., dissenting) (1974).

69. See *id.*

70. See, e.g., *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922, 925 (4th App. Dist. 1983) (public policy of California to allow inspection of books without “proper-purpose” restriction); *German-American Coffee Co. v. Diehl*, 109 N.E. 875, 877 (N.Y. 1915).

71. See Latty, *supra* note 2, at 160.

C. Pseudo-foreign Corporations

Another effect is the existence of so-called pseudo-foreign corporations,⁷² which exacerbates the problems described above. First, a state has an important interest in obtaining information on a foreign corporation that operates within its borders due to the need of making it identifiable and reachable both by its officials and third parties.⁷³ If the corporation is technically foreign, but essentially domestic, the state's interest is even greater because such a corporation affects the state's and its citizens' interests to the same extent as a domestic corporation. Thus, the host state will need to obtain the same information on this pseudo-foreign corporation that it has on domestic corporations. The state would, for example, want a pseudo-foreign corporation to publish annual account statements just like domestic corporations, whereas it might be content with truly foreign corporations only providing information on where they are incorporated, their charter, and the persons authorized to bind them.

Second, it might be justifiable for a host state to apply foreign law to a truly foreign corporation. But once the foreign corporation has its headquarters and all or most of its shareholders in the host state where it also conducts (almost) all of its business, it is not really a foreign corporation, but a pseudo-foreign corporation. States with less restrictive laws will still not mind applying foreign law, whereas a forum state whose laws pursue strong public policies will be more reluctant to apply foreign law to essentially domestic cases for several reasons.

First, incorporating in another state, although all significant contacts are within the forum state, could be considered a fraudulent circumvention of the laws of the forum state.⁷⁴ The

72. See *supra* note 2.

73. See *supra* Part III.B.

74. See Nadel, *supra* note 13, at 393–94. *But see* Case C–212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-1459, ¶ 27 (“That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.”); 2 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 775 (1935) (“It is no fraud or evasion of the laws of a State for its citizens, intending to act only in their own State, to form themselves into a corporation under the laws of another State.”); Nadel, *supra* note 13, at 394–96.

forum state could deny recognition to such an undertaking and either hold the pseudo-foreign corporation to be null and void⁷⁵ or superimpose its own law.⁷⁶

Second, applying forum law could be justified by a (constitutional) necessity to treat like cases alike, unless substantial differences require a different treatment.⁷⁷ The forum state could argue that, except for the mere fact of foreign incorporation, there are no substantial differences between a pseudo-foreign corporation and a domestic corporation that would justify a different treatment.⁷⁸ For example, the Iowa Supreme Court held in *State ex rel. Weede v. Iowa Southern Utilities Co.*:

It was conceived in Iowa, born in Delaware, and has lived its entire life in Iowa. The foreignness of such a corporation has been spoken of as but a "metaphysical concept." Its existence in Delaware is an illusory mirage, more atmospheric, than real. Under the circumstances it is, in actuality, more domestic than foreign.⁷⁹

Third, at close inspection, the Delaware Effect could prove undemocratic, because it generally gives the people of Delaware a say in matters of corporate law that is by no means proportional to their percentage of the U.S. population, nor to the voice they are meant to have by the U.S. Constitution.⁸⁰ Theo-

75. For example, disregard the corporate existence. See *Taylor v. Branham*, 17 So. 552, 554 (Fla. 1895); *Fritts v. Palmer*, 132 U.S. 282, 289 (1889); *Cleaton v. Emery*, 49 Mo. App. 345, 354–55, 1892 WL 1812 *5 (1892); *Hill v. Beach*, 12 N.J. Eq. 31, 35–36, 1858 WL 4982, *4 (Ch. 1858); 36 AM. JUR. 2D *Foreign Corporations* § 412 (2001). See also *supra* note 30 and *infra* Part V.A.

76. This is essentially an "outreach issue." See the common law exceptions to the internal affairs rule, *supra* Part II.A., and the outreach statutes, *infra* Part IV.B. See also *Latty*, *supra* note 2, at 150; *Sandrock*, *supra* note 62, at 248–50.

77. See U.S. CONST. amend. XIV, § 1 cl. 2; GRUNDGESETZ [German Constitution] art. 3.

78. State law often provides that foreign corporations do not enjoy greater privileges or more rights than domestic corporations. See, e.g., ALA. CODE § 10-2B-15.05(b) (1994); CONN. GEN. STAT. § 33-924(b) (1997); N.H. REV. STAT. ANN. § 293-A:15.05(b) (1999); N.Y. BUS. CORP. LAW § 1306 (McKinney's 1986 & Supp. 2002); WIS. STAT. ANN. § 180.1505(2) (2002). Cf. *Latty*, *supra* note 2, at 156.

79. *State ex rel. Weede v. Iowa S. Util. Corp. Co. of Del.*, 2 N.W.2d 372, 386 (Iowa 1942).

80. For instance, even if one takes into consideration that in the U.S. Senate the states are represented equally and not in proportion to their population, the U.S. Constitution still only grants each state 1/50 of the votes in the

retically, this is legitimate because Delaware law is only an option for out-of-state corporations and not mandatory. Moreover, corporate law and conflict of laws rules are state laws and Delaware merely exercises its right to legislate retained by it under the federal constitution.⁸¹ Yet, as a practical matter, this does not change the legal reality that Delaware's influence on corporate law is disproportionate, especially since the other states cannot simply change their choice of law rules due to the constitutional lock-in effect described above.⁸² On the other hand, all that it takes to "democratize" the Delaware Effect is a federal legislative or judicial endorsement of the internal affairs rule, which can be seen in the *Edgar* and *CTS* cases — precisely within the constitutional lock-in effect just mentioned. But this argumentation does not hold as far as pseudo-foreign corporations are concerned, because the application of the internal affairs rule to pseudo-foreign corporations essentially accepts foreign state legislation on domestic issues, (i.e., it lets the incorporating state interfere with the "internal affairs" of the host state).⁸³

If for these reasons the host state wants to apply its local laws to a pseudo-foreign corporation, it is especially important that the host state be able to exercise jurisdiction over such a pseudo-foreign corporation because the state of incorporation might not be willing to enforce local⁸⁴ public policy against its own law.⁸⁵

Senate. However, Delaware's inescapable influence on corporate law is far greater than that and is probably closer to 50%, if not even higher.

81. "Reserved Powers to States. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

82. See *supra* Part II.B. This distinguishes the internal affairs rule from other jurisdictional rules. Since corporations are not to be subjected to inconsistent demands, states seem to have to legislate uniformly on the corporate choice of law rules in order to avoid such inconsistencies. This means, for example, that states cannot "defend themselves" by legislating differently from the intruding state and adopting a real seat rule. This restriction does not apply in the case of other jurisdictional rules.

83. Cf. RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976).

84. I.e., foreign from the point of view of the state of incorporation.

85. This is not actually a "problem" in the case of a pseudo-foreign corporation. Such a corporation by definition has the most substantial contacts with the forum state that regards it as pseudo-foreign and that forum state, therefore, has jurisdiction. Yet, the question arises how a third state would treat

IV. DEALING WITH THE PROBLEMS

In sum, pseudo-foreign corporations and foreign corporations present issues of disclosure, the collision of laws of the host state and the state of incorporation, and procedure. The U.S. deals with these issues through state legislation, on the one hand, and federal constraints on such legislation on the other. The next section examines two types of state laws, qualification and outreach statutes, and discusses the federal or constitutional restraints on such statutes.

A. *Qualification Statutes*

1. Nature

Qualification statutes address the issues of disclosure and procedure. They require a foreign corporation to register with a state before doing business within that state, i.e., before doing "intrastate business" as opposed to "interstate business."⁸⁶

Registration means that the corporation has to provide the host state with certain information, and consent to its jurisdiction. Although the state laws differ in detail, a corporation generally has to state its name and state of incorporation,⁸⁷ file a certificate issued by its home jurisdiction evidencing its corporate existence,⁸⁸ and appoint an agent upon whom process may

such a corporation, i.e., would New York treat a Delaware corporation that does all its business in and has all its contacts with California according to Delaware or California law? A case like that could come up in the context of a derivative suit brought in New York by a New York shareholder relying on provisions of California law. The answer is not clear because there are no precedents. Since New York's own outreach statute would not apply, New York could turn to Delaware law and ignore the California outreach statute. On the other hand, since New York courts might want California courts to apply the New York outreach statute in the reverse case, they might be inclined to do the same for California. It could also be argued that, since no New York interests are involved, New York is bound by the Full Faith and Credit Clause to apply the California outreach statute. *Compare infra* Part IV.B.3.a., with sources cited *infra* note 168.

86. *See, e.g.*, CAL. CORP. CODE § 2105(a) (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8(b) § 371 (2001); N.Y. BUS. CORP. LAW § 1304(a) (McKinney's 1986 & Supp. 2002).

87. *See, e.g.*, CAL. CORP. CODE § 2105(a)(1) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1304 (a)(1)–(3) (McKinney's 1986 & Supp. 2002).

88. *See, e.g.*, DEL. CODE ANN. tit. 8(b)(1) § 371(b)(1) (2001); N.Y. BUS. CORP. LAW § 1304(b) (McKinney's 1986 & Supp. 2002).

be served and provide the agent's name and address.⁸⁹ It must also indicate the address of its principal place of business outside the state;⁹⁰ a recent statement of its assets and liabilities;⁹¹ the business it proposes to do;⁹² a statement that it is allowed to pursue that business in its home jurisdiction;⁹³ and, finally, pay a fee.⁹⁴ The information given must be updated either periodically through annual or biannual reports⁹⁵ or whenever a change occurs.⁹⁶

Concerning the procedural issue of service of process, the qualification statutes provide that a foreign corporation that wishes to qualify must designate an agent in the forum state upon whom process may be served.⁹⁷ Designation of an agent not only facilitates the actual service of process, but it also "subjects the foreign corporation to the general jurisdiction" of the host state in subject matters that the tenuous relation would otherwise not extend to.⁹⁸ If process cannot be served on this agent, (for example, if the agent has resigned or cannot be found at the address provided), process may be served on the

89. *See, e.g.*, CAL. CORP. CODE §§ 2105(a)(4), (b) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1304(a)(6)–(7), (b) (McKinney's 1986 & Supp. 2002); DEL. CODE ANN. tit. 8, § 371(b)–(b)(2)(i) (2001).

90. *See, e.g.*, CAL. CORP. CODE § 2105(a)(2) (West 1990 & Supp. 2002).

91. *See, e.g.*, DEL. CODE ANN. tit. 8, § 371(b)(2)(ii) (2001).

92. *See, e.g.*, DEL. CODE ANN. tit. 8, § 371(b)(2) (2001); N.Y. BUS. CORP. LAW § 1304(a)(4) (McKinney's 1986 & Supp. 2002).

93. *See, e.g.*, DEL. CODE ANN. tit. 8, § 371(b)(2)(iii) (2001); N.Y. BUS. CORP. LAW §§ 1304(a)(4), 1305 (McKinney's 1986 & Supp. 2002). The requirement that a foreign corporation is entitled to do the business proposed to do abroad in its home jurisdiction seems to stem from decisions holding foreign corporations null and void if they are expressly chartered to do business exclusively abroad and are not entitled to engage in business in the state of incorporation. *See* Bank of Augusta v. Earle, 38 U.S. 519, 587–88 (1839); Land Grant Ry. & Trust Co. v. Board Comm'rs Coffey County, 6 Kan. 245 (1870). *See also supra* note 30.

94. *See, e.g.*, CAL. CORP. CODE § 2106(a) (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 371(b) (2001).

95. *See, e.g.*, CAL. CORP. CODE § 2117 (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 374 (2001).

96. *See, e.g.*, CAL. CORP. CODE § 2117(c) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW §§ 1308, 1309, 1309–A (McKinney's 1986 & Supp. 2002).

97. *See supra* note 89.

98. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 892 (1988). For the difference between "general" and "specific" jurisdiction, see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); Sternberg v. O'Neil, 550 A.2d 1105, 1117 (Del. 1988). *See also supra* note 57.

Secretary of State.⁹⁹ In the case of a foreign corporation that has failed to qualify despite an obligation to do so, process may be served on the Secretary of State as well.¹⁰⁰ The qualification statute thus facilitates the task both of prospective plaintiffs and the courts. First, the need for qualification and qualification itself demonstrate the existence of the “minimum contacts” of the foreign corporation with the forum required for the exercise of jurisdiction.¹⁰¹ Second, plaintiffs and courts are provided with a practical means of actually acquiring jurisdiction through an effective method of serving process that cannot be evaded by the corporation.¹⁰² Third, the statement required of a foreign corporation does not only include the name and address of the agent upon whom process may be served, but also provides plaintiffs and courts with information concerning the place of incorporation, and thus the applicable law according to the internal affairs rule, which can be important in determining who has authority to act for the defendant foreign corporation. Moreover, it enables them to obtain more information on the corporation in its state of incorporation.

The sanctions for failure to qualify differ. In general, even though contracts are valid, the corporation cannot maintain an action in state courts,¹⁰³ and the state has the right to enjoin the corporation from doing business in the state and to impose penalties.¹⁰⁴ But the sanctions can be more drastic as well. For

99. *See, e.g.*, CAL. CORP. CODE §§ 2105(a)(5)(A), 2111 (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 376(b) (2001); N.Y. BUS. CORP. LAW § 1304(a)(6)–(7) (McKinney’s 1986 & Supp. 2002).

100. *See, e.g.*, CAL. CORP. CODE §§ 2111, 2203 (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 382(a) (2001); N.Y. BUS. CORP. LAW § 307(a) (McKinney’s 1986 & Supp. 2002).

101. *See supra* Part II.D.

102. A defendant foreign corporation that has transacted business in the forum state cannot escape service of process by either withdrawing from the state, CAL. CORP. CODE § 2112(a)(4) (West 1990 & Supp. 2002), DEL. CODE ANN. tit. 8, § 381 (2001), N.Y. BUS. CORP. LAW § 1310(a)(5) (McKinney’s 1986 & Supp. 2002), or by having failed to qualify at all, *see supra* note 100.

103. At least until it has qualified and paid outstanding fines and taxes. *See, e.g.*, CAL. CORP. CODE § 2203(c) (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, § 383 (2001); N.Y. BUS. CORP. LAW § 1312(a) (McKinney’s 1986 & Supp. 2002).

104. *See, e.g.*, REVISED MODEL BUS. CORP. ACT § 15.02 (1999); CAL. CORP. CODE § 2203 (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, §§ 378, 383–84 (2001); N.Y. BUS. CORP. LAW § 1312(a) (McKinney’s 1986 & Supp. 2002).

example, in Alabama, contracts concluded by non-qualified foreign corporations are unenforceable.¹⁰⁵ Failure to qualify does not enable a corporation to escape service of process.¹⁰⁶

But qualification also has advantages for the foreign corporation. In return, they receive not only the authorization to transact intrastate business, but also equal treatment in comparison to domestic corporations.¹⁰⁷

2. Applicability and Exceptions

The applicability of qualification statutes is determined by the question of whether the foreign corporation “does business” in the forum state. “Doing business” seems to be a very broad term, yet in this context it requires more than it does for the purpose of establishing jurisdiction.¹⁰⁸

The first test is whether the corporation does intrastate as opposed to interstate business. California limits the application of its statute by explicitly forbidding foreign corporations from doing “intrastate business” without having qualified first.¹⁰⁹ The Revised Model Business Corporation Act and the statutes

105. ALA. CODE § 10-2B-15.02 (1994).

106. *See, e.g.*, DEL. CODE ANN. tit. 8, § 382(a) (2001). *See also supra* note 100.

107. *See* N.Y. BUS. CORP. LAW § 1306 (McKinney’s 1986 & Supp. 2002) (granting foreign corporations the powers accorded to them by their state of incorporation, but no greater powers than domestic corporations). *See supra* note 78 and *infra* Part IV.A.3.

108. *See, e.g.*, CAL. CORP. CODE § 191(a) (West 1990 & Supp. 2002); DEL. CODE ANN. tit. 8, §§ 373(b), 382(b) (2001); N.Y. BUS. CORP. LAW § 1301(c) (McKinney’s 1986 & Supp. 2002). For a detailed analysis of the “doing business” criterion, see JONATHAN R. MACEY, MACEY ON CORPORATION LAWS § 8.01 [D] (Aspen Law & Business 2002 & Supp. 2001–2002). *See also* W.J. Dunn, Annotation, *What Constitutes Doing Business Within State by a Foreign Magazine, Newspaper, or Other Publishing Corporation, for Purposes other than Taxation*, 38 A.L.R.2d 747 (1954); E.H. Schopler, Annotation, *Leasing of Real Estate by Foreign Corporation, as Lessor or Lessee, as Doing Business within State within Statutes Prescribing Conditions of Right to do Business*, 59 A.L.R.2d 1131 (1958); R.F. Cox, Annotation, *Holding Directors’, Officers’, Stockholders’, or Sales Meetings or Conventions in a State by Foreign Corporation as Doing Business or Otherwise Subjecting it to Service of Process and Suit*, 84 A.L.R.2d 412 (1962); Annotation, *Construction Work by Foreign Corporation as Doing Business for the Purposes of Statute Requiring Foreign Corporation to Qualify as Condition of Access to Local Courts*, 90 A.L.R.3d 937 (1979).

109. CAL. CORP. CODE § 2105(a) (West 1990 & Supp. 2002).

of New York and Delaware do the same. They forbid foreign corporations from doing business “in this state,”¹¹⁰ and Delaware¹¹¹ and California¹¹² make an express exception if the corporation’s business operations in the state “are wholly interstate in character.” The constitutional underpinnings of the interstate/intrastate distinction will be discussed in the next section.¹¹³

Even if it can be established that the business activities conducted within the host state are intrastate in character and sufficient to allow the exercise of jurisdiction, it does not follow that they necessarily constitute “doing business” for purposes of the qualification statutes. The state statutes expressly exclude certain activities from the determination process such as maintaining or defending an action,¹¹⁴ activities concerning internal affairs (e.g., holding directors’ or shareholders’ meetings),¹¹⁵ maintaining bank accounts,¹¹⁶ and certain activities related to

110. REVISED MODEL BUS. CORP. ACT § 15.02(a) (1999); DEL. CODE ANN. tit. 8, §§ 371(b), 373(a)(4) (2001); N.Y. BUS. CORP. LAW § 1301(a) (McKinney’s 1986 & Supp. 2002).

111. DEL. CODE ANN. tit. 8, § 373(a)(4) (2001). The wording of this provision indicates that §§ 373(a)(1)–(3) are subcategories of the “wholly interstate in character” test. These subcategories seem to be derived from case law. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Wallace Constr. Co. v. Industrial Boiler Co., 470 So.2d 1151, 1152 (Ala. 1985); Detsch & Co. v. Calbar, Inc., 39 Cal. Rptr. 626, 633 (Cal. Dist. Ct. App. 1964). The same is true for the exemption of insurance companies DEL. CODE ANN. tit. 8, § 373(a)(5) (2001) since the U.S. Supreme Court has held the sale of insurance is commerce of interstate nature. *See* United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 539 (1944); Legion Ins. Co. v. Garner Ins. Agency, 991 F.Supp. 1326, 1330 (M.D. Ala. 1997). The loaning of money is also not an interstate transaction since money is not a commodity of bargain, *Contel Credit Corp. v. Tiger, Inc.*, 520 N.E.2d 1385, 1386 (Ohio Ct. App. 1987). This is consistent with the denial of banking powers to foreign corporations. DEL. CODE ANN. tit. 8, § 379 (2001).

112. CAL. CORP. CODE § 191(a) (West 1990 & Supp. 2002) (“other than interstate or foreign commerce . . .”).

113. *See infra* Part IV.A.3.

114. *See, e.g.*, CAL. CORP. CODE § 191(c)(1) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1301(b)(1) (McKinney’s 1986 & Supp. 2002).

115. CAL. CORP. CODE § 191(c)(2) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1301(b)(2) (McKinney’s 1986 & Supp. 2002).

116. CAL. CORP. CODE § 191(c)(3) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1301(b)(3) (McKinney’s 1986 & Supp. 2002).

the corporation's securities.¹¹⁷ California law further provides that effecting sales through independent contractors,¹¹⁸ soliciting and procuring orders that require acceptance outside the state,¹¹⁹ pledging real or personal property as security,¹²⁰ isolated transactions, and intrastate activities carried out by a subsidiary¹²¹ do not constitute intrastate business.¹²²

3. Constitutionality of Qualification Statutes

Qualification statutes are generally held to be constitutional. This dates back to the notion articulated in *Bank of Augusta v. Earle*¹²³ and *Paul v. Virginia*¹²⁴ that, although corporations may very well have legal personality, they are nevertheless not citizens of the United States for purposes of the Privileges and Immunities Clause.¹²⁵ As creations of only the chartering state, they have no legal existence outside their state of incorporation and are recognized only through comity.¹²⁶ Thus, if other states are therefore free to exclude them completely from entering their territory, they are also free to admit them under conditions.¹²⁷

117. CAL. CORP. CODE § 191(c)(4) (West 1990 & Supp. 2002); N.Y. BUS. CORP. LAW § 1301(b)(4) (McKinney's 1986 & Supp. 2002).

118. CAL. CORP. CODE § 191(c)(5) (West 1990 & Supp. 2002).

119. CAL. CORP. CODE § 191(c)(6) (West 1990 & Supp. 2002).

120. CAL. CORP. CODE § 191(c)(7) (West 1990 & Supp. 2002). *See also* DEL. CODE ANN. tit. 8, §§ 373 (a)(6)–(7) (2001).

121. CAL. CORP. CODE § 191(b) (West 1990 & Supp. 2002).

122. CAL. CORP. CODE § 191(c)(8) (West 1990 & Supp. 2002). For additional exceptions for foreign lending institutions see CAL. CORP. CODE § 191(d) (West 1990 & Supp. 2002).

123. *Bank of Augusta v. Earle*, 38 U.S. 519, 586 (1839).

124. *Paul v. Virginia*, 75 U.S. 168, 177–78 (1868).

125. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, § 2, cl. 1.

126. *Bank of Augusta*, 38 U.S. at 589.

127. *Hooper v. California*, 155 U.S. 648, 652 (1895); *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 314 (1892); *In re Trust Estate of Willard Saulsbury, Deceased*, 233 A.2d 739, 744 (Del. Ch. 1967); *German-American Coffee Co. v. Diehl*, 109 N.E. 875, 877 (N.Y. 1915); *Great N. Ry. Co. v. State* (two cases), 267 P. 506, 509–10 (Wash. 1928). This includes posing the condition to reincorporate locally. *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 440, 444 (1931); *Beveridge*, *supra* note 18, at 702. *See also* *Bungert*, *supra* note 38, at 606–609. This argument is not available in the EC. *See infra* text accompanying notes 332 & 351.

Qualification statutes are also held to be constitutional under the Commerce Clause.¹²⁸ The only relevant question in this context seems to be whether the foreign corporation is actually involved in *intrastate* commerce.¹²⁹ If that is the case, the qualification statutes can constitutionally be applied, if not, (i.e., if the foreign corporation is engaged solely in *interstate* business), the application is in violation of the Commerce Clause.¹³⁰ This distinction is reflected by state statutes that expressly exempt foreign corporations engaged in interstate commerce,¹³¹ thus avoiding unconstitutionality under the Commerce Clause.

Yet, the new balancing test in Commerce Clause cases, as stated in *Pike v. Bruce Church, Inc.*¹³² — according to which a statute will be upheld if it “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden . . . on such commerce is clearly excessive in relation to the putative local benefits” — casts doubt on the continuous validity of this seemingly all or nothing approach. It seems that even if the foreign corporation does *intrastate* business, a state qualification statute could be held unconstitutional under the Commerce Clause. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the U.S. Supreme Court struck down an Ohio statute that tolled a statute of limitations defense, amongst others, for unqualified for-

128. “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3; *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 899 (1988) (Rehnquist, J., dissenting); *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944); *Sternberg v. O’Neil*, 550 A.2d 1105, 1114 (Del. 1988). See also Bungert, *supra* note 38, at 609–611. See generally Horowitz, *supra* note 14.

129. This seems to be the relevant question in almost every case. See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 22–24 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961); *Union Brokerage Co.*, 322 U.S. at 202; *Wallace Constr. Co. v. Industrial Boiler Co.*, 470 So. 2d 1151, 1152 (Ala. 1985); cases cited *infra* note 130.

130. *Allenberg Cotton Co.*, 419 U.S. at 32; *Crutcher v. Kentucky*, 141 U.S. 47 (1891); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921); *Eli Lilly*, 366 U.S. at 279; *Great N. Ry. Co.*, 267 P. at 509; *Int’l Textbook Co. v. Pigg*, 217 U.S. 91, 111–12 (1910); *Vest v. Night Commander Lighting Co.*, 139 So. 295 (Ala. Ct. App. 1931). But see *Allenberg Cotton Co.*, 419 U.S. at 37 (Rehnquist, J., dissenting).

131. See *supra* Part IV.A.2. and note 111.

132. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

foreign corporations.¹³³ The court held that state interests “legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny” and considered the burden imposed on interstate commerce to be unjustified by Ohio interests.¹³⁴ This has led the Delaware Supreme Court, in *Sternberg v. O’Neil*, to declare that “it is clear that any statute which causes a foreign corporation to register and thereby consent to the general jurisdiction of a state, or in the absence of that registration and consent, to be subjected to regulations that are inconsistent with those for domestic corporations, is a burden that violates the federal commerce clause.”¹³⁵ This understanding of *Bendix* would, however, render all qualification statutes unconstitutional, and the Delaware Supreme Court continued to distinguish *Bendix* on the grounds that the Delaware qualification statute, as opposed to the Ohio tolling statute, was not “coercive” and therefore valid.¹³⁶ Yet, the essential difference between the cases cannot be the question of “coercive penalties” since the burden on interstate commerce is to be measured by the costs of compliance with the statutes, not by the sanctions for non-compliance.¹³⁷ *Bendix* can be explained as a case not involving qualification, but rather a question of substantive law that openly discriminated against all foreign corporations, even where the discrimination served no purpose, since these companies were already subject to Ohio jurisdiction and could be reached.¹³⁸ Thus *Bendix* does not overrule all pre-

133. 486 U.S. 888.

134. *Id.* at 894.

135. *Sternberg v. O’Neil*, 550 A.2d 1105, 1113 (Del. 1988).

136. *Id.* at 1114. Especially since the Delaware statute (like other state statutes, see, for example, *supra* note 103) applies only until the foreign corporation has qualified, thus allowing it to correct its mistake and gain access to the state courts.

137. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 42 (Rehnquist, J., dissenting) (interpreting the Court’s decisions in *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 282–283 (1961); *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 282 U.S. 440, 444 (1931)). This is especially important for states that impose harsher sanctions for failure to qualify than denial of access to state courts (e.g., Alabama).

138. See *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 898 (Scalia, J., dissenting). Moreover, for the purpose of the statute it would be sufficient to require that foreign corporations subject themselves to the specific jurisdiction of Ohio, yet the statute goes beyond that and forces them to consent to general jurisdiction. See also the opinion by Chief Justice

vious cases that have recognized the states' right to demand qualification.

In sum, a state may require a foreign corporation to qualify when it engages in intrastate commerce.¹³⁹ If the foreign corporation is engaged in both intrastate and interstate commerce, the state may require qualification, but impose sanctions only with respect to the intrastate aspect of the business.¹⁴⁰ However, the most difficult question remains to be solved. When is a foreign corporation engaged in interstate commerce and when in intrastate commerce?

The courts repeat that this question must be determined on the individual facts of each case.¹⁴¹ But there are some guidelines. First, the mere fact that a foreign corporation acts in another state does not make that transaction "interstate."¹⁴² Second, the state statutes have tried to reproduce the case law; in particular, Delaware's exceptions to the requirement of qualification are mainly based on the interstate/intrastate distinction as drawn by the courts.¹⁴³ Third, as a general rule all transactions that involve the shipment of goods over state borders, plus the transactions incidental and essential thereto, are in interstate commerce.¹⁴⁴ Fourth, a foreign corporation's business is

Rehnquist in this case (at 899), dissenting on the ground that the contract was in fact an intrastate contract and that Ohio in that case would have been entitled to apply its tolling statute.

139. *Eli Lilly*, 366 U.S. at 279; *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210 (1944).

140. *Eli Lilly*, 366 U.S. at 282–283; *Furst & Thomas v. Brewster*, 282 U.S. 493, 498 (1931); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 203 (1914); *Union Brokerage Co. v. Jensen*, supra note 128, at 211. Cf. *Bendix Autolite*, 486 U.S. at 899 (Rehnquist, J., dissenting).

141. *Contel Credit Corp. v. Tiger, Inc.*, 520 N.E.2d 1385, 1386 (Ohio Ct. App. 1987); *Green Tree Acceptance, Inc. v. Blalock*, 525 So.2d 1366, 1370 (Ala. 1988); *Stewart Machine and Engineering Co. v. Checkers Drive In Restaurants of North America, Inc.*, 575 So.2d 1072, 1074 (Ala. 1991); *Puffer Mfg. Co. v. Kelly*, 73 So. 403 (Ala. 1916); *Wallace Constr. Co. v. Industrial Boiler Co.*, 470 So.2d 1151, 1152 (Ala. 1985).

142. But compare the solution in the European Community, *infra* Part VI.B. See also notes 127, 331, 332 and 351.

143. See *supra* Part IV.A.2. and notes 111 and 131.

144. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974). See *Wallace Constr. Co.*, 470 So.2d at 1153–1154; *Contel Credit Corp.*, 520 N.E.2d at 1386; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921); *York Mfg. Co. v. Colley*, 247 U.S. 21 (1918) (distinguishing *Gen. Ry. Signal & Co. v. Virginia*, 246 U.S. 500 (1918)).

intrastate when it has entered the state through its agents and carries on a substantial part of its usual business in the state.¹⁴⁵ Thus, if the above-mentioned requirements are met, qualification statutes are constitutional.¹⁴⁶

B. Outreach Statutes

Outreach statutes are the legislative pendants to the “unusual circumstances” exception to the internal affairs rule. They apply the substantive law of the forum state to foreign corporations if certain conditions are met.¹⁴⁷

1. Content

The New York outreach statute subjects foreign corporations to provisions of substantive New York law regarding the right to inspect the record of shareholders,¹⁴⁸ the filing of a record of voting trusts,¹⁴⁹ the liability of directors and officers,¹⁵⁰ the li-

145. *Contel Credit Corp.*, 520 N.E.2d at 1386; *Georgia Lumber & Veneer Corp. v. Solem Machine Co.*, 150 F. Supp. 126, 131 (Ga. Dist. Ct. 1957); *Legion Ins. Co. v. Garner Ins. Agency, Inc.*, 991 F. Supp. 1326, 1330 (M.D. Ala. 1997); *Redwine v. United States Tobacco Co.*, 75 S.E.2d 556, 558 (Ga. 1953).

146. For questions of constitutionality under the Equal Protection Clause, see Bungert, *supra* note 38, at 627–629, 662–663. On constitutionality with respect to foreign corporation law, see generally William Laurens Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C. L. REV. 733 (1969); John J. Stenger & William B. Gwyn, *Foreign Corporations in North Carolina: The “Doing Business” Standards of Qualification, Taxation, and Jurisdiction*, 16 WAKE FOREST L. REV. 711, 715–20 (1980).

147. For these conditions, see *infra* Part IV.B.2.

148. N.Y. BUS. CORP. LAW § 1315 (McKinney’s 1986 & Supp. 2002). The statute was held to be constitutional in *Sadler v. NCR Corp.*, 928 F.2d 48, 53 (2d Cir. 1991). See also Potraker, *supra* note 47, at 881–85.

149. N.Y. BUS. CORP. LAW § 1316 (McKinney’s 1986 & Supp. 2002).

150. *Id.* § 1317.

Liabilities of directors and officers of foreign corporations.

(a) Except as otherwise provided in this chapter, the directors and officers of a foreign corporation doing business in this state are subject, to the same extent as directors and officers of a domestic corporation, to the provisions of:

- (1) Section 719 (Liability of directors in certain cases) except subparagraph (a)(3) thereof, and
- (2) Section 720 (Action against directors and officers for misconduct.)

ability of a foreign corporation for failure to disclose required information,¹⁵¹ etc.¹⁵²

(b) Any liability imposed by paragraph (a) may be enforced in, and such relief granted by, the courts in this state, in the same manner as in the case of a domestic corporation.

Id.

151. *Id.* § 1318.

Liability of foreign corporations for failure to disclose required information

(a) A foreign corporation doing business in this state shall, in the same manner as a domestic corporation, disclose to its shareholders of record who are residents of this state the information required under paragraph (c) of section 510 (Dividends or other distributions in cash or property), paragraphs (f) and (g) of section 511 (Share distributions and changes), paragraph (d) of section 515 (Reacquired shares), paragraph (c) of section 516 (Reduction of stated capital in certain cases), and shall be liable as provided in section 520 (Liability for failure to disclose required information) for failure to comply in good faith with these requirements.

Id.

152. *Id.* § 1319.

Applicability of other provisions

(a) [T]he following provisions, to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders:

(1) Section 623 (Procedure to enforce shareholder's right to receive payment for shares).

(2) Section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor).

(3) Section 627 (Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor).

(4) Sections 721 (Exclusivity of statutory provisions for indemnification of directors and officers) through 727 (Insurance for indemnification of directors and officers), inclusive.

(5) Section 808 (Reorganization under act of congress).

(6) Section 907 (Merger or consolidation of domestic and foreign corporations).

Id. For earlier developments in New York law and constitutional implications see Donald L. Block Baraf, *The Foreign Corporation — A Problem in Choice of Law Doctrine*, 33 BROOK. L. REV. 219 (1967).

California has the broadest outreach statute, which subjects foreign corporations to a multitude of provisions of its substantive law. Section 2115 of the California Corporations Code provides:¹⁵³

(a) A foreign corporation (. . . including a foreign parent corporation even though it does not itself transact intrastate business) is subject to the requirements of subdivision (b) commencing on the date specified in subdivision (d) and continuing until the date specified in subdivision (e) if:¹⁵⁴

. . . .

(b) Except as provided in subdivision (c), the following chapters and sections of this division shall apply to a foreign corporation as defined in subdivision (a) (to the exclusion of the law of the jurisdiction in which it is incorporated):

. . . .

Section 301 (annual election of directors);

Section 303 (removal of directors without cause);

Section 304 (removal of directors by court proceedings);

Section 305, subdivision (c) (filling of director vacancies where less than a majority in office elected by shareholders);

Section 309 (directors' standard of care);

Section 316 (. . . liability of directors for unlawful distributions);

Section 317 (indemnification of directors, officers, and others);

Sections 500 to 505, inclusive (limitations on corporate distributions in cash or property);

Section 506 (liability of shareholder who receives unlawful distribution);

Section 600, subdivisions (b) and (c) (requirement for annual shareholders' meeting and remedy if same not timely held);

153. For a comparison of California and Delaware law with respect to CAL. CORP. CODE § 2115, see Halloran & Hammer, *supra* note 43, at 1295–1324; Newman, *supra* note 62, at 132.

154. See *infra* Part IV.B.2.

Section 708, subdivisions (a), (b), and (c) (shareholder's right to cumulate votes at any election of directors);

Section 710 (supermajority vote requirement);

Section 1001, subdivision (d) (limitations on sale of assets);

Section 1101 (. . . limitations on mergers);

Chapter 12 (. . . reorganizations);

Chapter 13 (. . . dissenters' rights);

Sections 1500 and 1501 (records and reports);

Section 1508 (action by Attorney General);

Chapter 16 (. . . rights of inspection).

. . . .

(f) Any foreign corporation that is subject to the requirements of subdivision (b) shall advise any shareholder of record, any officer, director, employee, or other agent . . . and any creditor of the corporation in writing, within 30 days of receipt of written request for that information, whether or not it is subject to subdivision (b) at the time the request is received. . . .

New York and California are not the only states that subject foreign corporations under certain conditions to provisions of their own law. Other states have or had similar statutes.¹⁵⁵

155. See *Yates v. Bridge Trading Co.*, 844 S.W.2d 56 (Mo. Ct. App. 1992) (parties chose Missouri law on issuance of stock applied to Delaware corporation); *Joncas v. Krueger*, 213 N.W.2d 1 (Wis. 1974) (Wisconsin: shareholders of domestic and foreign corporations liable for wages); *Toklan Royalty Corporation v. Tiffany*, 141 P.2d 571, 573 (Okla. 1943) (Oklahoma: forum law on inspection of books and records applied to Delaware corporation). See also *Thomas v. Mathiessen*, 232 U.S. 221 (1914) (California: unlimited liability of shareholders applied to New York shareholder of Arizona corporation); *Pinney v. Nelson*, 183 U.S. 144 (1901) (unlimited liability of shareholders applied to California shareholder of Colorado corporation); *Armstrong v. Dyer*, 198 N.E. 551 (N.Y. 1935) (law making shareholders liable for wages does not apply to foreign corporations); *Provident Gold Mining Co. v. Haynes*, 159 P. 155 (Cal. 1916) (shareholder liability); *German-American Coffee Co. v. Diehl*, 109 N.E. 875, 877 (N.Y. 1915) (New York: liability of directors of foreign corporations for unlawful distributions); *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922 (4th App. Dist. 1983) (California: forum law on inspection of corporate records applied over Delaware law).

2. Applicability and Exceptions

These outreach statutes do not apply under all circumstances. First, they are limited to specific issues of substantive law and do not substitute the foreign law completely for the forum law. Second, they do not apply to all foreign corporations, but only to such foreign corporations that have substantial contacts with the forum state. Third, certain corporations are generally exempted from their application.

The California statute tries to assure that it only applies to corporations that do not have any (more) significant contacts with other states. Section 2115(a)(1) of the California Corporate Code provides:

(1) the average of the property factor, the payroll factor, and the sales factor . . . with respect to it is more than 50 percent during its latest full income year and

(2) more than one-half of its outstanding voting securities are held of record by persons having addresses in this state appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year. . . .¹⁵⁶

Thus, even if other states were to adopt the same rule, corporations would not be subjected to inconsistent regulations because only one state at a time could have the necessary contacts with the foreign corporation. However, different methods of calculation might still lead to a situation where the laws of two states apply. That risk is reduced to some extent by incorporating the calculation method into the outreach statute,¹⁵⁷ but, since reference is made to external (tax) laws, it is not completely eliminated. Yet, that is not the point. It is unrealistic to believe that other states would actually adopt the exact same rule. The whole idea of hypothetically asking what would happen if other states were to adopt the exact same rule,¹⁵⁸ can only be explained as a test to determine whether the state made enough of an effort to avoid inconsistencies. This will reduce

156. CAL. CORP. CODE § 2115(a)(1) (West 1990 & Supp. 2002). See also Haloran & Hammer, *supra* note 43, at 1284–88.

157. See CAL. CORP. CODE § 2115(b)(2) (West 1990 & Supp. 2002).

158. This test was used in *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 860 (1st App. Div. 1982).

inconsistencies to a great extent as a practical matter, but will not exclude their theoretical possibility.¹⁵⁹

The California outreach statute further provides a time frame stating when the substantive law provisions begin to apply once the necessary contacts are established and when they cease to apply after the company no longer fulfills the criteria.¹⁶⁰ Foreign corporations listed on a national securities exchange are generally exempted.¹⁶¹

New York law takes a similar approach and (partially) exempts foreign corporations from the application of its outreach provisions if the corporation is listed on a national security exchange or if less than one half of the corporation's taxable income is allocable to New York.¹⁶²

159. *Id.* Cf. *infra* text accompanying note 177.

160. CAL. CORP. CODE § 2115(d), (e) (West 1990 & Supp. 2002).

[(d)] For purposes of subdivision (a), the requirements of subdivision (b) shall become applicable to a foreign corporation only upon the first day of the first income year of the corporation (i) commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in subdivision (a) have been met or (ii) commencing on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met.

[(e)] For purposes of subdivision (a), the requirements of subdivision (b) shall cease to be applicable to a foreign corporation (i) at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests referred to in subdivision (a) is not met or (ii) at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that one of those tests is not met, provided that a contrary order has not been entered before the end of the income year.

Id.

161. CAL. CORP. CODE § 2115(c) (West 1990 & Supp. 2002).

(c) This section does not apply to any corporation (1) with outstanding securities listed on the New York Stock Exchange or the American Stock Exchange, or (2) with outstanding securities designated as qualified for trading on the Nasdaq National Market (or any successor thereto) of the Nasdaq Stock Market operated by the Nasdaq Stock Market Inc., or (3) if all of its voting shares (other than directors' qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to this section.

Id.

162. N.Y. BUS. CORP. LAW § 1320 (McKinney's 1986 & Supp. 2002).

3. Constitutionality

Outreach statutes are held to be constitutional — no court seems to have questioned the concept of outreach statutes *per se* and the individual statutes have generally been upheld against constitutional challenges.¹⁶³ The positive justification again is that outreach statutes can be imposed on the corporation as a condition of doing business in the host state.¹⁶⁴

Exemption from certain provisions.

(a) Notwithstanding any other provision of this chapter, a foreign corporation doing business in this state which is authorized under this article, its directors, officers and shareholders, shall be exempt from the provisions of paragraph (e) of section 1316 (Voting trust records), subparagraph (a)(1) of section 1317 (Liabilities of directors and officers of foreign corporations), section 1318 (liability of foreign corporations for failure to disclose required information) and subparagraph (a)(4) of section 1319 (Applicability of other provisions) if when such provision would otherwise apply:

- (1) Shares of such corporation were listed on a national securities exchange, or
- (2) Less than one-half of the total of its business income for the preceding three fiscal years, or such portion thereof as the foreign corporation was in existence, was allocable to this state for franchise tax purposes under the tax law.

Id.

163. See *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991); *Beveridge*, *supra* note 18, at 703–15 (discussing the constitutional issues). But see the *Arden-Mayfair, Inc.* conflict where apparently in 1978 a California court filed findings of fact and conclusions of law holding the California outreach statute to be unconstitutional. However, the case was settled in 1979, and in 1982 the California statute was explicitly upheld by the California Court of Appeal in *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852 (1st App. Div. 1982); *Beveridge*, *supra* note 18, at 706 n.63.

164. See *supra* IV.A.3.; *Pinney v. Nelson*, 183 U.S. 144 (1901); *Joncas v. Krueger*, 213 N.W.2d 1, 4 (Wis. 1974) (shareholder liability); *German-American Coffee Co. v. Diehl*, 109 N.E. 875, 877 (N.Y. 1915) (directors' liability); *State ex rel. Weede v. Iowa S. Util. Corp. Co. of Del.*, 2 N.W.2d 372, 386 (Iowa 1942) (issuance of stock against par value only). See also *Kozyris*, *supra* note 31, at 42 (discussing the distinction between the “organic powers” of a corporation that are determined by the *lex incorporationis* and the exercise of such powers, which depends on the law of the forum).

a. Full Faith and Credit Clause

This constitutional provision requires that “Full Faith and Credit . . . be given in each State to the public Acts, Records and Judicial Proceedings of every other state”¹⁶⁵ and has been construed to include state statutes.¹⁶⁶ It could therefore be argued that the forum state has to apply the *lex incorporationis* by virtue of the Full Faith and Credit Clause. However, the Full Faith and Credit Clause does not lead to the absurd result that each state has to apply the laws of other states and can never apply its own law.¹⁶⁷ The full faith and credit requirement does not prevent a host state from applying its own law if it has a “significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair.”¹⁶⁸ Applying that test to the outreach statutes of New York and California, it becomes evident that both statutes pass this test: they apply only if the host state has very substantial contacts with the foreign corporation — specifically, if the host state has more contacts than any other state — and they are both designed to prevent circumvention of the host state’s public policy.¹⁶⁹

165. U.S. CONST. art. IV, § 1, cl. 1.

166. *Alaska Packers Ass’n v. Industrial Accident Comm’n of Cal.*, 294 U.S. 532, 546 (1935); *Wilson*, 187 Cal. Rptr. at 856.

167. *Alaska Packers Ass’n*, 294 U.S. at 547 (weighing the states’ interests against each other); *Wilson*, 187 Cal. Rptr. at 856.

168. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–3 (1981); *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 857 (1st App. Div. 1982); *State ex rel. Weede v. Iowa S. Util. Corp. Co. of Delaware*, 2 N.W.2d 372, 395 (Iowa 1942). See also *McDermott Inc. v. Lewis*, 531 A.2d 206, 218 (Del. 1987). See *Kozyris*, *supra* note 31, at 31; J. Thomas Oldham, *Regulating the Regulators: Limitations Upon a State’s Ability to Regulate Corporations with Multi-State Contacts*, 57 DENVER L.J. 345, 360 (1980).

169. See *Wilson*, 187 Cal. Rptr. at 858 (distinguishing *Broderick v. Rosner*, 294 U.S. 629 (1935)). See also *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922, 925 (4th App. Dist. 1983) (dictum, since court held that inspection of books was not an internal affair); *Gettridge v. State Capital Co.*, 18 P.2d 375 (Cal. 1933). See also *Thome v. Macken*, 136 P.2d 116, 117–18 (Cal Ct. App. 1943) (quoting 5 Ruling Case Law 911 § 5) (application of foreign law against public policy of forum); Douglas E. Noll, *California’s New General Corporation Law: Quasi-Foreign Corporations*, 7 PAC. L.J. 673, 697–98 (1976); Oldham, *supra* note 43, at 114–121.

b. Commerce Clause

Regarding outreach statutes, the Commerce Clause¹⁷⁰ plays a less significant role than with respect to qualification statutes. Whereas qualification requirements directly affect the corporation's business by determining whether the foreign corporation is entitled to do business in the forum state at all, outreach statutes only affect the internal affairs of the corporation and not its relation to third parties; outreach statutes merely force foreign corporations to play by the same rules as domestic corporations and do not have any specific commerce aspects. Effects on commerce, let alone interstate commerce, if any, will only be intermediate and incidental.¹⁷¹

Yet, the California outreach statute was thought to be in violation of the Commerce Clause because of uncertainty as to its applicability. Scholars criticized that it was not always clear to the corporation when the statute applied, and pointed to problems associated with the treatment of nominee shareholders and the fluctuation in business experienced by new corporations in particular.¹⁷²

Still, some of these problems have been dealt with by the California legislature, and the California Court of Appeals in *Wilson v. Louisiana Pacific Resources, Inc.* rejected the contention that the California outreach statute, which provided for cumulative voting, was unconstitutional under the Commerce Clause.¹⁷³ It held first that, since cumulative voting applied to both domestic and foreign companies, the statute did not place a distinctive burden on out-of-state interests and regulated

170. *But see* Kozyris, *supra* note 31, at 33–46; Stephen R. Ginger, *Regulation of Quasi-Foreign Corporations in California: Reflections on Section 2115 after Wilson v. Louisiana Pacific Resources, Inc.*, 14 SW. U. L. REV. 665, 671–76 (1984).

171. *See Valtz*, 188 Cal. Rptr. at 925.

172. Ginger, *supra* note 170, at 677; Mark E. Kruse, *California's Statutory Attempt to Regulate Foreign Corporations: Will It Survive The Commerce Clause?*, 16 SAN DIEGO L. REV. 943, 956–61 (1979); Oldham, *supra* note 168, at 369–370, 379. The statute was considered to be constitutional by Noll, *supra* note 169, at 696.

173. *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 862 (1st App. Div. 1982). *See* the description by Kozyris, *supra* note 31, at 58–60. It should be noted, however, that the case was moot and limited to the cumulative voting provision. *See* Ginger, *supra* note 170, at 667.

“even-handedly” in the sense of the *Pike* test.¹⁷⁴ The court then rejected the contention that the statute affected interstate commerce by creating an incentive to remain below the applicability threshold because that effect was neither intended by the legislature nor proven to actually exist.¹⁷⁵ Finally, the court dealt with the U.S. Supreme Court’s requirement that corporations should not be subjected to conflicting demands¹⁷⁶ by emphasizing that there was no actual conflict in this case and that the potential for conflict was very small since a corporation can do a majority of its business only in one state at a time.¹⁷⁷ Moreover, the outreach statutes with their “majority of business in the host state” requirement can be construed as describing the “rarest situations” in which the Commerce Clause does not object to foreign corporations being subjected to conflicting demands.¹⁷⁸

c. Contracts Clause

Courts have not held outreach statutes to be in violation of the Contracts Clause either. The Contracts Clause provides that states shall make no law impairing the obligations of contracts¹⁷⁹ and defendants have tried to argue that outreach statutes, especially the old California rule of unlimited shareholder liability, interfered with their corporation contract. Yet, while the courts seemed to accept this argument in principle, it never carried the day, because it was always held that either the shareholder had contracted with a view to the law of the host state¹⁸⁰ or that the state had authorized the company to bind it

174. See cases cited *supra* note 132.

175. *Wilson*, 187 Cal. Rptr. at 860. See also *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922, 925 (4th App. Dist. 1983).

176. *Supra* Part II.B.

177. *Wilson*, 187 Cal. Rptr. at 860. See *supra* text accompanying notes 158 & 159.

178. This presupposes that “rarest situation” does not mean that the situation hardly ever occurs, but that it is an unusual situation (see the language of RESTATEMENT § 302) not envisaged by the general corporation law, which expects that a foreign corporation’s “most significant relationship” point to another state, i.e., its state of incorporation. See *supra* text accompanying note 41.

179. “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1.

180. *Thomas v. Matthiessen*, 232 U.S. 221, 234 (1914); *Pinney v. Nelson*, 183 U.S. 144, 147 (1901).

in any given state by conferring power on it to transact business¹⁸¹ or that the corporation was formed after the enactment of the law.¹⁸² The modern test seems to be to determine whether there was a substantial impairment and whether such substantial impairment could be justified given the nature and the purpose of the state law.¹⁸³

Therefore, outreach statutes could be unconstitutional under the Contracts Clause if they substantially impair contractual obligations without sufficient justification. However, California law imposing cumulative voting on a foreign corporation was held to be only a minimal alteration.¹⁸⁴

d. Due Process Clause

Outreach statutes do not deprive the foreign corporation of due process of law.¹⁸⁵ For a state to be able to apply its local law over foreign law, it is sufficient that its contacts with the dispute are not too slight and too casual to make the application of local law consistent with due process.¹⁸⁶ This resembles the “minimum contacts test” used to establish whether a state can exercise jurisdiction.¹⁸⁷ The outreach statutes of California and New York, which apply only to companies that do a majority of their business in these states, undoubtedly pass the due process threshold of minimum contacts.¹⁸⁸

181. *Provident Gold Mining Co. v. Haynes*, 159 P. 155, 157 (Cal. 1916).

182. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954); *Pinney*, 232 U.S. at 147.

183. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–17 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978); *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 862 (1st App. Div. 1982).

184. *Wilson*, 187 Cal. Rptr. at 862.

185. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST., amend. XIV, § 1, cl. 2.

186. *Wilson*, 187 Cal. Rptr. at 861–862; *Valtz v. Penta Inv. Corp.*, 188 Cal. Rptr. 922, 926 (4th App. Dist. 1983); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181–82 (1964); *Watson*, 348 U.S. at 71–73. See Oldham, *supra* note 43, at 111–113; Oldham, *supra* note 168, at 354–56.

187. See *supra* Part II.D. See *Kozyris*, *supra* note 31, at 31–32.

188. Noll, *supra* note 169, at 696–97. For questions concerning a retrospective law applying to vested rights, see *Wilson*, 187 Cal. Rptr. at 861, in which the court points out that the defendant has to overcome a presumption of constitutionality by showing arbitrariness or irrationality. See also *State ex rel. Weede v. Iowa S. Util. Corp. Co. of Del.*, 2 N.W.2d 372, 395 (Iowa 1942).

e. Equal Protection Clause

Foreign corporations cannot rely on the Equal Protection Clause¹⁸⁹ to escape application of outreach statutes. Unlike qualification statutes, which exclude foreign corporations altogether or treat them differently by applying sanctions, outreach statutes are designed to provide equal treatment with domestic corporations. Therefore, there is no different treatment under this aspect and the Equal Protection Clause is not violated.¹⁹⁰ Neither can the foreign corporation argue that it is denied equal protection with respect to other foreign corporations listed on a national securities exchange, which are exempt from the outreach statute, because the exemption is based on the rational basis that the regulations of such an exchange provide an adequate substitute.¹⁹¹

V. COMPARISON TO THE EUROPEAN COMMUNITY

A. *Applicable Law*

In Europe, like in the U.S., there is no “federal” or European law on conflict of corporate laws and the EC Member States have traditionally applied their own conflict rules.¹⁹² The issue of how to treat foreign corporations is not seen primarily as an issue of the application of the “internal affairs rule.” There seems to be agreement that a foreign corporation’s internal affairs should be treated according to the laws of its home jurisdiction.¹⁹³ The crucial question is, rather, where to find the home jurisdiction, in other words, how to determine the corporation’s “nationality.” Whereas there seems to be a consensus in the U.S. to equate a company’s home jurisdiction with its

189. “[N]or deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1, cl. 2.

190. *Watson*, 348 U.S. at 70; *Valtz*, 188 Cal. Rptr. at 926; *State ex rel. Weede*, 2 N.W.2d at 395. See also Noll, *supra* note 169, at 698; Bungert, *supra* note 38, at 666–667.

191. *Wilson v. Louisiana Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 862–863 (1st App. Div. 1982).

192. For further detail, see DANIEL ZIMMER, *INTERNATIONALES GESELLSCHAFTSRECHT* (1996).

193. See Bernhard Grossfeld, *Internationales Gesellschaftsrecht*, in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN Rn. 17 (1998).

place of incorporation,¹⁹⁴ this is different in Europe. As briefly mentioned above, there are two principal competing theories.¹⁹⁵

The “place of incorporation theory” determines a corporation’s nationality by its place of incorporation, i.e., the place where it is registered as a corporate entity.¹⁹⁶ A corporation incorporated in the United Kingdom is therefore a British corporation. The “real seat theory,” however, relies on the corporation’s seat of administration,¹⁹⁷ which is defined as the place where the basic decisions of the board are effectively transformed into daily managerial and administrative decisions.¹⁹⁸ Therefore, if a corporation incorporated in the United Kingdom is managed from Germany,¹⁹⁹ Germany would regard it as a German corporation²⁰⁰ — with devastating effects. Until recently, the German Supreme Court for Civil Law argued as follows: since this German corporation is not incorporated and not registered in Ger-

194. See Blackburn, *supra* note 38, at 54–55.

195. For a brief overview, see Blackburn, *supra* note 38, at 85–88; Jan Wouters, *Private International Law and Companies’ Freedom of Establishment*, 2 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 101, 103–10 (2001) [hereinafter E.B.O.R.].

196. Peter Kindler, *Internationales Handels- und Gesellschaftsrecht*, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH Band II, Rn. 265–68 (1999); Grossfeld, *supra* note 193, Rn. 20, 22.

197. Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 97, 269 (271); Kindler, *supra* note 196, Rn. 312–15; Grossfeld, *supra* note 193, Rn. 20, 26.

198. Bundesgerichtshof, BGHZ 97, 269 (272); Grossfeld, *supra* note 193, Rn. 228; Kindler, *supra* note 196, Rn. 316; Otto Sandrock, *Die Konkretisierung der Überlagerungstheorie in einigen zentralen Einzelfragen*, in FESTSCHRIFT FÜR GÜNTHER BEITZKE 669, 683 (Otto Sandrock ed., 1979). There is also a presumption that a foreign corporation is managed from the place of its incorporation. See Oberlandesgericht München, DER BETRIEB [DB] (1986), 1767 (1768); Oberlandesgericht München, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 35 (1986), 2197 (2198); Kindler, *supra* note 196, Rn. 329.

199. See, e.g., Kammergericht, NJW 48 (1989), 3100 (3101); Oberlandesgericht Düsseldorf, NJW-Rechtsprechungs-Report Zivilrecht [NJW-RR] 18 (1995), 1124 (1124); Oberlandesgericht München, NJW 35 (1986), 2197 (2198); Oberlandesgericht Hamburg, NJW 35 (1986), 2199 (2199); Landgericht Marburg, NJW-RR 4 (1993), 222 (223).

200. If a German court had to decide in matters of a corporation incorporated in Britain and managed from France, it would have to apply French law to that corporation. Since France also follows the real seat theory, Grossfeld, *supra* note 193, Rn. 153, it would accept that referral so that French substantive law would apply. *Id.* Rn. 98, 105, 108. For a comparison with the situation in the U.S., see *supra* note 85 and accompanying text.

many, it is non-existent, a nullity. As such it does not have legal personality and can neither own property, nor contract, nor sue.²⁰¹ But such a foreign corporation can nevertheless be sued. Moreover, its members and everybody acting on its behalf will be held liable for its debts.²⁰² The court has now joined the majority opinion among legal scholars and treats a foreign corporation having its real seat in Germany as a German corporation. It is therefore no longer considered to be a nullity for failure to incorporate according to German law, but is treated as a general, partnership-like, company.²⁰³ These partnership-like companies²⁰⁴ have at least limited legal personality and can own property and both sue and be sued, yet the downside is that the legal principles governing these companies provide for unlimited liability of the partners.

B. Delaware in Europe: The "Centros Effect"

Thus the "real seat theory," which is followed in many European jurisdictions,²⁰⁵ serves as an efficient countermeasure against pseudo-foreign corporations. However, is a corporation registered in Britain and having its real seat in Germany actually a pseudo-foreign corporation if it does all or most of its business in Britain? What if the shareholders were dispersed over Europe? American outreach statutes would not apply to

201. Oberlandesgericht München, NJW-RR (1995), 703 (704).

202. See Bundesgerichtshof, DER BETRIEBS-BERATER [BB] 2000, 1106; Bundesgerichtshof, BGHZ 97, 269 (272); Oberlandesgericht Oldenburg, NJW 221 (1990), 1422 (1423); Kammergericht, NJW 48 (1989), 3100 (3101); Oberlandesgericht Hamburg, NJW 35 (1986), 2199 (2199); Landgericht Marburg, NJW-RR 4 (1993), 222 (223); Kindler, *supra* note 196, Rn. 344–46; Grossfeld, *supra* note 193, Rn. 427, 436, 440–44. See also Albrecht Randelzhofer/Ulrich Forsthoff, *Artikel 48, in DAS RECHT DER EUROPÄISCHEN UNION, BAND I*, Rn. 5–6 (Eberhard Grabitz & Meinhard Hilf eds., 2001).

203. Bundesgerichtshof, BB 40 (2002), 2031 (2032); Horst Eidenmüller & Gebhard Rehm, *Gesellschafts- und zivilrechtliche Folgeprobleme der Sitztheorie*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 1 (1997), 89 (90–91); Randelzhofer/Forsthoff, *supra* note 202, Rn. 5–6; Karsten Schmidt, *Sitzverlegungsrichtlinie, Freizügigkeit und Gesellschaftsrechtspraxis*, ZGR 1–2 (1999), 20 (24–25).

204. These companies are the *Gesellschaft bürgerlichen Rechts*, §§ 705–740 BÜRGERLICHES GESETZBUCH [BGB] (German Civil Code), or the *Offene Handelsgesellschaft*, §§ 105–160, HANDELSGESETZBUCH [HGB] (German Commercial Code).

205. Grossfeld, *supra* note 193, Rn. 153.

such a corporation. But the “real seat theory” poses a more serious question: Is it compatible with the freedom of establishment as guaranteed by Articles 43 and 48 of the European Community Treaty (“EC Treaty”)?

Although many commentators believe that the ECJ’s *Centros* decision has answered this question in the negative,²⁰⁶ substantial doubts remain,²⁰⁷ and it is unlikely that the upcoming deci-

206. See, e.g., Oberster Gerichtshof (Austrian Supreme Court), PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHT [IPRAX] 5 (2000), 418 (421) (For commentary on this decision, see Markus Heidinger, Case Comment, 15 J. OF INT’L BANKING L. 2000, N-8; Ilan Rappaport, *Freedom of Establishment — A New Perspective*, J. BUS. L. 2000, 628, 631–33); Oberster Gerichtshof, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 5 (2000), 156 (159); Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH*, IPRAX 5 (1999), 323; Robert Freitag, *Der Wettbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht*, EUZW 1999, 267; Günther H. Roth, *Gründungstheorie: Ist der Damm gebrochen?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 21 (1999), 861; Otto Sandrock, *Centros: Ein Etappensieg für die Überlagerungstheorie*, BB 26 (1999), 1337 (1342); Daniel Zimmer, *Mysterium “Centros,”* ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 164 (2000), 23 (33). Cf. Gérard Jazottes et al., *Droit européen des affaires*, 53 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ECONOMIQUE 220 (2000); Michel Menjucq, *Liberté d’établissement et fraude en droit communautaire*, RECUEIL DALLOZ 1999, JURISPRUDENCE, 550.

207. See, e.g., Bundesgerichtshof, BB 22 (2000), 1106 (1107); Amtsgericht Heidelberg, EUZW 3 (2000), 414 (reference for preliminary ruling; ECJ refused case on procedural grounds, ECJ, Case C-86/00, HSB-Wohnbau GmbH, Order of 10 July 2001, NJW 43 (2001), 3179); Oberlandesgericht Brandenburg, NJW-RR 1 (2001), 29 (30) (holding that the real seat theory was still applicable); Landgericht Salzburg (Austria), IPRAX 6 (2001), 341 (reference for preliminary ruling; ECJ refused case on procedural grounds, ECJ, Case C-447/00, Holto Ltd., Order of 22 January 2002); Peter Behrens, *Reactions of Member State Courts to the Centros Ruling by the ECJ*, 2 E.B.O.R. 159, 160 (2001) (German original published in IPRAX 5 (2000), 384); Ulrich Forsthoff, *Niederlassungsrecht für Gesellschaften nach dem Centros-Urteil des EuGH*, EUROPARECHT 2 (2000), 167 (170); Peter Kindler, *Niederlassungsfreiheit für Scheinauslandsgesellschaften?*, NJW 28 (1999), 1993 (1996); Brigitta Lurger, “Centros Revisited”: *Die österreichische Sitztheorie und die Niederlassungsfreiheit des EG-Vertrages*, IPRAX 4 (2001), 346 (350–52); Randelzhofer/Forsthoff, *supra* note 202, Rn. 73–74; Wulf-Henning Roth, “Centros”: *Viel Lärm um Nichts?*, ZGR 2 (2000), 311 (330–37); Hans Jürgen Sonnenberger & Helge Großerichter, *Konfliktlinien zwischen internationalem Gesellschaftsrecht und Niederlassungsfreiheit*, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 10 (1999), 721 (722); Wouters, *supra* note 195, at 115–20; Helen Xanthaki, *Centros: Is this really the End for the Theory of the Siege Reel*, 22 COMPANY LAWYER 2, 7 (2001).

sion of the ECJ in *Überseering* will bring much clarification. The Court is likely to follow the suggestion by Advocate General Dámaso Ruiz-Jarabo Colomer and limit its holding to the question whether a corporation can be denied legal personality under the real seat theory.²⁰⁸ Even a negative answer would not abolish the real seat theory because it would leave open the possibility of treating a corporation, which is managed at home and incorporated abroad, like a domestic partnership-like company. Yet, it is clear that the times of drastic application of the real seat theory are over. The ECJ will over time probably take a pragmatic approach and decide on a case-by-case basis to what extent the application of forum law is acceptable.

Thus, whether the ECJ will require the application of the place of incorporation theory throughout Europe or proceed on a case-by-case basis, the trend certainly goes in the direction of greater flexibility for incorporators. EC Member States will therefore be faced with the question of how to deal with corporations that evade mandatory rules of the forum law by simply incorporating abroad.

Even if the EC Member States will then have to accept that more often than not foreign law prevails, it remains to be seen how vigorous and dramatic state competition will be under this "Centros Effect." Quite a few factors indicate that state competition will be less vigorous in Europe than in the U.S.²⁰⁹ First,

According to the Oberlandesgericht Düsseldorf, RIW 6 (2001), 463, and the Oberlandesgericht Hamm, RIW 6 (2001), 461, the *Centros* decision did not change the rule that a German corporation cannot transfer its seat (whether real or statutory) to another state, a corporate decision to that effect being treated as a decision to dissolve the corporation. *See also* Oberlandesgericht Frankfurt, RIW 10 (1999), 783 (place of incorporation theory applies where company has no actual real seat) (comment by Stefan Haack in RIW 1 (2000), 57); Oberlandesgericht Zweibrücken, RIW 5 (2001), 373 (applying real seat theory in matter involving a corporation from Costa Rica); Landgericht München I, IPRAX 2 (2001), 137 (foreign companies to be recognized following *Centros* only where duly organized and existing under foreign law).

208. Opinion of Advocate General Colomer, Case C-208/00, *Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH* (Dec. 4, 2001), Celex No. 600C0208. *See also* Randelzhofer/Forsthoff, *supra* note 202, Rn. 62-72; Ulrich Forsthoff, *Abschied von Sitztheorie*, BB 7 (2002), 318.

209. *Cf.* Merkt, *supra* note 62, at 559-60 (questioning whether Europe is in fact susceptible to a race to the bottom due to the inverse relationship of company law regimes of the EC Member States, e.g., Germany's strict co-determination requirements are counterbalanced by weaker shareholder rights).

the already substantial harmonization of European company law leaves less room for permissive rules, even if there remain unharmonized, controversial issues. This gives incorporators fewer incentives to think about foreign incorporation. Second, the language barrier will make it less feasible for many small and medium sized enterprises to incorporate abroad. Third, re-incorporation or transfer of corporate domicile is not (yet) possible within the European Community, and therefore many corporations are “locked in” in their home state.²¹⁰ Fourth, there are no states in Europe that, like Delaware, substantially depend for their income on franchise taxes.²¹¹ Terence L. Blackburn, however, expects an even more vigorous race for laxity in Europe than in the U.S.²¹² He argues against the background of the real seat theory, and claims that states will have a greater incentive to compete, because they will be competing for the real seat of a corporation and the associated jobs and taxes, and not just for incorporation.²¹³

Be that as it may, any race for laxity — stronger than in the U.S. or weaker — is regarded with suspicion in the EC.²¹⁴ Cer-

210. German company law treats a corporate decision to transfer the corporate domicile to another state as a decision to liquidate the corporation. Even if the new state accepts the transfer and acknowledges continuing legal personality (i.e., disregards the German treatment of the transfer decision as dissolving the corporation), tax obstacles remain. German tax law will impose a very substantial liquidation tax which would be prohibitive of a transfer of corporate domicile. § 12 KÖRPERSCHAFTSTEUERGESETZ (German Corporate Tax Law).

211. See Merkt, *supra* note 62, at 564–65.

212. Blackburn, *supra* note 38, at 89. See also Clark D. Stith, *Federalism and Company Law, A “Race to the Bottom” in the European Community*, 79 GEO. L.J. 1581, 1587 (1991).

213. Blackburn, *supra* note 38, at 89–91.

214. See Bundesgerichtshof, BB 22 (2000), 1106 (1107); Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware*, EUR. L. REV. 2000, 25(1), 57; Pedro Cabral & Patricia Cunha, “Presumed Innocent:” *Companies and the Exercise of the Right of Establishment under Community Law*, EUR. L. REV. 2000, 25(2), 157, 164; Max Götttsche, *Das Centros-Urteil des EuGH und seine Auswirkungen*, DEUTSCHES STEUERRECHT 34 (1999), 1403 (1404); Eva-Maria Kieninger, *Niederlassungsfreiheit als Rechtswahlfreiheit*, ZGR 5 (1999), 724, 747; Kindler, *supra* note 207, at 1993; Kindler, *supra* note 196, Rn. 269–72; Walter Kolvenbach, *EEC Company Law Harmonization and Worker Participation*, 11 U. PA. J. INT’L BUS. L. 709, 712 (1990); Eva Micheler, *The Impact of the Centros Case on Europe’s Company Laws*, COMPANY LAWYER 2000, 21(6), 179, 182; Paul J. Omar, *Centros Revisited: Assessing the Impact on Corporate Organisa-*

tainly, the U.S. example shows that the Delaware Effect does not necessarily cripple an economy and might in the end adopt beneficial rules for shareholders due to an active market for corporate control.²¹⁵ Still, this point falls short with respect to the EC. There is no active European market for corporate control, and even if there were, the European perception of corporate law does not focus on shareholder value alone.²¹⁶ It puts significant emphasis on other stakeholders, such as employees and creditors, as well and seeks to protect them in their own right and not as a reflex of shareholder protection.²¹⁷ Accordingly, the EC Treaty, in its Article 44(2)(g), expressly provides for measures “coordinating to the necessary extent the safeguards which, for the protection of the interests of members *and other* [sic], are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community.”²¹⁸ The following sections will describe how foreign corporations are dealt with in Europe in order to prevent or mitigate the problems identified above.

C. Qualification in Europe

U.S. qualification statutes address two main issues: the issue of disclosure, and the issue of service of process and exercise of jurisdiction. European primary law²¹⁹ guarantees foreign corporations the right of establishment in another Member

tion in Europe, INT'L COMPANY AND COMMERCIAL L. REV. 407, 413 (2000); G. H. Roth, *supra* note 206, at 861; Wouters, *supra* note 195, at 132. Cf. Merkt, *supra* note 62, at 546–49. From an American point of view, compare Stith, *supra* note 212, at 1612 (race to the bottom in the EC “undesirable under any theory of the firm”).

215. See sources cited *supra* note 66.

216. See Merkt, *supra* note 62, at 559.

217. Cf. *id.* at 554–60 (arguing that a one dimensional focus on shareholder value is a necessary condition for any competition for companies).

218. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 44(2)(g), O.J. (C 340) 3 (1997) (emphasis added) [hereinafter EC TREATY]. For the legislative reasons for this provision, see Alfred F. Conard, *The European Alternative to Uniformity in Corporation Laws*, 89 MICH. L. REV. 2150, 2153–62 (1991).

219. I.e., law embodied in the EC TREATY as opposed to secondary law enacted under the EC TREATY (directives and regulations).

State.²²⁰ Unlike in the U.S., a Member State can therefore not exclude a foreign corporation altogether from its market, and a state's ability to admit it under conditions are at best limited. Still, European law recognizes the importance of making information on corporations available and enabling third parties to serve process on a corporation.

Thus, freedom of establishment does not, as a practical matter, mean that a foreign corporation can enjoy greater freedom and immunities than domestic corporations. In fact, the practical differences between U.S. and European law are minimal. Foreign corporations in Europe have to be admitted unconditionally, but they are nevertheless required to qualify. In the U.S., foreign corporations can be excluded from a state's territory altogether or admitted under conditions, yet it appears that an exclusion never occurs and the conditions actually imposed do not amount to more than qualification, i.e., they are no real burden.

It should be noted, though, that the European system works entirely on the European government level, whereas the U.S. system is based on interaction between the federal and the state government levels. In Europe, admission is required by primary European law and qualification is required by secondary European law in the form of a directive transformed into the relevant national law. In the U.S., by contrast, federal constitutional law enables states to exclude foreign corporations or admit them under conditions, and state laws use that freedom in a way that virtually guarantees access to foreign corporations.

220. EC TREATY arts. 43, 48. Article 48 limits this right, however, to “[c]ompanies 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.” U.S. corporations can therefore not rely on it.

1. Disclosure

The Disclosure Directive²²¹ contains the most important European disclosure requirements.²²² It applies both to public limited companies and private limited liability companies²²³ and provides that certain kinds of information must be disclosed in the state of incorporation and that company letterheads and forms must indicate where this information can be found.²²⁴ This is of little help to a third party who deals with a foreign corporation, since foreign registers are not easily available and — even if they are available online — they are in a foreign language. It may be acceptable to refer a third party to information that is only available in the state of incorporation if the foreign corporation conducted a single transaction in the host state. But in the case of continuous transactions, of “doing business,” in the host state, this scheme would provide insufficient protection for third parties.

The laws of the EC Member States generally require that all corporations and partnerships must disclose the establishment of branches and provide a competent authority with certain kinds of information, and these “qualification laws” also apply to foreign corporations.²²⁵ They are, however, not completely national in character because they are based on the European Branch Directive,²²⁶ which harmonizes and imposes standards of qualification throughout Europe.

The Branch Directive deals with the above mentioned information deficit that occurs when foreign corporations continu-

221. First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards, which for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, 1968 O.J. SPEC. ED. 41 [hereinafter Disclosure Directive].

222. *Id.* arts. 2–4.

223. *See id.* art. 1. The public limited company and the private limited liability company are roughly analogous to the U.S. publicly traded corporation and the closely-held corporation, respectively.

224. *Id.* arts. 2–4.

225. *See, e.g.*, §§ 13–13h HGB (German Commercial Code).

226. Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, 1989 O.J. (L 395) 36–39 [hereinafter Branch Directive].

ously conduct business within a host state, and it applies to “branches” of foreign corporations opened in another Member State.²²⁷ The directive itself does not define what a branch is. But given the definition of the word branch in other directives as a “place of business”²²⁸ or “permanent presence,”²²⁹ and its established definition in German law as a geographically separate part of an enterprise that permanently conducts business independently of the main office and that has the necessary organizational means to do so,²³⁰ it becomes clear that “branch” and “doing business” are functionally equivalent.

The Branch Directive requires the Member States to provide for compulsory disclosure of the address of the branch, its activities, the register in which the information disclosed in the state of incorporation is kept, the name and legal form of the company and the name of the branch, if different, the appointment, termination of office and particulars of the persons who are authorized to represent the company in dealings with third parties and legal proceedings, the winding-up of the company, certain accounting documents, and the closure of the branch.²³¹ Member States may additionally choose to provide for the submission of the signature of the persons authorized to represent the company,²³² the instruments of constitution of the company in a certified translation,²³³ an attestation from the register re-

227. *Id.* art. 1(1). Companies means the forms of companies to which the Disclosure Directive applies, i.e., both public limited companies and limited companies. *Id.*

228. Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, art. 1(8), 1993 O.J. (L 141) 27, 32 (“branch shall mean a place of business”); Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, art. 1(3), 1989 O. J. (L 386) 1, 3.

229. Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, art. 2(b), 2001 O.J. (L 110) 28, 31 (“‘branch’ means any permanent presence”).

230. Bayerisches Oberstes Landesgericht, NJW-RR 17 (1992), 1062 (1063); Klaus J. Hopt, *in*: Baumbach/Hopt, HGB, § 13, Rn. 3. *See also* Peter Kindler, *Neue Offenlegungspflichten für Zweigniederlassungen ausländischer Kapitalgesellschaften*, NJW 51 (1993), 3301 (3303).

231. Branch Directive, *supra* note 226, art. 2(1).

232. *Id.* art. 2(2)(a).

233. *Id.* art. 4.

lating to the existence of the company,²³⁴ and certain information on security interests in the company's property.²³⁵

This leads to the same extent of disclosure as provided by the U.S. qualification statutes. The sanction for non-compliance is, however, less drastic than in the U.S. Whereas U.S. law denies a non-complying foreign corporation access to state courts or even declares contracts unenforceable, which can lead to a substantial economic loss, the Branch Directive leaves it up to the Member States to provide for "appropriate penalties" for failure to disclose.²³⁶ German law imposes a maximum "coercive fine" of $\square 5,000$ on non-complying corporations that can be reapplied until the corporation complies.²³⁷ The fine is administered by the courts keeping the company register, which can act on their own motion.²³⁸ It is doubtful whether this kind of penalty is actually appropriate because it provides only an *ex post* remedy that usually comes too late for third parties. Moreover, there is no incentive for voluntary compliance, because even if the court acts and threatens to impose the fine, the corporation can — due to the coercive nature of the fine — easily escape it by then complying immediately.²³⁹ It is dubious whether this situation constitutes an insufficient transformation of the directive by Germany. The *Daihatsu* case suggests that it is not,²⁴⁰ although one could argue that third parties rely more on *ex ante* compliance in so far as Branch Directive information is concerned and, therefore, a more forceful penalty, which gives corporations incentives for voluntary compliance, is required.

2. Procedure

As we have seen, the Branch Directive addresses exclusively issues of disclosure, whereas procedural issues such as the service of process are not dealt with. Enabling service of process on foreign corporations and the exercise of jurisdiction over

234. *Id.* art. 2(2)(c).

235. *Id.* art. 2(2)(d).

236. *Id.* art. 12.

237. \S 14 HGB (German Commercial Code).

238. *Id.*; Hopt, *supra* note 230, \S 14, Rn. 3.

239. Hopt, *supra* note 230, \S 14, Rn. 3.

240. *See* Case C-97/96, *Verband Deutscher Daihatsu-Händler eV v. Daihatsu Deutschland GmbH*, 1997 E.C.R. I-6843, \P 17-20. For commentary, see case note by Wolfgang Schön, *JURISTEN ZEITUNG* 4 (1998), 194.

them constitutes the 'second pillar' of U.S. qualification statutes. This pillar, however, is not missing in European law; it is simply unnecessary in the context of corporate law since it is dealt with in a broader context by the Brussels-I-Regulation,²⁴¹ which replaced, as of March 1, 2002, the 1968 EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters among the Member States.²⁴²

The Brussels-I-Regulation applies to civil and commercial matters²⁴³ and establishes as a general rule that "persons domiciled in a Member state shall, whatever their nationality, be sued in the courts of that Member State."²⁴⁴ A corporation is domiciled "at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business."²⁴⁵ Yet, even though this already subjects corporations to three possible jurisdictions, it does not ensure that a corporation can be sued wherever it does business, i.e., wherever it has a branch. This gap is closed by an exception to the general rule, which permits a person to be sued "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."²⁴⁶ Service of process in another EC Member State is effected pursuant to the rules of a special Council regulation.²⁴⁷ Thus, at least in as far as the external affairs of a foreign corporation are concerned, the European regulations

241. Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1 [hereinafter Brussels-I-Regulation].

242. Brussels-I-Regulation, *supra* note 241, art. 68. There are no substantial differences between the new Brussels-I-Regulation and the old Brussels Convention. For details on the Brussels Convention, see REINHOLD GEIMER & ROLF A. SCHÜTZE, *EUROPÄISCHES ZIVILVERFAHRENSRECHT, KOMMENTAR ZUM EUGVÜ UND ZUM LUGANO-ÜBEREINKOMMEN* (1997). Since these treaties remain in force with respect to non-members of the EC, the following remarks also apply in relation to these countries.

243. Brussels-I-Regulation, *supra* note 241, art. 1(1).

244. *Id.* art. 2(1). Article 3(1) establishes an exception to this rule whereby domiciliaries of Member States may be sued in courts of other Member States so long as certain rules are followed, as laid out in Articles 2–7. *See infra* note 246.

245. *Id.* art. 60(1).

246. *Id.* art. 5(5).

247. Council regulation (EC) 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 2000 O. J. (L 160) 37.

achieve the same goals of ensuring jurisdiction over foreign corporations as the U.S. qualification statutes.

With respect to the internal affairs of a corporation, exclusive jurisdiction regardless of domicile is granted:

in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, [to] the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law.²⁴⁸

At first sight this resembles the early history of the U.S. system, where the courts refused to exercise jurisdiction over the internal affairs of a foreign corporation.²⁴⁹ Yet, this is only partially true, because the place of incorporation/real seat problem returns through the backdoor due to the last sentence, which refers the determination of a corporation's seat to the private international law of the forum. This means that the courts of an EC Member State that adheres to the place of incorporation theory will have no jurisdiction over the internal affairs of a foreign corporation. The same is generally true for the courts of an EC Member State that applies the real seat theory, but they have a loophole for pseudo-foreign corporations over which they can exercise jurisdiction even in matters relating to their internal affairs.

The U.S. rule, which is based on the *forum non conveniens* doctrine, has the advantage of greater flexibility and of greater domestic control over foreign corporations.²⁵⁰ Yet, the European rule also makes sense. It applies only to a very limited number of internal affairs, so that the above distinction between internal and external affairs is more descriptive than doctrinally accurate; this limits the adverse effects on control and flexibility. It also provides a clear statutory rule, which will foster uni-

248. Brussels-I-Regulation, *supra* note 241, art. 22(2).

249. *See supra* note 58.

250. For example, under the U.S. system, the courts of the host state can exercise jurisdiction regarding the question of dissolution of a foreign corporation, whereas in Europe the courts of a state following the place of incorporation theory would never have jurisdiction on that question, and the courts of a state following the real seat theory would have jurisdiction only in the case of a pseudo-foreign corporation.

form application and certainty for the corporations. Finally, it reduces the chances of positive jurisdictional conflicts in cases in which there is an inherent need for a single, uniform decision, i.e., in decisions affecting third parties.

3. "Constitutional" Aspects

In Europe, qualification statutes do not pose any "constitutional" problems on the 'federal,' European level. Although the relevant disclosure provisions are national law, they are nevertheless based on European directives.²⁵¹ From a theoretical point of view, this provides for European "approval" of the national laws so that they cannot successfully be challenged as being in breach of European law, so long as the EC Member States have correctly transformed the directives into national law.²⁵² From a practical point of view, this system creates a uniformity that prevents discrimination and provides a level playing field for all corporations throughout Europe.

The same is true with regards to the procedural issue. The laws already have European approval and, since the relevant provisions are European regulations, which have direct effect in all Member States,²⁵³ there is no possibility of incorrect transformation into national law.

D. Outreach in Europe

European Community law does not contain outreach statutes and the same seems to be true for the laws of most of the EC Member States.²⁵⁴ There are, however, features in European company law that resemble outreach statutes: the real seat theory on the Member State level and harmonization on the European level.

1. Real seat theory

The first feature is found at the Member State level: many Member States adhere to the real seat theory, which subjects

251. *E.g.*, Disclosure Directive, *supra* note 221.

252. EC TREATY art. 249(3). The possibility of the directives themselves being in breach of the EC TREATY can be neglected here.

253. EC TREATY art. 249(2).

254. *But see infra* Part VI.B. on the Danish and Dutch laws on pseudo-foreign corporations.

corporations to the laws of the state in which the corporation has its real seat.²⁵⁵ In theory, this does not have to be the forum state; it is logically possible, although unlikely, that, for example, a German court will have to apply French law to a corporation incorporated in Britain but with its real seat in France.²⁵⁶ With this theoretical caveat in mind, it can be stated that the real seat theory leads to a very drastic outreach that is not limited to selected issues of substantial law deemed crucial, and effectively leads to the elimination of the corporation “at the border,” i.e., before it can even enter the host state.²⁵⁷ This “outreach effect” is intentional: the real seat theory was adopted in continental Europe in the 19th century in order to prevent corporations from taking advantage of more liberal laws in Belgium and Britain.²⁵⁸

The differences to U.S. outreach statutes are substantial. Even if one adheres to the more moderate version of the real seat theory, which does not regard a foreign corporation with a real seat in the forum state as a nullity but re-qualifies it as a domestic partnership-like company,²⁵⁹ it is not qualification but transformation against the members’ will as expressed in their company contract. Moreover, the real seat theory does not apply only to pseudo-foreign corporations or to corporations doing most of their business in the forum state. A corporation incorporated in Britain, having its real seat in France, and doing most of its business in Germany is easily conceivable and would have to be treated according to French law by a German court. This also goes too far from the point of view of a state interest analysis, since it is not apparent which significant interests of the forum state are served if its courts apply the real seat theory to a corporation with its real seat in a third state. Finally,

255. See *supra* Part V.A.

256. See *supra* note 200.

257. See Brigitte Knobbe-Keuk, *Umzug von Gesellschaften in Europa*, ZHR 154 (1990), 325 (334–42); Brigitte Knobbe-Keuk, *Niederlassungsfreiheit: Diskriminierungs- oder Beschränkungsverbot*, DB 51/52 (1990), 2573 (2577–78).

258. Carney, *supra* note 66, at 316; David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the “Race to the Bottom” in the European Communities*, 32 HARV. INT’L L.J. 423, 428 (1991); Latty, *supra* note 2, at 166 n.130; Merkt, *supra* note 62, at 560–61.

259. See *supra* note 203.

in Europe the real seat theory is not applied by all EC Member States, which creates disparities in protection and friction between the different national systems.

2. Harmonization

The other “outreach feature” in European corporate law can be found at the European Community law level. The harmonization efforts pursuant to the above mentioned Article 44 of the EC Treaty that started in 1968 with the first company law directive, the Disclosure Directive,²⁶⁰ have led to a functional convergence between the corporation laws of the different Member States.²⁶¹ In the harmonized areas of company law, Member States are obliged to adapt their laws to the directives so that issues will be resolved the same way throughout Europe.²⁶² These directives, which provide for disclosure, protection against the *ultra vires* doctrine, and uniform rules on the nullity of companies,²⁶³ capital maintenance,²⁶⁴ accounting rules,²⁶⁵ merger and division of corporations,²⁶⁶ etc.,²⁶⁷ ensure that in their respective areas a level playing field for corporations ex-

260. See *supra* note 221.

261. For an overview of the European provisions on corporation law, see Conard, *supra* note 218, at 2162–67.

262. See EC TREATY art. 249(3).

263. Disclosure Directive, *supra* note 221, arts. 2, 3, 9, 10.

264. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 1977 O.J. (L 26) 1 [hereinafter Capital Directive].

265. Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, 1978 O.J. (L 222) 11; Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, 1983 O.J. (L 193).

266. Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, 1978 O.J. (L 295) 36; Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, 1982 O.J. (L 378) 47.

267. See the various directives reprinted by MARCUS LUTTER, *EUROPÄISCHES UNTERNEHMENSRECHT* (1996); D.D. PRENTICE, *EEC DIRECTIVES ON COMPANY LAW AND FINANCIAL MARKETS* (1991).

ists. In the context of state competition, it can therefore be said that European law draws the bottom line at which a race to the bottom would have to stop by establishing certain minimum standards. Moreover, in some areas it also imposes a limit on how strictly a state may regulate by imposing maximum standards as well.²⁶⁸

However, this system still has substantial gaps because important European legislation has not been passed yet. In particular, the adoption of the proposed Fifth Directive concerning the internal structure of corporations,²⁶⁹ the proposed directive on take-over bids²⁷⁰ and the proposed directive on the transfer of corporate domicile²⁷¹ is needed to close these gaps. And even with these directives adopted, European law will not achieve the degree of uniformity of U.S. corporation law.

3. "Constitutional" Aspects

From a "constitutional" point of view the harmonization issue is not problematic since the national laws are based on the European directives.²⁷² The real seat theory, however, is most problematic since it is — as mentioned above — doubtful whether its dramatic consequences are compatible with the

268. For a discussion of this aspect with respect to the Capital Directive, see generally HENRIK DRINKUTH, *DIE KAPITALRICHTLINIE — MINDEST- ODER HÖCHSTNORM?* (1998).

269. Amended proposal for a Fifth Directive founded on article 54 (3) (g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, 1983 O.J. (C 240) 2. See Second Amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, 1991 O.J. (C 7) 4.

270. Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids, 1996 O.J. (C 162) 5. See Amended proposal for a thirteenth European Parliament and Council Directive on company law concerning takeover bids, 1997 O.J. (C 378) 10; Commission Opinion pursuant to Article 251 (2) (c) of the EC Treaty on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and the Council on company law concerning takeover bids, COM (01) 77 final.

271. Proposal for a 14th European Parliament and Council Directive on Company Law on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law — Commission Proposal, *reprinted in* ZIP 39 (1997), 1721 [hereinafter Proposed Transfer of Corporate Domicile Directive].

272. See *supra* Part V.C.3.

freedom of establishment guaranteed by the EC Treaty. The ECJ will most likely advance the law in a direction of greater flexibility and security for corporations and their members.²⁷³

4. Summary

To sum up, outreach in Europe rests on two pillars, the real seat theory and harmonization, both of which are not very stable. The real seat theory applies only in some of the EC Member States and is likely to be substantially restricted by the ECJ, if not altogether declared incompatible with the EC Treaty. Harmonization, on the other hand, is incomplete and leaves substantial gaps.

E. Remaining Problems: Focus of the European Discussion

What are these substantial gaps? In other words, what are the public policy issues that Member States that adhere to the real seat theory wish to protect? From the European law viewpoint, the only public policy issues acceptable are those that have not already been dealt with by European law.²⁷⁴ In all other respects, the relevant directives define the necessary extent of protection. If the directive imposes both a minimum and maximum standard, states are not permitted to deviate from that standard at all, neither for domestic nor for foreign corporations. But even if the directive only prescribes a minimum standard and leaves it open to the Member States to set higher standards in their national law, that does not mean that these Member States have a legitimate interest in applying these higher standards to foreign corporations because the directives have rendered the relevant “safeguards equivalent throughout the community.”²⁷⁵ Given these considerations, there seem to be two crucial issues remaining: corporate governance and minimum capital requirements.

273. See *supra* Part V.B.

274. Cf. Wouters, *supra* note 195, at 121–22 (discussing harmonization and national conflicts rules).

275. EC TREATY art. 44 (2)(g).

1. Corporate Governance: Co-determination

The Member States recently managed to agree on the Statute for the European Company (Societas Europaea, SE) ["SE"],²⁷⁶ a project that had taken over thirty years to negotiate. This statute (in the form of a European regulation) allows the formation of a business corporation under European law.²⁷⁷ Thus, the EC Member States, which all had to agree on this particular form of business corporation, had to find a means of accommodating different ideas about the internal organization of a corporation. The way in which problems are resolved in the context of this statute is a good indicator of the issues that the EC Member States deem crucial, because the SE is likely to become an important feature in European company law, since it greatly facilitates European corporate take-overs, easily permits the transfer of corporate domicile, and is especially attractive for large national concerns.

The question of a two-tier or one-tier board structure, which was still open due to the unsuccessful structure directive, was resolved in favor of giving the corporation the option to choose between the two possibilities.²⁷⁸ This indicates that these two options are deemed equivalent by the EC Member States or at least that the choice of the "foreign structure" is not considered harmful to their public policy. It could certainly be argued that this was a political compromise rather than a substantive corporate governance decision, but that would not change the *legal* implication that these options are deemed equivalent. Moreover, whereas the Member States specifically provided that "in view of the specific Community character of an SE, the 'real seat' arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States' laws and does not preempt any choices to be made for other Community texts on

276. Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), 2001 O.J. (L 294) 1 [hereinafter SE-Statute].

277. *Id.* art. 1.

278. SE-Statute, *supra* note 276, art. 38. The choice made by the SE has no effect on whether the SE will be subject to co-determination rules. See Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, art. 2(f), 2001 O.J. (L 294) 22, 24 [hereinafter SE-Directive] (defining a special "representative body," which will exercise the employee's rights). Cf. Meinhard Heinze, *Die Europäische Aktiengesellschaft*, ZGR 1 (2002), 66 (82–84).

company law,”²⁷⁹ EC Member States did not make a reservation restricting the implications of their — perhaps political — decision of granting the SE the option to choose between a two-tier or one-tier board structure, nor in any other respect.

The crucial issue that kept delaying the adoption of the statute, was workers’ co-determination and the way it was dealt with demonstrates that there was no real consensus on this point. The SE-Statute refers this question²⁸⁰ to a special directive, which in turn refers it primarily to negotiations between employees and the corporations participating in the formation of an SE.²⁸¹ If the parties cannot reach an agreement within a certain period of time, default rules apply in some circumstances.²⁸² In sum, these provisions are designed to preserve the status quo existing in the companies that form an SE, not to genuinely establish employees’ rights.²⁸³ This shows that countries that insist on co-determination as a matter of public policy have not retreated from their position. European law acknowledges this, and a special provision requires the Member States to prevent the “misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.”²⁸⁴

Many of the other corporate law issues are dealt with according to the laws of the EC Member States in which the SE has its registered office.²⁸⁵ This could mean either that the Member States do not attach any special importance to these issues or they regard the foreign laws as providing sufficient protection. Yet, the SE-Statute — as does the European Economic Interest

279. SE-Statute, *supra* note 276, recital (27). *Cf. id.* art. 69(a) (five years after entry into force of the Regulation, the Commission is to submit a report on the application of the Regulation and proposals for amendments, including an analysis of the appropriateness of allowing the location of an SE’s head office and registered office in different Member States).

280. *Id.* arts. 1, 12.

281. SE-Directive, *supra* note 278, arts. 3–4. *Cf. Heinze, supra* note 278.

282. SE-Directive, *supra* note 278, arts. 5, 7.

283. *Id.* recital (7) (“If and when participation rights exist within one or more companies establishing an SE, they should be preserved through their transfer to the SE, once established, unless the parties decide otherwise.”).

284. *Id.* art. 11.

285. SE-Statute, *supra* note 276, arts. 4–5, 9.

Group Regulation²⁸⁶ — follows the real seat theory,²⁸⁷ which reduces the strength of this argument, since the Member States then in fact do not tolerate foreign law as far as these issues are concerned. The Member States only agreed on a system that allows the transfer of the corporate domicile of an SE; they did not resolve issues of pseudo-foreign SEs.²⁸⁸ So even though the crucial issue was co-determination, it does not mean that the Member States will not insist on other public policies when pseudo-foreign corporations are involved.

But this *renvoi* to national law oftentimes refers to national law as harmonized by European directives.²⁸⁹ Moreover, the remaining public policy issues were not important enough to further delay the adoption of the SE-Statute. Since an SE will always be a multinational corporation that affects more than one country,²⁹⁰ the adoption of the SE-Statute shows that EC Member States trust each other's laws to some extent. This indicates that the issues referred back to national law are not all that important.

2. Limited Liability and Minimum Capital: Internal v. External Affairs

Nevertheless, the most important issue seems to be the minimum capital requirement. The SE-Statute could only deal with it with respect to SEs and the Capital Directive, which

286. See Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), arts. 2(1), 5(b), 6, 12, 1985 O.J. (L 199) 1–4.

287. See SE-Statute, *supra* note 276, art. 7; see also *id.* art. 9. Article 7 provides: “The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.” This cannot be changed by a later transfer of the corporate domicile. See SE-Statute, *supra* note 276, art. 8(14).

288. This was not necessary since the SE-Statute ensures that the real seat and the corporate domicile always coincide. See SE-Statute, *supra* note 276, art. 7.

289. See Christian Kersting, *Societas Europaea: Gründung und Vorgesellschaft*, DB 39 (2001), 2079 (2079).

290. SE-Statute, *supra* note 276, art. 2. See Kersting, *supra* note 289, at 2079; Marcus Lutter, *Europäische Aktiengesellschaft – Rechtsfigur mit Zukunft?*, BB 1 (2002), 1 (4); Günther Christian Schwarz, *Zum Statut der Europäischen Aktiengesellschaft*, ZIP 42 (2001), 1847 (1857–58).

requires a minimum capital of \square 25,000, applies only to public limited liability companies and not to limited companies.²⁹¹ Therefore, a British “Limited Company” and an Irish “Private Company” are not required to have and maintain a minimum capital. This creates a loophole for company founders. The Danish founders of Centros Ltd. openly admitted that they incorporated the corporation in the U.K. in order to circumvent the Danish laws requiring a minimum capital, and the ECJ did not let the Danish authorities intervene.²⁹²

The minimum capital requirement is closely related to the question of liability, since providing the company with a minimum capital and maintaining it are seen as the “price” for limited liability.²⁹³ Unlike common law, civil law does not perceive limited liability to be based on an agreement among the shareholders; it is essentially seen as a statutory departure from the general rule of joint and several liability for a joint economic undertaking — a privilege that is only granted contingent on the company being endowed with a minimum capital.²⁹⁴ This makes it an external affair since it involves the right of third parties to enforce claims against the shareholders. The close connection between the minimum capital requirement and limited liability is reflected in the sanctions for failure to comply. Without maintaining the statutory minimum capital, a company cannot be registered and thus can neither obtain legal personality nor can the members obtain limited liability.²⁹⁵ If the minimum capital is not maintained, this will frequently lead to some amount of personal liability for the members.²⁹⁶

291. Capital Directive, *supra* note 264, art. 6(1).

292. Case C-212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-1459.

293. Bundesgerichtshof, BGHZ 80, 129 (136). See CHRISTIAN KERSTING, *DIE VORGESELLSCHAFT IM EUROPÄISCHEN GESELLSCHAFTSRECHT* 24, 146 (2000).

294. See Companies Act, 1985, 33 Eliz. II, sec. 2 (Eng.). See also KERSTING, *supra* note 293, at 146. Cf. Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991) (arguing that limited liability should be seen as a contractual relationship between shareholders). The fact that limited liability is based on an agreement among the shareholders makes the internal affairs rule applicable. If limited liability is seen as a matter peculiar to the relationship between the corporation or its shareholders and third parties, it would not come within the scope of the internal affairs rule.

295. See Capital Directive, *supra* note 264, art. 6(1).

296. For example, repayment of unlawful distributions to shareholders. Capital Directive, *supra* note 264, art. 16.

These limited liability aspects underlie the strong public policy that is expressed by some Member States' minimum capital requirement. This issue has not been resolved thus far, although the European Commission did contemplate extending the scope of the Capital Directive to limited companies, which would have led to a minimum capital requirement for all corporations.²⁹⁷ However, the Commission also realized that such a proposal is likely to encounter strong opposition from the Member States that do not require a minimum capital.²⁹⁸

F. Summary

U.S. law dealing with pseudo-foreign corporations exists mainly on the state level. Both the conflict of laws rules and qualification and outreach statutes are state law. The system works well in ensuring disclosure of information, that foreign corporations can effectively be sued in the host state, and that public policies of the host state can be enforced as against pseudo-foreign corporations. It also has the advantages of uniformity of its basic features: the internal affairs rule, qualification statutes, and a constitutional principle that corporations should not be subjected to inconsistent sets of rules. However, the system lacks predictability. The questions of when a transaction involves interstate rather than intrastate commerce, or when the outreach statutes apply, or the constitutionality of the outreach statutes do not have clear answers. The first two questions in particular seem to be answered on a case-by-case basis. This may provide flexibility desirable for courts, but can prove costly for enterprises.

The European system also operates on the Member State level, although its foundations are based on European law. It works well as far as qualification and the exercise of jurisdiction over foreign corporations are concerned. The system lacks uniformity, however; the choice of law rules differ in the Member States and harmonization is incomplete, especially with regards to co-determination and minimum capital requirements. It is not unlikely that corporations will be subjected to inconsistent

297. EUROPÄISCHE KOMMISSION, STUDIE ÜBER DIE ERWEITERUNG DES ANWENDUNGSBEREICHS DER ZWEITEN RICHTLINIE AUF GESELLSCHAFTEN ANDERER RECHTSFORM (1993) [hereinafter KOMMISSION STUDIE].

298. *Id.* at 25.

rules. Moreover, it is unclear if and in how far Member States can enforce their public policies as against pseudo-foreign corporations. The real seat theory seems to be only of limited use, if any, in that respect.

Altogether, the U.S. example shows that public policy issues can be protected, even in the context of a Delaware Effect created by adherence to the place of incorporation theory. This article has also described European law's functionally equivalent rules and explored their weaknesses. The next section will try to devise a statutory solution for the EC.

VI. A SUGGESTED STATUTORY SOLUTION

The existing body of law described above has apparently been sufficient thus far to prevent the problems associated with foreign corporations from getting out of hand. The real seat theory, however, is too efficient and unnecessarily drastic in its effects.²⁹⁹ It makes little sense to replace it with another "theory" that would lack the certainty and clarity of a statute and the uniform application of which could therefore not be guaranteed. Thus, a statutory solution will have to avoid the harsh effects of the real seat theory and take a "softer" approach.

A. Further Harmonization

One way of dealing with the necessary replacement or attenuation of the real seat theory could be further harmonization of company law.³⁰⁰ The passage of the Fifth Structure Directive,³⁰¹ the 13th Take-over directive,³⁰² the 14th Transfer of domicile Directive,³⁰³ the extension of the 2nd Capital Directive to limited companies,³⁰⁴ and broadening the scope of the SE-Directive on co-determination³⁰⁵ would lead to

299. Commentators have interpreted the *Centros* decision as holding that the Danish reaction to the circumvention of the minimum capital requirement was disproportionate. See, e.g., Randelzhofer/Forsthoff, *supra* note 202, Rn. 67; W. H. Roth, *supra* note 207, at 320; Wouters, *supra* note 195, at 137.

300. This seems to be the approach preferred by Stith, *supra* note 212, at 1587, who also suggests keeping up the real seat theory. *Id.* at 1618.

301. *Supra* note 269.

302. *Supra* note 270.

303. *Supra* note 271.

304. Cf. Wolfgang Schön, *Gesellschafter-, Gläubiger- und Anlegerschutz im Europäischen Bilanzrecht*, ZGR 4–5 (2000), 706 (726).

Directive on co-determination³⁰⁵ would lead to such a degree of uniformity in European company law that the problems associated with pseudo-foreign corporations would no longer be an issue. There would be no need to worry about whether to apply the law of the host state or the state of incorporation, because the result would basically be the same. This scenario does not seem to be utopian from a political point of view, given the fact that politically problematic issues, such as co-determination, have been resolved in the SE-Statute. It is also conceivable to apply the solutions found for the SE *mutatis mutandis* to the proposed directives as well. However, there are still three points that substantially question the practicability of this approach.

First, a directive permitting re-incorporation of corporations within the EC will probably increase the number of pseudo-foreign corporations and lead to additional problems. Once existing corporations, which are "locked in" at the moment, are free to move, one can expect decisions on re-incorporation that are most controversial with the stakeholders and will certainly have political ramifications.³⁰⁶

Second, further harmonization would work only in relation to EC Member States. With third states, another solution would have to be adopted. Yet, it does not make much sense to apply different conflict of laws rules to EC Member States and third nations.³⁰⁷

Third, even if the issue of co-determination can be settled as in the SE-Statute and the accompanying directive, there is one crucial problem that further harmonization will probably not be able to deal with: the minimum capital requirement as the focal point of European discussion. It is unlikely that the EC Member States will agree to introduce a mandatory minimum capital requirement for limited companies. The European Commission has proposed it in a study,³⁰⁸ but the idea does not seem to have been pursued any further. One could argue, however, that

305. *Supra* note 278.

306. Societates Europaeas will be able to re-incorporate throughout Europe once this company form is available in 2004. It is unlikely, though, that given the structure of these companies and the way they will have to be formed, the occurrence of a pseudo-foreign SE will not even be possible.

307. *Cf.* Sandrock, *supra* note 62, at 252; Sandrock, *supra* note 206, at 1344.

308. KOMMISSION STUDIE, *supra* note 297, at 25–28.

this is not really a crucial point given that third parties could be protected by informing them of the fact that a corporation does not maintain a minimum capital.³⁰⁹ On the other hand, a minimum capital requirement is also a bonding device that aligns incentives and can prevent moral hazard.³¹⁰ Its importance is underscored by the fact that large creditors compensate for a lacking minimum capital requirement by imposing debt covenants on their debtor, which essentially serve the same function.³¹¹ The argument basically leads back to the question whether a minimum capital requirement makes sense in the first place.

However, this is exactly the question that national legislators have answered differently and that the European legislator is currently unable to resolve. It can certainly be said that the European tendency is strongly in favor of a minimum capital requirement as a price for limited liability³¹² because it can be found both in the Capital Directive³¹³ and the SE-Statute,³¹⁴ as well as the proposed statute for a European Private Com-

309. See Luca Enriques & Jonathan R. Macey, *Creditors versus Capital Formation: The Case against the European Legal Capital Rules*, 86 CORNELL L. REV. 1165, 1188 (2001); Eilis Ferran, *Creditors' Interests and "Core" Company Law*, COMPANY LAWYER 1999, 20(10), 314, 318; Micheler, *supra* note 214, at 179. Cf. Conard, *supra* note 218, at 2174 (critiquing the persuasiveness of this argument in as far as the situation in Europe is concerned). On the more general issue of who should bear the cost of obtaining information on foreign law, see W. H. Roth, *supra* note 207, at 333.

310. See Conard, *supra* note 218, at 2174; HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 56 (1996).

311. William W. Bratton, *Corporate Debt Relationships: Legal Theory in a Time of Restructuring*, 1989 DUKE L.J. 92, 108, 140 (1989); John C. Coffee, *Unstable Coalitions: Corporate Governance As a Multi-Player Game*, 78 GEO. L.J. 1495, 1512–15, 1519–21 (1990); Enriques & Macey, *supra* note 309, at 1188; Helen A. Garten, *Market Discipline Revisited*, 14 ANN. REV. BANKING L. 187, 199–209 (1995); Wolfgang Schön, *Wer schützt den Kapitalschutz?*, ZHR 166 (2002), 1 (4); Schön, *supra* note 304, at 725 (arguing that debt covenants are less efficient because they involve transaction costs, do not protect small creditors, and could subject a corporation to inconsistent regulations).

312. But see the opinion of Advocate General La Pergola in *Centros*, who, citing Charny, *supra* note 258, at 424, considers competition among the Member States to be necessary absent harmonization. Opinion of Advocate General La Pergola, Case 212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-1459, 1479 n.49. *Contra* Buxbaum, *supra* note 8, at 154, n.24.

313. Capital Directive, *supra* note 264, art. 6(1).

314. SE-Statute, *supra* note 276, art. 4.

pany.³¹⁵ Moreover, the European Economic Interest Grouping that does not have a minimum capital requirement also has no limited liability.³¹⁶ Yet, the Capital Directive still does not apply to limited companies. Further harmonization therefore does not seem to be a practicable option.

B. Member State Rules

Thus, the question is: could EC Member States pass outreach statutes, which require pseudo-foreign corporations to maintain a minimum capital and adopt co-determination?

Over a year before *Centros* was decided, the Netherlands enacted the 1997 Pro-Forma Foreign Companies Act,³¹⁷ which provides that pseudo-foreign corporations³¹⁸ have to be registered in the Netherlands, contains provisions on disclosure,³¹⁹ requires the registration and maintenance of a minimum capital,³²⁰ and holds the directors personally liable for failure to do so.³²¹

In a reaction to *Centros*, Denmark has enacted a tax law that requires foreign corporations to put up a guarantee of DKK110,000 (Danish *kronos*) (the equivalent of the minimum capital of DKK125,000 less a discount of DKK15,000) or show that the value of its net assets is equal to that amount.³²² Com-

315. See generally VORSCHLÄGE FÜR EINE EUROPÄISCHE PRIVATGESELLSCHAFT (Jeanne Boucourechliev & Peter Hommelhoff eds., 1999).

316. For further detail, see KERSTING, *supra* note 293, at 250.

317. The Pro Forma Foreign Companies Act (*Wet op de formeel buitenlandse vennootschappen*) of December 17, 1997 entered into force January 1, 1998, Stb. 1997, 697 (Neth.) [hereinafter Pro Forma Companies Act]. See Werner F. Ebke, *Centros — Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623, 644–688 (2000); Levinus Timmerman, *Das niederländische Gesellschaftsrecht im Umbruch*, in FESTSCHRIFT FÜR MARCUS LUTTER 173, 183–85 (Uwe H. Schneider et al. eds., 2000).

318. Defined in Article 1 of the Pro Forma Foreign Companies Act as a company doing business “entirely or almost entirely” in the Netherlands and having “[no] further real tie” with its state of incorporation. Pro Forma Foreign Companies Act, art. 1.

319. *Id.* arts. 2–3.

320. *Id.* art. 4(1)–(2).

321. *Id.* art. 4(4).

322. For further details see Søren Friis Hansen, *From C 212 to L 212 — Centros Revisited*, 2 E.B.O.R. 141 (2001).

pliance with these requirements is a prerequisite to doing business in Denmark.³²³

On a more general level, such statutes could also provide for joint and several liability of shareholders of a pseudo-foreign corporation that does not maintain a minimum capital either according to the laws of the host state or according to the Capital Directive. As regards co-determination, the statute would simply have to declare the corporate governance modifications for domestic corporations applicable to pseudo-foreign corporations as well. To ensure that corporations are not faced with inconsistent rules applied to them by different states, i.e., to ensure that only one outreach statute applies, the definition of “pseudo-foreign” would have to be sufficiently narrow.

Otto Sandrock, who conceived a “super-addition theory” in the context of the American outreach statutes, has suggested a similar, albeit non-statutory, concept.³²⁴ His idea is to generally apply the *lex incorporationis* and to permit the stakeholders under certain circumstances to invoke cogent forum law that then replaces the law of the state of incorporation.³²⁵ This theory, which had been widely rejected,³²⁶ has received new attention in the wake of the *Centros* case.³²⁷ It avoids the drastic consequences of the real seat theory, while it safeguards the public policy of the host state. It also has the additional advantage of likely being more in compliance with *Centros* than any other theory.³²⁸ Moreover, the statutory approach taken by California and New York has worked in the U.S. and could be, at least at first sight, a model on which a European solution could be based.³²⁹

323. *Id.* at 150–52.

324. See Sandrock, *supra* note 62.

325. *Id.*; Otto Sandrock, *Die Multinationalen Korporationen im Internationalen Privatrecht*, in 18 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 169, 191 (1978). Compare the similar earlier proposal by Latty, *supra* note 2, at 159–62.

326. See, e.g., Grossfeld, *supra* note 193, Rn. 64, 69–70; Kindler, *supra* note 196, Rn. 292–95.

327. See Buxbaum, *supra* note 8.

328. Sandrock, *supra* note 206, at 1343.

329. Despite his criticism, Grossfeld, *supra* note 193, Rn. 37, queries whether the super-addition theory could become the model for the European Community.

Yet, such a statute or such a theory would be incompatible with the fundamental freedoms guaranteed by the EC Treaty.³³⁰ To claim that they apply only to essentially national cases and not community cases would be no defense against an allegation of breach of the treaty. Unlike in the U.S., where the dormant commerce clause does not protect corporations by virtue of their foreign incorporation but only when the corporation engages in interstate commerce,³³¹ the mere fact that the corporation is incorporated in another Member State opens the way for application of the EC Treaty.³³² In its *Centros* decision, the ECJ held accordingly and left only the prevention of abuse and fraud to the EC Member States, the mere circumvention of law not constituting either.³³³ Under these circumstances, public policy arguments, which could theoretically justify an infringement of the right of establishment,³³⁴ will not prevail, especially since different solutions adopted by different Member States would increase the danger of discrimination.

C. European Rules

Thus, a solution can only be found at the European level. This has several important advantages. First, it avoids the problem of discrimination by creating uniform rules that apply throughout Europe. Second, it is very unlikely that the ECJ would find these rules of secondary European law to be in violation of the primary law right of establishment. Third, it could significantly reduce remaining obstacles to the right of estab-

330. As regards the Dutch statute, see the reference for preliminary ruling, Case C-410/99, *Kantongerecht te Groningen*, 2000 O.J. (C 20) 11. (This case became moot and was withdrawn because the pseudo-foreign corporation was struck off the company register in England. See Ebke, *supra* note 317, at 645.) See also Case C-167/01, *Kantongerecht te Amsterdam*, 2001 O.J. (C 200) 41; Ebke, *supra* note 317, at 646-48; Timmerman, *supra* note 317, at 185. As regards the Danish statute, see Hansen, *supra* note 322, at 152-57.

331. *Supra* notes 127, 142, 332, and 351.

332. See Wolfgang Schön, *Der Rechtsmissbrauch im Europäischen Gesellschaftsrecht* (forthcoming; on file with author). Cf. Ebke, *supra* note 317, at 630. It can be argued, however, that compatibility with EC law depends on whether the state enacting an outreach statute follows the real seat or the place of incorporation theory. See Ebke, *supra* note 317, at 648.

333. Concerning the issue of abuse and fraud, compare Menjucq, *supra* note 206, at 555-56; Sandrock, *supra* note 206, at 1343.

334. EC TREATY art. 46(1). See Randelzhofer/Forsthoff, *supra* note 202, Rn. 45-55.

lishment. Fourth, it would provide corporations with more certainty and clarity as to the applicable law, reduce the risk of corporations being subjected to inconsistent rules and thus enable them to choose more comfortably the law that suits them best.

1. Legislative Power of the EC

When suggesting a solution at the European level the first question that arises is the legislative competence of the EC. Just like the federal government in the U.S., the EC has only the powers expressly granted to it by the EC Treaty.³³⁵

Article 293 of the EC Treaty seems to reserve the issue of recognition of companies to negotiations between Member States. Yet, Advocate General Colomer points out that this does not prevent the ECJ from deciding these issues according to the fundamental freedoms.³³⁶ This makes it clear that Article 293 does not exempt corporate choice of law from the scope of the EC Treaty.³³⁷

Moreover, the Treaty of Amsterdam³³⁸ amended the EC Treaty and gives the EC the power of “promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.”³³⁹ It has to be conceded, however, that the relevant provision is related to the free movement of persons and not to the right of establishment. Still, given the express mention of the rules on conflict of laws, the systematical position of the provision within the treaty seems of little significance.³⁴⁰ Also, the Council has, pursuant to

335. EC TREATY art. 5.

336. Opinion of Advocate General Colomer, Case C-208/00, *Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH* (Dec. 4, 2001), ¶ 34, Celex No. 600C0208.

337. The considerations of the Proposed Transfer of Corporate Domicile Directive, *supra* note 271, came to the same conclusion.

338. TREATY OF AMSTERDAM AMENDING THE TREATY ON THE EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997).

339. EC TREATY art. 65(b).

340. Sandrock, *supra* note 206, at 1339. *See also* Katharina Boele-Woelki, *Unification and Harmonization of Private International Law in Europe*, in *PRIVATE LAW IN THE INTERNATIONAL ARENA* 61, 62–66 (Jürgen Basedow et al. ed., 2000); Ebke, *supra* note 317, at 639; Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?*, IPRAX 6 (2000), 454 (454); Christian Kohler, *Interroga-*

these provisions, already adopted the Brussels-I-Regulation, which contains provisions on corporations as well.

A European solution could also be based on Article 44(2)(g) of the EC Treaty. If this provision allows the coordination of “the safeguards which, for the protection of the interests of members and other, are required by Member States,”³⁴¹ then *a maiore ad minus* it also allows for provisions that enable Member States to maintain certain safeguards against pseudo-foreign corporations.³⁴²

Finally, Article 308 of the EC Treaty provides ‘backup powers’ in case the “Treaty has not provided the necessary powers” to attain “one of the objectives of the Community.”³⁴³

Thus, according to one of the provisions cited above,³⁴⁴ the EC has the power to adopt a European solution to the question of the corporate choice of law. Given the problems that this question presents, there is little doubt that a European solution is “necessary for the proper functioning of the internal market”³⁴⁵ and does not violate the principle of subsidiarity.³⁴⁶

2. Content of the suggested European rules

So what should the European rules be? A first attempt to find a European solution was made in 1968 when the then six Member States agreed, pursuant to Article 293 of the EC Treaty, on a Convention on the Mutual Recognition of Companies and Legal Entities [“1968 Convention”].³⁴⁷ However, this convention never entered into force because the Netherlands did not ratify it.³⁴⁸ The convention provided for the recognition

tions sur les sources du droit international privé européen après le traité d'Amsterdam, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 1999, 1, 16.

341. EC TREATY art. 44(2)(g).

342. The Proposed Transfer of Corporate Domicile Directive, *supra* note 271, was also based on that provision.

343. EC TREATY art. 308.

344. The question of which provision of the treaty actually confers the power is significant only as to the further question of the procedure for adoption and the necessary majority, and is beyond the scope of this Article.

345. *See* EC TREATY art. 65.

346. *See id.* art. 5(2). *See* the considerations of the Proposed Transfer of Corporate Domicile Directive, *supra* note 271.

347. Übereinkommen über die gegenseitige Anerkennung von Gesellschaften und Juristischen Personen, v. 29. 2. 1968, BGBl. II S.370 (1972) [hereinafter 1968 Convention].

348. *See* Grossfeld, *supra* note 193, Rn. 137.

of foreign corporations, but allowed each party to reserve the right to apply cogent forum law to foreign corporations that had their real seat in a state other than the state of incorporation.³⁴⁹

With the 1968 Convention, the U.S. experience with outreach statutes, existing European legislation, and Sandrock's super-addition theory³⁵⁰ serving as guidelines, the European rules could be embodied in a European directive and take the following form:

1. Foreign corporations are recognized as legal entities, independently of their real seat. The law of the state of incorporation applies to their internal affairs.
2. As regards foreign corporations having their real seat in their territory, Member States have the right to:
 - a) apply, *mutatis mutandis*, the SE-Directive on co-determination's rules in the case of an SE established by transformation to these corporations by either enacting special laws in accordance with that directive or applying the national laws enacted with respect to SEs;
 - b) require the maintenance of a minimum capital not exceeding the amount stated in the Capital Directive (□25,000) and in accordance with the other provisions of the Capital Directive, and impose liability for non-compliance.
3. As regards foreign corporations having their real seat in their territory, Member States have, if these issues have not already been dealt with by European law, the right to enforce other public policies:
 - a) for the benefit of third parties by applying these rules to the foreign corporation. Each Member State will notify the Commission on what rules it will apply for the benefit of third parties and this notification will be published. A

349. 1968 Convention, arts. 1, 4. All ratifying states exercised that right. Sandrock, *supra* note 206, at 1339.

350. The super-addition theory was already seen as a possible model for Europe by Bernhard Grossfeld & Thomas König, *Identitätswahrende Sitzverlegung in der Europäischen Gemeinschaft*, IPRAX 6 (1991), 380 (382); Bernhard Grossfeld & Thomas König, *Das Internationale Gesellschaftsrecht in der Europäischen Gemeinschaft*, RIW 6 (1992), 433 (436). Cf. Barbara Höfling, *Die Centros-Entscheidung des EuGH — auf dem Weg zu einer Überlagerungstheorie für Europa*, DB 23 (1999), 1206.

Member State can only apply the rules as published after notification;

b) for the benefit of shareholders by requiring the corporation to disclose information pertinent to the different treatment of these public policy issues under the law applicable to the company. A Member State may impose liability on the corporation and its directors for non-compliance if it has notified the commission on these rules and the notification has been published.

4. Measures adopted by Member States as regards foreign corporations having their real seat in their territory must be enforced in the other Member States, including the state of incorporation.

5. A corporation has its real seat where the basic decisions of the board are effectively transformed into daily managerial and administrative decisions. The corporation, its directors, or its shareholders who own directly or indirectly more than 10% of the shares have to register the real seat of the company with the competent authority according to the Branch Directive and according to the provisions of that directive. The corporation, its directors, and its shareholders who own directly or indirectly more than 10% of the shares are jointly and severally liable to any party for any damages resulting from culpable (negligent or intentional) non-compliance.

a) If the corporation has registered its real seat with a state, it is presumed that the real seat is located in that state. If there is no registered real seat, it is presumed that the real seat is located in the state of incorporation. The presumption can be rebutted by any party, except for the corporation itself, its directors and its shareholders who own directly or indirectly more than 10% of the shares, in any proceeding involving the question of the location of the real seat of the corporation.

b) If, at the same time, different proceedings involve the question of the location of the real seat of the corporation, each party is obliged to notify its respective court of the other proceedings. Each court shall rule on the location of the real seat in an interim award. If the rulings do not come to the same conclusion, each court shall stay its proceedings and refer the question to the European Court of Justice for a preliminary ruling. Courts of non-Member states can request a preliminary ruling on the location of the real seat of a corporation by the courts of the Member

State in which the corporation is presumed to have its real seat.

6. Member States must not treat the transfer of a domestic corporation's real seat to another Member State as the dissolution of the corporation. A Member State may, however, apply a procedure analogous to the procedure described in Article 8 of the SE-Statute.

3. Discussion

These proposed rules seek to strike a balance between the necessary recognition of even pseudo-foreign corporations, the need to safeguard public policies of Member States, the objective of not subjecting foreign corporations to inconsistent rules, and giving founders and managers the opportunity to choose the law that suits them best.

First, it is necessary to make clear that foreign corporations are to be recognized as legal entities in all Member States. Even though this cannot be inferred from Article 48 of the EC Treaty,³⁵¹ the necessity nevertheless follows from the *Centros* case. The application of the internal affairs rule will allow founders to choose the law that suits them best, and thus promotes at least limited competition among Member States. Its general application is also superior to the general application of the real seat theory. Even if the real seat theory recognized pseudo-foreign corporations as legal entities, it would nevertheless have to re-qualify them as domestic corporations, which will lead to a variety of problems that can be avoided by choosing the state of incorporation theory.

Second, in order to avoid the disadvantages of the "pure" state of incorporation theory, it is necessary to make sure that Member States can enforce their public policies. This Article has so far identified the questions of co-determination and minimum capital requirements as crucial in this respect. The proposal tries to address these issues by enabling Member States to apply existing European legislation on these issues to

351. EC TREATY art. 48 is limited in scope and only treats companies as natural persons in as far as the right of establishment is concerned. Cf. Ranzelzhofer/Forsthoff, *supra* note 202, Rn. 1-2. Compare *supra* notes 127, 142, 331, and 332.

pseudo-foreign corporations.³⁵² A British Ltd. having its real seat in Germany can therefore be required to have and maintain a minimum capital and — no matter what its internal structure is³⁵³ — its employees will be entitled to some degree of co-determination, which will be set by a procedural mechanism pursuant to the SE-Directive. The SE-Directive contains different sets of rules for the different methods of formation of an SE; the proposal chooses the rules that apply in the case of an SE established by transformation because this case is closest to the case of a pseudo-foreign corporation, i.e., a pseudo-foreign corporation can for this purpose be viewed as a domestic corporation that has transformed into a foreign one.³⁵⁴ This solution has the advantage of keeping the system coherent and of avoiding re-negotiation of these issues. Seen together with the general recognition of foreign corporations and the adoption of the place of incorporation theory, this approach offers a fair trade-off³⁵⁵ — EC Member States will have to give up the real seat theory and will not receive full harmonization in return. But this theory has been eroded by the ECJ's jurisprudence anyway and they will at least be able to prevent the circumvention of their laws and their public policies. Member States who adhered to the place of incorporation theory will have to tolerate the exceptions to this theory that might go beyond the abuse and fraud exceptions recognized by *Centros*. But, on the other hand, they receive recognition of all foreign corporations and certainty as to which rules apply to pseudo-foreign corporations.

Third, the proposal also realizes that Member States might pursue other public policies apart from co-determination and

352. A roughly similar example of such a technique is Article 6 of the Single Member Directive. Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies, art. 6, 1989 O.J. (L 395) 40, 41.

353. I.e., the choice of internal structure does not permit it to evade co-determination. *See supra* note 278.

354. In the case of an SE established by transformation, the default rule of the SE-Directive ensures that co-determination will not be diminished. *See Heinze, supra* note 278, at 90–91. In the case of a pseudo-foreign corporation this means, *mutatis mutandis*, that the level of co-determination will be equal to the level that applies to a comparable domestic corporation, unless the pseudo-foreign corporation reaches a different agreement with its employees.

355. It especially provides the clear separation between the recognition of the legal entity and the question which domestic rules can be applied to it required by Knobbe-Keuk, *supra* note 257, at 338.

minimum capital requirements (e.g., laws on groups of companies³⁵⁶) and enables them to enforce these policies unless European laws have already dealt with the issues. In order to avoid too many exceptions to the general internal affairs rule, the proposal distinguishes between rules that benefit third parties (e.g., liability of the parent for the subsidiary in certain circumstances) and rules that benefit shareholders (e.g., minority protection, guaranteed dividends). Rules that benefit third parties can be more strictly enforced because, on the one hand, third parties need and deserve more protection, and, on the other hand, these rules are less likely to interfere with the internal affairs of the corporation. Since shareholders can protect themselves by not becoming shareholders, i.e., by not investing, it is less important to safeguard their interests. Public policies can be enforced by simply informing (prospective) shareholders of the different legal rules that apply to a foreign corporation. The notification and publication requirements seek to give the foreign corporation and its shareholders a clear idea of which legal regime applies and to protect them against surprise decisions.

Fourth, even though state interests do not warrant the enforcement of third state interests, if the conflict of laws rules operate on the Member State level and are not uniform,³⁵⁷ this changes once they are transferred to the European level. It is then necessary, in the interest of keeping the laws applicable to a corporation constant throughout the Community, that all EC Member States recognize and enforce rules applied to a foreign corporation by the state in which the corporation has its real seat. Thus, German courts would have to apply the French laws enacted pursuant to this proposed directive to an Irish company having its real seat in France.

Fifth, the proposal tries to facilitate the determination of where the “real seat” of the corporation is. It therefore defines the term “real seat” in accordance with the real seat theory and does not adopt the approach of the Californian outreach statute. Even though a corporation cannot really be called pseudo-foreign if it does business all over Europe and its shareholders are dispersed throughout the Community, the location of the real seat should be the only controlling factor. First, the real

356. See Bundesgerichtshof, BB 22 (2000), 1106 (1107).

357. See *supra* Part V.D.1.

seat is already used as such in the EEIG-Regulation and the SE-Statute.³⁵⁸ Second, the corporation remains in control of the laws to apply to its internal affairs, and this important question does not depend on where the company's securities are traded or on the development of its business activities. Third, it is easier to determine where the real seat is located. To facilitate this task further, the proposal provides for registration of the real seat according to the Branch Directive, which also implies disclosure, and publication according to the Disclosure Directive. For the same reason, the proposal establishes certain presumptions as to the location of the real seat and liability on the part of the corporation, directors, and 10% shareholders. The procedural rules try to avoid inconsistent decisions by courts and to ensure that the corporation not only has a real seat, but has only one real seat.³⁵⁹ It therefore also invites courts of non-EC Member States to refer questions on the location of the real seat of a foreign corporation to the courts of the EC Member State where the corporation is presumed to have its real seat for a preliminary ruling.³⁶⁰ In sum, these suggested rules make sure that the corporation is not subjected to inconsistent demands.

Sixth, from the point of view of the *Centros* decision, it is sufficient to ensure that foreign corporations can enter a host state. According to *Daily Mail*, it is not necessary to enable them to leave their state of incorporation.³⁶¹ Thus, Germany has to accept and to recognize a *Centros Ltd.* pseudo-foreign corporation entering Germany, but can deny a domestic German corporation the right to transfer its (real) seat to Britain.³⁶² This distinction seems artificial and constitutes reverse discrimination, i.e., discrimination against nationals as opposed to discrimination against foreign nationals. Yet, the proposal does not aim to deal with the question of transfer of corporate domicile in general. It therefore leaves undecided the question of reincorporation (whether this involves the transfer of the real

358. See *supra* notes 286, 287.

359. Xanthaki, *supra* note 207, at 3.

360. A direct referral to the ECJ is not possible since Article 234 of the EC TREATY only enables the courts of Member States to request a preliminary ruling.

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

362. Oberlandesgericht Düsseldorf, RIW 6 (2001), 463; Oberlandesgericht Hamm, RIW 6 (2001), 461.

seat or not³⁶³) and only allows domestic corporations to transfer their real seat to another Member State. In the context of the state of incorporation theory, this cannot compromise any public policy of the state of incorporation since its law continues to be applicable.

Finally, the European solution should take the form of a directive. This facilitates the integration of the European rules into the legal systems of the EC Member States, i.e., gives the Member States the necessary freedom to adapt the rules to their (public policy) needs. It therefore also minimizes interference with the Member States' legal systems and makes an agreement among the Member States more likely.

VII. CONCLUSION

In the U.S., the application of the place of incorporation theory has led to the Delaware Effect feared by many European commentators, but this has not adversely affected the U.S. economy. However, before calling for a Delaware Effect for Europe, one should consider that, whereas the corporate laws in the U.S. are very similar so that adverse effects are necessarily limited, the stakes in Europe are higher. They involve controversial issues like maintenance of minimum capital and the highly political co-determination question, neither of which are an issue in the U.S.

Both continents have developed functionally equivalent rules that deal with the questions presented by pseudo-foreign corporations. Both in European and U.S. law, foreign corporations have to qualify and pseudo-foreign corporations are subjected to "outreach" by the laws of the host state. In so far as the European outreach feature is based on the real seat theory, a new approach has become necessary due to the recent jurisprudence of the ECJ, strengthening the place of incorporation theory in Europe.

This is not a cause for alarm, however. The U.S. example shows that the place of incorporation theory still leaves room for appropriate exceptions, even in a federal system where the states are bound to take special regard of the position and laws

363. Therefore, a domestic corporation cannot become a pseudo-foreign corporation by re-incorporating abroad and maintaining its real seat in the state of its original incorporation.

of other states and where discrimination is prohibited. Europe simply has to be careful not to adopt a rigorous place of incorporation approach that does not allow exceptions designed to enforce public policies in appropriate circumstances. This danger is real given the *Centros* case, in which the founders of a pseudo-foreign corporation openly admitted that they wanted to circumvent the Danish minimum capital requirement and the ECJ did not let the Danish authorities intervene.³⁶⁴ It has to be conceded, though, that the measures taken were disproportionate and that the European Court of Justice might have found other, more proportionate, measures acceptable.

The ECJ is confined to ruling case by case on violations of the fundamental freedoms and, accordingly, cannot create a legal system that balances EC Member State interests while at the same time safeguarding Community interests. Such a system can and should be created only by the Community legislator who is called upon to act by the recent decisions of the ECJ. The proposed choice of corporate law directive avoids the dangers of a too rigorous place of incorporation approach by combining both theories. The place of incorporation theory, being the general rule, is supplemented by selected features of the real seat theory that refer back to existing European legislation as much as possible.

364. *Supra* note 6.