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National Choice of Law for Corporations

I. COMMON LAW: THE THEORY OF INCORPORATION

The theory of incorporation has prevailed in all common law jurisdictions and has gained some acceptance amongst civilian systems. In English law, the law of the place of incorporation has been traced back to eighteenth-century case law.[1] Its predominance is uncontroversial.[2] It is also followed in several key Commonwealth jurisdictions,[3] as well as in the United States.[4] It has also been adopted by some civilian systems, like the Netherlands,[5] Switzerland,[6] and Russia.[7] **1.01**

[1] *Henriques v Dutch West India Co* (1728) 2 LD Raym 1532, 92 ER 494; *Lazard Bros v Midland Bank* [1933] AC 289, 297, HL. For a different interpretation *see* S Rammeloo, *Corporations in Private International Law: A European Perspective* (1st edn OUP, Oxford 2001) 129.

[2] Dicey, Morris & Collins, *The Conflict of Laws* (14th edn, Sweet and Maxwell, London 2006) paras 30R-020 *et seq*; *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] 3 All ER 8, Ch; *Banco de Bilbao v Sancha and Rey* [1938] 2 KB 176, CA; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821, QB; *Grupo Torras SA v Al-Sabah* [2001] CLC 221, CA; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 WLR 1157.

[3] *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 227-228 (HCA); *National Trust Co v Ebro Irrigation & Power Ltd* [1954] Ont L Rep 463, 476–479 (Ont SC).

[4] WLM Reese & EM Kaufmann, 'The law governing the corporate affairs: choice of law and the impact of full faith and credit' (1958) 58 Colum L Rev 1118, 1125–1126.

[5] Rammeloo (n1) 98–100.

[6] *See* paras 1.11–1.12.

[7] Articles 1202–1203 of the Russian Civil Code.

1.02 According to this theory, 'all matters concerning the constitution of a corporation are governed by the law of the place of incorporation'.[8] Under the American approach, the law of the place of incorporation governs the existence and the subsequent dissolution of a corporation,[9] as well as issues involving corporate powers and liabilities,[10] shareholders, directors, and officers.[11]

A. Choice of Law for Corporations in England

1.03 In England,[12] it has been well established that the following seven main issues are all matters to be governed by the law of the place of incorporation: (1) the beginning or the end of the legal personality of a corporation;[13] (2) the validity of the appointment of directors;[14] (3) the authority of individuals to act on behalf of the corporation;[15] (4) the existence or not of liability of the corporation members for corporate debts;[16] (5) the capacity of the corporation to enter into certain agreements;[17] (6) contracts of membership to a corporation;[18] and (7) the amalgamation of corporations resulting in the establishment of a new corporation and the universal succession (*succesio universalis*) of the new corporation to the rights and obligations of its predecessors.[19]

B. Choice of Law for Corporations in the USA

1.04 The original position in US law was that corporations are creatures of law that do not exist beyond the borders of the state of incorporation.[20] However, by the end of the nineteenth-century it had been accepted that recognition of a corporation would depend on whether the requirements

[8] Rule 162(2) in Dicey, Morris & Collins (n2) para 30R-020.
[9] Restatement Second, Conflict of Laws, para 297 (1971).
[10] Ibid paras 301–302.
[11] Ibid paras 303–310.
[12] Dicey, Morris & Collins (n2) para 30–024.
[13] *Lazard Bros* (n1); *Presentaciones Musicales SA v Secunda* [1994] Ch 271, CA; *The Kommunar No 2* [1997] 1 Lloyd's Rep 8, 11, QB.
[14] *Sierra Leone Telecommunications* (n2).
[15] *Banco de Bilbao* (n2); *Presentaciones Musicales* (n13) 277 & 283.
[16] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 509, HL.
[17] *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, CA; *Janred Properties Ltd v ENIT* [1989] 2 All ER 444, CA. This issue is also governed by the law applicable to the agreements entered into by the company (*see* Rule 162(1) in Dicey, Morris, & Collins).
[18] *Pickering v Stephenson* (1872) LR 14 Eq 322, Ch; *Spiller v Turner* [1897] 1 Ch 911, Ch.
[19] *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, HL; *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964, 969.
[20] *Bank of Augusta v Earle* 38 US 519 (1839); M Rosenberg, P Hay & RJ Weintraub, *Conflict of Laws: Cases and Materials* (10th edn, The Foundation Press Inc., 1996) 983.

of the law of the place of incorporation had been fulfilled.[21] States though would no longer be allowed to impose special requirements on companies incorporated in other US jurisdictions in order to grant them permission to conduct business in their territory.[22]

1.05 For a long time the federal courts had also declined to adjudicate disputes concerning the internal affairs of foreign corporations.[23] However, the Supreme Court reversed the position in the *Williams v Green Bay & Wisconsin Railroad Co* case,[24] where it endorsed the opinion of the minority in the *Rogers v Guaranty Trust Co of New York* case.[25] It held that federal courts may hear cases involving internal affairs of a corporation foreign to the State where the federal court sits.

1.06 The Supreme Court accepted that the internal affairs of corporations should be governed by the law of the place of incorporation.[26] In fact it has been argued that this choice of law[27] has been elevated to a constitutional mandate.[28] These rules also apply in international corporate disputes, namely in cases where one party is alien,[29] ie a company incorporated abroad. However, it is rare that US federal courts will establish jurisdiction in such cases.[30]

1.07 Deviating from the position of English law, some US States recognize an exception to the theory of incorporation and adhere to the doctrine of pseudo-foreign corporations. A corporation is pseudo-foreign if it has no connection with the State of incorporation other than the act of incorporation, while its centre of management and activities lies elsewhere. The rules of this latter place will be entitled to apply as part of the law of the forum.[31]

[21] *Lancaster v Amsterdam Improvement Co* 35 NE 964, 967, col. 2 (NY CA, 1894); *Montgomery v Forbes* 19 NE 342, 343 (Massachusetts Supr J Ct, 1889).

[22] *Paul v Virginia* 75 US 168 (1868).

[23] *Rogers v Guaranty Trust Co of New York* 288 US 123, 53 S Ct 295, 297–298 (1933); *see also* Stone J's dissent at 302–303.

[24] 326 US 549, 66 S Ct 284, 286 (1946).

[25] 288 US 123, 53 S Ct 295, 302–303.

[26] *Edgar v MITE Corp* 457 US 624, 102 S Ct 2629, 2642 (1982).

[27] *CTS Corp v Dynamics Corp of America* 481 US 69, 107 S Ct 1637, 1648–1652 (1987).

[28] EF Scoles and others, *Conflict of Laws* (4th edn, West Group, St Paul, Minnesota 2004) 1229–1230, whereas Ph J Kozyris, 'Corporate Wars and Choice of Law' (1985) 32 Duke LJ 1, 49 argues that it does not clearly establish it.

[29] *ITEL Containers International v Atlanttrafik Express Service Ltd* (SDNY, 13 July 1988).

[30] *See* Ch 2.I.C.

[31] *Mansfield Hardwood Lumber Co v Johnson* 268 F 2d 317 (US Ct of Apps (5th Cir), 1959); *Western Air Lines, Inc v Sobieski* 12 Cal Rptr 719 (California CA, 1961); *Gries Sports v Modell* 473 NE 2d 807, 810 (Ohio SC, 1984); *Yates v Bridge Trading Co* 844 SW 2d 56 (Missouri Ct of Apps, 1992).

In other words, the doctrine of pseudo-foreign corporations operates as a kind of public policy clause with an overriding effect.

1.08 In order to determine whether a corporation is pseudo-foreign, it is necessary to examine, *inter alia*, various factors, such as the place of substantial business, the domicile of a substantial number of shareholders,[32] the residence of the parties and actors, the *situs* of property, the law of the place where the torts were committed by the company, the law that governs the contracts entered into by the company, or the sole or main location of the corporation carrying business.[33]

1.09 This doctrine was first conceived by Latty[34] but was initially adopted only in California and New York.[35] However, it has always enjoyed support from eminent authors.[36] It has been developed to tackle one of the main disadvantages of the incorporation theory, namely the fact that it may result in the application of a law with which the corporation has in fact no genuine connection other than the act of its incorporation. However, both the federal and some State courts declined to adopt it and applied the law of the place of incorporation, even in cases where there was no genuine link between the corporation and the place of incorporation, provided that the litigation concerned take-over battles, derivative suits, and a variety of other internal matters.[37]

1.10 By the 1980s the pseudo-foreign doctrine had gained almost universal acceptance in the USA.[38] It was argued that State courts should abstain though from directly regulating the constitution of a foreign corporation, because in doing so it would impose excessive burdens on interstate commerce.[39] Full faith and credit demands the application of the law of the place of incorporation.[40] Even Delaware, which has attracted most incorporations in the US,[41] eventually recognized the existence of such an exception, but

[32] *Western Air Lines* (n31).
[33] *Mansfield* (n31).
[34] ER Latty, 'Pseudo-Foreign Corporations' (1955) 65 Yale LJ 137.
[35] Kozyris (n28).
[36] Restatement Second, Conflict of Laws, para 302(g) (1971); EF Scoles (n28) 1232; AW Vestal, 'Choice of Law and the Fiduciary Duties of Partners Under the Revised Partnership Act' (1994) 79 Iowa L Rev 219, 268.
[37] Kozyris (n28) 18–24.
[38] Ibid 96.
[39] Ibid 33.
[40] *Order of United Commercial Travellers v Wolfe* 331 US 586, 67 S Ct 1355 (1947).
[41] *See* 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating Terrorism: United States of America' (FATF, Paris 23 June 2006) p 231; John Armour, 'Who should make corporate law? EC legislation versus regulatory competition' (2005) 58 CLP 369, 376 n24.

only on very rare occasions, where national policy is outweighed by the interests of the forum state in the company and its shareholders.[42]

C. Choice of Law for Corporations in Switzerland

1.11 Switzerland adheres to the incorporation theory. According to article 154(1) of the Swiss Private International Law Act, corporations are governed by the law of the place of incorporation, if the registration and publicity requirements of the latter have been met. In the event that such requirements have not been met, the law of the place of incorporation is replaced by the law of the place where the corporation is 'actually administered' under article 154(2) of the said act.[43]

1.12 The theory of incorporation constituted the Swiss choice of law even before the enactment of the LDIP in the sense that the Swiss courts would apply the law of the place of the statutory seat and not of the real seat. However, it had been held by the Swiss Federal Tribunal that the law of the real seat would replace the law of the place of incorporation, if the statutory seat was fictitious.[44] This was held to be the case with regard to a foundation established in Liechtenstein that had 'no activity, real seat or even a letter box' in the Principality. There was strong academic debate whether this abuse-of-law exception survived the enactment of the LDIP. The Federal Tribunal reached the conclusion that the 'fictitious seat' theory was incompatible with the spirit and letter of the LDIP.[45]

II. CIVIL LAW: THE REAL SEAT THEORY

1.13 The majority of civilian systems have opted for the real seat theory.[46] The content of this theory is more or less uniform throughout the jurisdictions that have adopted it, subject to minor variations that will be examined on

[42] *McDermott Inc v Harry Lewis* 531 A 2d 206, 218 (Del SC, 1987); followed by *Draper v Gardner* 625 A 2d 859 (Del SC, 1993), where the court drew attention to *Kamen v Kemper Financial Services Inc* 500 US 90, 111 S Ct 1711 (1991), where the US Supreme Court had held that it was the law of the state of incorporation which governed the substantive legal issues of corporate governance.

[43] *Loi du 18 décembre 1987 sur le droit international privé* (LDIP) RS 291.

[44] ATF 108 II 398 (1982).

[45] ATF 117 II 494, para 5b (1991).

[46] Article 110(1) of the Belgian *Code de Droit International Privé*; article 10 of the Austrian *Gesetz über das internationale Privatrecht* and Oberster Gerichtshof 14 July 1993 (1998) 125 JDI 993; article 10 of the Greek Civil Code; article 158 of the *loi du 10 août 1915 concernant les sociétés commerciales* of Luxembourg; article 11(2) of the United Arab Emirates Civil Code.

a State-by-State basis. According to this theory, a corporation is governed by the law of the place where the central management and control is located.[47]

A. Choice of Law for Corporations in France

1.14 After a period of incoherence and uncertainty in French case law,[48] the *Cour de Cassation* adopted the *siège social* as the connecting factor for corporate disputes.[49] The *siège social* was defined as the real seat, namely the location where the corporation has its main legal, financial, administrative, and technical management. The *Conseil d'Etat* has also adopted the same theory.[50]

1.15 Since then the *Cour de Cassation* has confirmed the validity of the real seat theory and has recognized one exception to the rule,[51] namely the case where, due to a change of sovereignty over the territory where the real seat of the company is situated, the latter moves its real seat to the territory of its original State of incorporation. Two requirements were put in place for the satisfaction of the exception. First, the company had to be controlled by French nationals and, second, the transfer of seat had to be lawfully decided by the competent corporate body.[52] However, the nationality of such corporations will normally be governed by the agreement or treaty of independence.[53]

1.16 The issue of the identification of the real seat as a matter of fact was addressed in a series of cases which were summed up by the legislator and enacted as law.[54] The French courts have held that in order to determine the *siège social*, one should refer to the place where the general assembly of the shareholders is summoned, the board of directors has its offices, and the superior organs of management and control can be found. Under this test, the Banque Franco-Serbe, which had been incorporated in Denmark, was considered a French corporation.[55] The *siège social* is, therefore, not to be

[47] Rammeloo (n1) 11–13.

[48] H Batiffol & P Lagarde, *Traité de Droit International Privé* (8th edn LGDJ, Paris 1993) vol. 1, 334–335; Y Loussouarn & P Bourel, *Droit International Privé* (6th edn, Dalloz, Paris 1999) 751–753.

[49] Cass civ 7 July 1947, *Compagnie du Cambodge c Administration de l'Enregistrement* (1949) 38 RCDIP 78.

[50] CE 22 February 1960, *Société Mayol, Arbona et Cie* (1960) 49 RCDIP 335.

[51] Cass civ 30 March 1971, *Caisse Centrale de reassurance des mutuelles agricoles c Mutuelle centrale d'assurances et de reassurance des mutuelles agricoles et Société générale* (1971) 60 RCDIP 451; B Ancel & Y Lequette, *Les grands arrêts de la jurisprudence française de droit international privé* (5th edn, Dalloz, Paris 2006) 458.

[52] Ancel & Lequette (n51) 462.

[53] Ibid.

[54] B Audit, *Droit International Privé* (4th edn, Economica, Paris 2006) 874.

[55] CA Paris 21 May 1957, *Banque Franco-serbe c Danske-Landmarndsbank* (1958) 47 RCDIP 128.

understood as the registered office (*siège statutaire*), but as the real seat (*siège réel*). That test has been consistently followed ever since.[56] In the case of public limited companies (*sociétés anonymes*), it has been ruled that one should look for the location of the board of directors and not for that of the general assembly.[57]

1.17 In general, the real seat is considered to be located in the place where effective management is exercised, that it is the place where the general assembly is convened, the board of directors holds its meetings and the major contracts concerning the corporation are signed.[58] This jurisprudential approach stands as positive law by virtue of article 1837(1) CC.

1.18 In order to facilitate the process before the French courts, the *Cour de Cassation* has established a rebuttable presumption that the real seat is located at the registered office.[59] This requires the litigant wishing to overturn the presumption to prove that the central management is not located at the registered office.[60] In doing so, facts such as the ownership of the company in question, the existence of registered branches in France, the domicile of the chairman of the board of directors, and the location of the premises of the company in which decisions are made will become extremely relevant.[61]

1.19 In cases of multinational corporations or corporations having various administrative organs in various States, the court will have to take into account the location of the organs of the very central management and control, and not of the management of secondary character or exploitation.[62] In cases of foreign companies setting up a subsidiary in France, the position

[56] P Kahn, Cass comm 19 May 1992, *Banque Worms c Grindlay's Bank* (1992) 119 JDI 954 (note); M Menjucq, Cass comm 8 December 1998, *Soc General Accident c Banque Nationale de Paris et autres* (1999) 88 RCDIP 284 (note).

[57] *Compagnie du Cambodge* (n49); although this case concerned the transfer of the place where the General Assembly was held, it has been generally alleged that central management and control lies with the board of directors (*see* Batiffol & Lagarde (n48) 339).

[58] Cass soc 3 March 2004, *Mme X c Soc Ural Hudson Ltd* <http://www.legifrance.gouv.fr/> accessed on 13 June 2011.

[59] Cass Ass 21 December 1990, *Directeur general des impots c Soc Roval* (1992) 81 RCDIP 70–72. *Siège statutaire* (statutory seat) is the place named as seat in the corporate charter and corresponds best to the registered office in English company law.

[60] Cass comm 18 October 1994, *Paul Guez c Soc Emerson Europe SA* <http://www.legifrance.gouv.fr/> accessed on 13 June 2011.

[61] Cass crim 31 January 2007, *La Soc Elf Aquitaine* <http://www.legifrance.gouv.fr/> accessed 13 June 2011.

[62] Batiffol & Lagarde (n48) 338.

of the law nowadays is that the central management and control of a French subsidiary is located in France.[63]

B. Choice of Law for Corporations in Germany

1.20 Despite the fact that the German BGB does not provide for a choice of law for corporations, the real seat theory has been long established in case law.[64] According to the latter, the real seat is the place of central management and control.[65] Central management has been construed to mean the place where 'the fundamental business decisions by the managers are being implemented effectively into day-to-day business activities'.[66]

1.21 Furthermore, renvoi plays a significant role in the German conflict of laws for corporations. The reference made by German law to the law of the seat includes a reference to the private international law rules of the latter.[67] Thus questions concerning the corporation will be resolved according to the substantive law of the country chosen by the private international law rules of the country pointed to by the law of the seat.[68] Thus, the law of the place of incorporation may be applied by renvoi.

C. Choice of Law for Corporations in Italy

1.22 The choice of law for corporations in Italy is *sui generis*. Article 25(1) of Law No 218 of 31 May 1995 on the reform of the Italian system of private international law[69] adheres *prima facie* to the incorporation theory. However, the same article further stipulates that Italian law will apply if the *sede dell'amministrazione* (seat of the administration) or the *oggetto principale dell'impresa* (principal purpose of business) is located in Italy. The interpretation of these terms has been left to the courts. It requires the finding of an

[63] Cass civ 8 February 1972, *Epelbaum c Société Shell Berre* (1973) 100 JDI 218; Ancel & Lequette (n51) 460–461.

[64] WF Ebke, 'The 'Real Seat' Doctine in the Conflict of Corporate Laws' (2002) 36 Intl Law 1015, 1021–1022; for a list of German cases endorsing the rule of the seat theory *see* G Hertel, 'La loi nationale face aux structures patrimoniales étrangères: la loi allemande' [2001] RHDI 189, 201, 202 n47.

[65] Hertel (n64) 201–204.

[66] Ebke (n64) 1022, citing BGH BGHZ 1986, 296 (German Federal Court of Cassation).

[67] 1896 Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) (BGBEG), s 4(1).

[68] T Koller, 'The English Limited Company—Ready to Invade Germany' (2004) 15 ICCLR 334, 335–336.

[69] A Montanari & VA Narasi, *Conflict of Laws in Italy: The Text and an English translation of Italian Law No 218 of 31 May 1995* (1st edn, Kluwer Law International, The Hague 1997) 36–37.

actual relationship with the Italian legal order by discarding formalities.[70] This requirement will be satisfied if the place where the acts forming the will of the company (*volontà sociale*) take place[71] in Italy or the activity of the company is predominantly in Italy.[72] In all other cases the law of the place of incorporation will apply, which includes renvoi under article 13 of Law No 218.

1.23 The *sui generis* link of the principal place of business is not applied frequently. It has been adopted in order to tackle a specific type of cross-border entrepreneurship, namely the Liechtenstein *Anstalten*, which Italians were increasingly using in Italy.[73] It is now settled that in cases where an *Anstalt* does not have its principal place of business in Italy, the lack of plurality of shareholders does not conflict with Italian public order.[74]

1.24 According to article 25(2) of Law No 218, the scope of article 25(1) covers the legal status of the entity, its name, its incorporation, transformation and dissolution, its capacity, its establishment and the powers of its organs, agency, the acquisition, or loss of membership of the company as well as the rights and obligations resulting thereof, the liability for its obligations, and the consequences of breach of the articles of association.

III. THE INCORPORATION AND REAL SEAT THEORIES COMPARED

1.25 It is necessary to examine the two theories in question within their legal context in order to identify their respective advantages and disadvantages. This will ensure a better understanding of their functioning.

A. Advantages and Disadvantages of the Incorporation Theory

1.26 With regard to the incorporation theory, it is fairly reasonable that the legal order that created the corporation should also govern it.[75] No other

[70] T Ballarino, *Diritto Internazionale Privato* (3rd edn Cedam, Padova 1999) 365–366; Cass civ (3) 10 December 1974 n 4172 (Italian Court of Cassation) reported in G Bellagamba & G Cariti, *Il sistema Italian del diritto internazionale privato: Rassegna della giurisprudenza* (1st edn, Giuffrè, Milano 2000) 145–146.

[71] Simonetto, *Trasformazione e fusione delle società: Società costituite all'estero* (2nd edn, Zanichelli, Bologna-Roma 1976) 389.

[72] Ballarino (n70).

[73] Ibid 365.

[74] Cass SU 16 November 2000 n14870 (2002) 38 RDIPP 193 (Italian Court of Cassation).

[75] TC Drucker, 'Companies in Private International Law' (1968) 17 ICLQ 28.

state has a greater interest than the State of incorporation in regulating a corporation's internal affairs.[76] Arguments based on legal certainty,[77] predictability[78], party autonomy,[79] and security of transactions are also in its favour. This theory facilitates any potential litigant in identifying *ex ante* the law applicable to a possible dispute with a corporation. Last but not least, a considerable advantage of the incorporation theory is that it has promoted the economic development of the countries that have adopted it. The Netherlands are a good example of civilian jurisdictions that adopted the incorporation theory in order to encourage foreign investment.[80]

1.27 However, abuse of law and tolerance, if not promotion, of letter-box companies, ie companies that do not retain any connection with their State of incorporation, other than a mere letter-box, are said to be amongst the most significant disadvantages of this theory.[81] The incorporation theory is criticized for allowing the founders to establish the corporation in a jurisdiction with lax company law and simultaneously circumvent the rules of the State in which they conduct business, and in which one might expect them to have been incorporated. Practice has shown that jurisdictions with very lenient rules of corporate governance, which also adopt the theory of incorporation, have attracted huge numbers of corporations. Some think that thanks to such lax laws, Delaware has attracted thousands of corporations and have described this now as a 'law beauty competition'.[82]

1.28 The common-law response to this alleged defect of the incorporation theory has been the pseudo-foreign company doctrine.[83] The urge to guarantee the financial stability of corporations operating within their jurisdiction and to protect shareholders and creditors from fraudulent practices has motivated the propagation of this doctrine.[84] It was, therefore, anti-abuse policies that lead to the promulgation of such laws in various States, the

[76] *Soviet Pan Am Travel Effort v Travel Comm Inc* 756 FSupp 126, 131 (SDNY, 1991).
[77] *Yates v Bridge Trading Co* 844 SW 2d 56, 62 (Missouri Ct of Apps, 1992).
[78] Y Hadari, 'The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of such Enterprises' (1974) 23 Duke LJ 1, 10; JT Oldham, 'Regulating Regulators: Limitations Upon a State's Ability to Regulate Corporations with Multi-State Contacts' (1980) 57 Den LJ 345, 350.
[79] B Audit, *Droit International Privé* (4th edn, Economica, Paris 2006) 870–871.
[80] D Charny, 'Competition among Jurisdiction in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities' (1991) 32 Harv Int'l LJ 423, 429.
[81] Rammeloo (n1) 17–18.
[82] R Drury, 'The regulation of foreign corporations: Responses to the "Delaware syndrome"' (1998) 57 CLJ 165.
[83] *See* paras 1.07–1.09.
[84] Oldham (n78) 378.

most prominent of which are California and New York, in the USA, and the Netherlands, in Europe.

B. Anti-Abuse Considerations: The Advantage of the Real Seat Theory

1.29 The advantages of the real seat theory have been efficiently summarized in the following statement:

> This theory, which is a protective one, is still supported by the better arguments. It ensures that in general the law of the state that is most affected will be implemented; it has the advantage of being appropriate to the issues arising, it makes effective state supervision possible, and offers the greatest possible protection for creditors. A state which, out of concern for its own national economy, is wary of the encroachment of the interests of the founders of the company and the state of incorporation will in principle choose a connecting factor independent of the statutory seat and place of registration and concentrate on the law of the place from which the company is actually controlled.[85]

1.30 The assumption behind this theory is that no law is more closely connected with the corporation than the law of the country where the central management is located. Although in several countries it is always possible for a corporation to transfer its seat abroad without prior dissolution,[86] this decision is not as easy as it sounds. It is a very hard and often not cost-effective decision. Setting aside these advantages, the real seat theory restricts the extent of party autonomy of entrepreneurs in selecting to establish a company under a specific national law.

1.31 On the other hand, the real seat theory may lead to more equitable solutions than the incorporation theory by facilitating a kind of extraterritorial application of the law. The best example is that of the Elf scandal that shook France in 1994. The giant French oil company, Elf Aquitaine, had actually become a private bank for executives who defrauded at least 3 billion French francs from the Elf Group through the establishment of several offshore companies and the opening of several bank accounts abroad.

[85] *Re Expatriation of A German Company* [1993] 2 CMLR 801, para 7 (Bavarian *Oberstes Landesgericht*).

[86] Article 112 of the Belgian *CDIP*; Y Loussouarn, Belgian Cass 12 November 1965, *Soc Lamot Ltd c Willy Lamot* (1967) 56 RCDIP 506, 510 (note). In Germany though dissolution of the corporation was a prerequisite for the transfer of the seat abroad: C Kersting, 'Corporate Choice of Law—A Comparison of the United States and European Systems and a Proposal for a European Directive' (2002) 28 Brook J Intl L 1, 39 n207; Ebke, (n64) 1036 n151&152, citing relevant German case law.

1.32 In relation to fraudulent activities undertaken by a manager of Elf Gabon, a company incorporated in Port-Gentil, Gabon, the manager in question tried to evade liability for complicity in concealment and concealment of abuse of corporate assets by arguing that the relevant French corporate law provisions could not apply to the director of a Gabonese company. The *Cour de cassation* held that Elf Gabon was a French company, because the French parent company, Elf Aquitaine, held 58.28 per cent of the shares of Elf Gabon, the latter retained an establishment registered in the Commercial Registry of Nanterre, the president of the board of directors was domiciled in Paris and the decisions to perform all the relevant fraudulent activities were taken in the premises of the *Tour Elf* in La Défense, Paris. It was thus proved to the satisfaction of the *Cour de cassation* that the real seat of Elf Gabon was in France and that French law should apply to its directors.[87]

1.33 In any event, the criticism that the real seat theory negates the legitimate expectation of the founders that the law of the place of incorporation will govern all corporate affairs ignores the fact that the real seat in fact does not envisage the exclusion of the law of incorporation. It merely suggests as an *optimum* that the central management is located in the country of incorporation.

[87] Cass crim 31 January 2007, *La Soc Elf Aquitaine et al*. <http://www.legifrance.gouv.fr/> accessed on 13 June 2011.