The Single-Member Limited Liability Company (SUP)

A Necessary Reform of EU Law on Business Organizations?

Bearbeitet von
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VI. Separation of the registered office from the central administration

1. The splitting of the seat (Sitzaufspaltung) as an indication of a lack of probity

117. *Moving* a company seat can have very different motives. A company moving both its registered office and at the same time its administrative seat to another country shows that it sees the host country as its new economic location.[219] This measure conforms to the concept of the freedom of establishment as the freedom to select one's location economically[220] and it is clearly covered by the legally protected right to freedom of establishment (Art. 49 et seq. TFEU) – which according to "Sevic" means *to participate in the economic life of the country effectively*.[221, 222]

118. When a company however moves *only its registered office or only its administrative seat* to another country and thus splits the company seat, this company – as a general rule – is not concerned with an economic choice of location. This applies all the more so to companies whose seat is already split during formation. Contrary to assessments in the relevant literature that claim otherwise, the shareholders generally do not want to achieve "a legal structure which serves the best possible use of operational production factors" with this kind of construct.[223] Rather, the objective most commonly[224] is to evade their creditors or commit abuse of law, even if euphemistically described as "jurisdictional arbitrage",[225] "migration for restructuring

[219] On the following already MünchKommBGB/Kindler (fn. 76), marginal no. 818.

[220] MünchKommBGB/Kindler (fn. 76), marginal no. 143.

[221] CJEU of 13. 12. 2005, Case C-411/03 [2005], I-10825 = RIW 2006, 140 (SEVIC), marginal nos. 17, 18; on this MünchKommBGB/Kindler (fn.74), marginal no. 126 et seq.; similar also CJEU of 12. 9. 2006, Case C-196/04 [2006], I-7995 = RIW 2006, 785 (Cadbury Schweppes), marginal nos. 53 et seq.; on this MünchKommBGB/Kindler (fn. 76), marginal no. 128.

[222] W.-H. Roth, Festschrift Hoffmann-Becking, 2013, pp. 965, 989.

[223] Schön, ZGR 2013, 333, 354; similarly Schön p. 359: "optimale Organisation unternehmerischer Tätigkeit auf dem Gebiet der Europäischen Union" (optimal organisation of entrepreneurial activity in the territory of the European Union).

[224] In the course of the consultations carried out in 2013 on the transfer of the seat, participants gave the following reasons: favourable tax regime/tax mitigation (45 %), a better "business climate" in the host country (25 %), more favourable law in the host country in the following areas: company law (20 %), social law (15 %), insolvency law (10 %), European Commission, Feedback Statement. Summary of Responses to the Public Consultation on Cross-border transfers of registered offices of companies, September 2013, p. 12.

[225] Cf. Weller, Festschrift Blaurock, 2013, p. 497, 507: "Insolvenzrechtsarbitrage", p. 511: "Gesellschaftsrechtsarbitrage"; monographically Mucciarelli, Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi, 2010.

purposes",[226] "regulatory arbitrage",[227] "tax optimisation",[228] "co-determination avoidance"[229], "accounting policy"[230] etc.[231]

119. The "foreign company with domestic economic activity" is therefore not a "situation… which as such is wanted and accepted in the internal market",[232] but on the contrary is the subject of one of the key concerns of the European Parliament in respect to a future EU directive on the transfer of the registered office.[233] A realistic assessment in conflict of laws is: "When real seat and registered office diverge, there is usually something fishy going on."[234]

120. But are there even grounds for this kind of general suspicion about the splitting of the seat in so far as the issue is the SUP project? Doesn't after all the splitting of the seat seem part of the very idea of the SUP, namely to make it easier for SMEs to establish foreign subsidiaries, especially under a uniform company law?

121. The General Approach seems to maintain a critical view on SUPs which maintain their registered seat and their central management in different member states. The permissive provision in Art. 10 of the Commission's Proposal ("An SUP shall have its registered office and either its central administration or its principal place of business *in the Union*.") was deleted. Thus, the possibility to separate the registered office from the central administration is left to national law (Art. 7(4)(b) of the General Approach).[235]

122. Nevertheless, the use of the place of registration as the connecting factor in company law as proposed in Art. 7(4)(b) of the General Approach is not the preferable solution; it does not get to the root of the dangers for creditors and third parties in cases of letter box SUPs having their statutory seat outside the state where their central administration is located (see above, paras. 118, 119). The use of the place of registration as a

[226] Steffek, in: Münchener Handbuch des Gesellschaftsrechts, vol. 6, 2013, § 37 (pp. 755 et seqq.).

[227] Cf. Ceyssens, NJW 2013, 3704, 3707 on the Single Supervisory Mechanism (SSM) in banking regulation.

[228] As part of the consultations carried out by the EU Commission in 2013 on the cross-border transfer of company seats, almost half of the respondents stated that "fiscal shopping" was the main motive for moving the registered office: European Commission, Feedback Statement. Summary of Responses to the Public Consultation on Cross-border transfers of registered offices of companies, September 2013, p. 12; See also OECD/G 20: Base Erosion and Profit Shifting Project. Designing Effective Controlled Foreign Company Rules, 2015; Reimer/Waldhoff, DB 2015, 2106 et seq.

[229] Morgenroth/Salzmann, NZA-RR 2013, 449, 455; Weller, Festschrift Blaurock, 2013, pp. 497, 511.

[230] A case in point is the transfer of certain risks to special purpose vehicles pretending to be foreign-based to avoid the consolidation requirement pursuant to § 290 HGB, as in the case of HRE: German Bundestag publication 16/12407 p. 80; here the legislators in their response relied on accounting law (§ 290 (2) no. 4), cf. Staub/Kindler (fn. 8), § 290 marginal nos. 51 et seqq.

[231] Cf. the drastic characterisation of the Centros shareholders by Gerhard Kegel, EWS 1999, issue 8, first page: " … Begünstigung von Schlitzohren, die dem Recht den Vogel zeigen!" (preferential treatment of crooks who give the law the finger); on this Kindler, Festschrift Buchner, 2009, pp. 426, 427.

[232] In the words of Schön, ZGR 2013, 333, 359 et seq.

[233] Kindler, EuZW 2012, 88, 892 with fn. 78; European Parliament, plenary session document A7-0008/2012 of 9. 1. 2012: Report with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats, recital H ("whereas the misuse of post-box offices and shell companies with a view to circumventing legal, social and fiscal conditions should be prevented"); on this Böttcher/Kraft, NJW 2012, 2701, 2703 with fn. 32; on the criticism of the abuse of law by means of letterbox companies also Reich et al., Understanding EU Internal Market Law, 2011, marginal no. 21. 8.; Reich EuZW 2011, 454, 455; less concerned is Drygala EuZW 2013, 569, 573 et seq.

[234] Kegel/Schurig, IPR, 9th ed. 2004, § 17 II 1 (p. 574); on this also Kindler, Festschrift Buchner, 2009, pp. 426, 427.

[235] Bayer/Schmidt, BB 2015, 1731, 1734; on the Italian proposal in this regard Kindler, ZHR 179 (2015), 330, 370.

connecting factor is to be rejected above all[236] because of the lack of parallelism with the applicable insolvency law and because of the corresponding legal uncertainty as to whether the SUP is subject to co-determination (see below, paras. 119 et seq., paras. 123 et seq.).

2. A first desideratum: parallelism with insolvency law

123. The proposed use of the registered office rather than the administrative seat as the connecting factor in company law (Art. 7(4)(b)) prevents the parallelism with applicable insolvency law (see above, para. 9). How much the creditor protection under company law is really worth however is usually only shown during insolvency proceedings.[237] In practice, the protection under company law of capital and assets is enforced virtually exclusively during insolvency proceedings,[238] and because of this too the parallelism in conflict-of-laws terms of insolvency law and company law is an urgent necessity. The mixture of foreign company law and domestic insolvency law can often not be resolved in a satisfactory way in practice.[239] Also against this backdrop, the use of the state in which the company is registered as the connecting factor in company law (Art. 7(4)(b) General Approach; see above, paras. 6, 117–122) should be rejected. The use of a different connecting factor in the above-mentioned proposal for regulating international insolvency law (see above, para. 9) and in the SUP proposal (Art. 7(4)(b)) respectively – administrative seat *versus* statutory seat – is not based on a recognisable "master plan" but seems to be more due to the fact that two different Directorates-General within the EU Commission (Internal Market and Justice) are involved which do not coordinate their work.

124. Conflict-of-laws judicature highlights the confused situation caused by the application of different national laws. In this regard, the Court of Justice of late has taken a very broad view on insolvency law: according to a judgement of 4 December 2014, **insolvency law covers all claims which are asserted before a court of law under insolvency proceedings**[240] ***and*** **which presuppose insolvency proceedings to have formally been opened or the actual insolvency of the debtor company.**[241]

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[236] For a fundamental critique of the theory of incorporation (and in favour of the real seat theory, in line with the COMI within the meaning of the EIR) see MünchKommBGB/Kindler (fn. 76), marginal nos. 359–386.

[237] Haas, Reform des gesellschaftsrechtlichen Gläubigerschutzes, opinion E for the 66th DJT (German Conference of Jurists) therefore with good reason argues for the allocation of crisis responsibility based on insolvency law, 2006; Haas, WM 2006, 1417, 1420 et seqq.; also Veil, ZGR 2006, 374, 396 et seq.; Goette, ZGR 2006, 261, 266; Hopt, ZHR 171 (2007), 199, 230.

[238] Legal actions under § 64 GmbHG (directors' liability for erosion of company assets) in practice are generally brought by liquidators: BGH, ZIP 2015, 68 = NZI 2015, 85 with note Mock marginal nos. 9, 19 with reference to German Bundestag publication 16/6140, p. 47; the same probably applies to legal actions brought in respect to capital maintenance: in the period from 2010 until 2014, there were 11 BGH rulings on the repayment of illegal refunds (§ 31 GmbHG) all of which were based on actions brought by liquidators. In the same period, there were seven BGH rulings on directors' liability vis-à-vis the company under § 43 GmbHG of which five resulted from actions brought by liquidators. On § 31 GmbHG cf. BGH, NZG 2010, 701, 702, 1267; 2011, 273, 904; 2012, 545, 667, 1069; 2013, 469, 1028; on § 43 GmbHG cf. BGH, NZG 2012, 667, 795, 992; 2013, 1021, 1036; 2014, 780; NZI 2014, 881; on the insolvency-law orientation of creditor protection as codified under company law, fundamental description by Röhricht, ZIP 2005, 505 et seqq.

[239] An instructive example is the case BGH of 2.12.2014 – II ZR 119/14, ZIP 2015, 68 = NZI 2015, 85 with note Mock; CJEU, pending case C-594/14, Kornhaas.

[240] CJEU of 4.12.2014, Case C-295/13, RIW 2015, 67 (H./. H.K.) marginal nos. 19 et seq. = EuZW 2015, 141 with note Kindler; on this Mankowski, EWiR 2015, 93; against the opening of proceedings as a classification element under insolvency law with sound reasoning D. Paulus, Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts, 2013, pp. 224 et seqq. and on this Thole, ZHR 178 (2014), 763, 766.

[241] CJEU of 4.12.2014 (previous Fn.), marginal no. 22 ("However, those considerations cannot be interpreted to the effect that an action based on a provision whose application does not require insolvency

VI. Separation of the registered office from the central administration

125. In so far as these broad qualifying characteristics adopted by the CJEU apply, numerous elements of liability which in accordance with the domestic classification may fall under company law have to be applied in insolvency proceedings to an SUP from another EU country (i. e. an SUP which has its administrative seat/COMI in the member state of the insolvency proceedings and its statutory seat in a different member state).[242] These elements include liability for delaying insolvency proceedings,[243] for the erosion of assets (§ 64 sentence 1 German GmbHG; § 25(3) no. 2 Austrian GmbHG; Art. 2634 codice civile)[244] and for payments to shareholders causing insolvency (§ 64 sentence 3 GmbHG),[245] for the liquidation proceedings under company law in case insolvency proceedings are dismissed for lack of assets (§ 26 InsO),[246] subordination and avoidance in case of shareholder loans,[247] and the shareholder's liability for shifting assets in the crisis ("liability for existence-destroying interventions").[248]

126. For SUPs registered in other EU countries with domestic COMI[249], the broad scope of application of insolvency law means that management and shareholders of such an SUP are subject to the liability regime of insolvency-related German company

proceedings to have formally been opened but does require the actual insolvency of the debtor, and thus on a provision which, in contrast to the provisions at issue in the case which gave rise to the judgment in Nickel & Goeldner Spedition (…), derogates from the common rules of civil and commercial law, does not derive directly from insolvency proceedings or is not closely connected with them."); the exclusion criterion of pre-insolvency locus standi of the debtor company formulated only shortly before in CJEU of 4.9.2014, Case C-157/13, RIW 2014, 673 = NZI 2014, 919 with note Mankowski (Nickel & Goeldner Spedition), marginal no. 28 thus seems to have been abandoned, given that it would also have applied to § 64 sentence 1 GmbHG.

[242] The administrative seat (or "central administration"), from a conflict-of-laws perspective in corporate matters, is identical with the "centre of main interests" within the meaning of Art. 3, 4 of the European insolvency regulation: CJEU of 20. 10. 2011, Case C-396/09 [2011], I-9939 ruling no. 3 = RIW 2012, 161 = NZI 2011, 990 with note Mankowski (Interedil); CJEU of 15. 12. 2011, Case C-191/10 [2011], I-13211 = RIW 2012, 166 = NZI 2012, 147 with note Mankowski (Rastelli), marginal no. 32 ("For companies, the centre of main interests is presumed, according to the second sentence of Article 3(1) of the Regulation, to be the place of the company's registered office. That presumption and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect *the European Union legislature's intention to attach greater importance to the place in which the company has its central administration* as the criterion for jurisdiction."; emphasis added); MünchKommBGB/Kindler (fn. 76), marginal no. 422; on the parallelism of COMI and administrative seat also Weller, Festschrift Blaurock, 2013, pp. 497, 506. Already previously AG Duisburg, NZG 2003, 1167 et seq. = IPRax 2005, 151; U. Huber, Festschrift Gerhardt, 2004, pp. 397, 405 et seq.; P. Huber, ZZP 114 (2001), 133, 141; Borges, ZIP 2004, 733, 737; Vallender, KTS 2005, 286; Benedettelli, Riv. dir. int. priv. proc. 2004, 510; Eidenmüller, NJW 2004, 3455; most recently D. Paulus (fn. 239), marginal no. 417.

[243] MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation, marginal no. 58 et seqq.; as to substantive law see Roth/Kindler (fn. 13), pp. 108 et seq.

[244] For instance lately on § 64 sentence 1 GmbHG CJEU of 4.12.2014, Case C-295/13, RIW 2015, 67 = ZIP 2015, 196 = EuZW 2015, 141 with note Kindler (H./. H.K.), marginal no. 22; on this Mankowski, EWiR 2015, 93; also MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation marginal nos. 87 et seq.; the insolvency-law orientation of the prohibitions to make payments in substantive law corresponds to this: in accordance with this orientation, these are aimed at the securing of assets and the equal treatment of all creditors, Habersack/Foerster, ZHR 178 (2014), 387, 395 et seq.; Habersack/Foerster, in: Großkommentar AktG, 5th ed. 2015, § 92 marginal nos. 122, 125; Haas, ZHR 178 (2014), 603, 605 et seq.; in English as to substantive law see Roth/Kindler (fn. 13), pp. 103 et seq.

[245] MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation, marginal no. 89.

[246] MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation, marginal nos. 91 et seq.

[247] MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation, marginal no. 96; BGH, BB 2012, 14 – PIN; BGH, BB 2015, 209 marginal no. 7 with note M. Wilhelm; in English as to substantive law see Roth/Kindler (fn. 13), pp. 50, 61 et seq.

[248] MünchKommBGB/Kindler (fn. 38), Art. 4 European insolvency regulation, marginal no. 101.

[249] Centre of main interests; see on this term MünchKommBGB/Kindler (fn. 38), Art. 3 European insolvency regulation, marginal nos. 14 et seqq.

law anyway.[250] This is also the view held by the German Federal Court of Justice in its most recent 2014 reference for a preliminary ruling on the legal classification of the erosion of assets under insolvency law.[251] According to this view, insolvency law covers all claims which the liquidator asserts as part of the insolvency proceedings and whose purpose is to protect the company from outflows of funds and thus to safeguard the insolvency estate in the interest of the creditors of the future insolvency proceedings;[252] the case concerns an action brought by a liquidator against the director of a British Ltd. with administrative seat in Germany in respect of whose assets German insolvency proceedings had been initiated.

3. A second desideratum: parallelism with the law applicable to corporate co-determination

127. Similar to the previous EPC project, the SUP project entails significant risks for the German system of workers' participation in the supervisory bodies of companies (*Unternehmerische Mitbestimmung*; employees' corporate co-determination).[253] A German SUP, as a subtype of the German GmbH, would be one of the legal forms covered by § 1(1) no. 1 MitbestG and § 1(1) no. 3 DrittelbG. But given that employees' corporate co-determination takes place on the supervisory board as an executive body of the company, it would be classified under conflict-of-laws rules as part of company law[254] and as such would be subject to the law of the statutory seat in accordance with Art. 7(4)(b) SUP directive (General Approach).[255] The Proposal says nothing on this, although European corporate law already deals with questions of co-determination in international cases and these provisions might be regarded as a model also for the SUP.[256]

128. Three avoidance strategies in particular come into consideration which in each case focus on an SUP with registered office in another EU country and administrative seat in Germany (see below a–c, paras. 129 et seq.). Ultimately, none of these strategies is successful, as the co-determination laws – as domestic overriding mandatory provisions – prevail over foreign company law (below d, paras. 132 et seq.). As also in relation to insolvency law (see above, paras. 123–126), however, referring to the member state in which the SUP is registered as a connecting factor (Art. 7(4)(b) SUP directive) leads to an – avoidable – mixture of national laws in the field of workers' corporate co-determination.

a) Avoidance strategy no. 1: a foreign SUP as holding company

129. It is possible to use an SUP with registered office in another EU country as the holding company within a corporate group. Because the German co-determination rules

[250] Kindler, EuZW 2015, 141 (note on CJEU of 4.12.2014 – Case C-295/13); on this also Mankowski, EWiR 2015, 93.

[251] BGH of 2.12.2014 – II ZR 119/14, ZIP 2015, 68 = NZI 2015, 85 with note Mock; CJEU, pending case C-594/14, Kornhaas.

[252] According to this formula, even the claims to capital maintenance (§§ 30, 31 GmbHG) should qualify as falling under insolvency law; cf. Röhricht, ZIP 2005, 505, 511 et seq.

[253] On workers' corporate co-determinaton in Germany see Kindler, La s.p.a. nell'esperienza tedesca: i tratti essenziali della Aktiengesellschaft, in Cagnasso/Panzani (eds.), Le nuove società per azioni, 2013, pp. 415, 450 et seq.

[254] MünchKommBGB/Kindler (fn. 76), marginal nos. 568 et seqq.

[255] Beurskens, GmbHR 2014, 738, 746.

[256] Bayer/Schmidt, BB 2015, 1731, 1735, referring to CD 2001/86/EC (European Company); Art. 16 CD 2005/56/EC on cross-border mergers of limited liability companies; the silence of the proposal as far as corporate co-determination is concerned, is seen as an "imperfection" also by Lecourt, Revue des sociétés 2014, 699, 707 (pt. 31–32).

classify as company-law rules, they do not apply to a letterbox SUP with effective seat in Germany under the proposed use of the statutory seat as the connecting factor in company law (Art. 7(4)(b) SUP directive). Instead, the co-determination regime of the member state in which the SUP is registered would apply, which country might in fact have no co-determination rules at all or at least a significantly lower level of co-determination than that under German law. The idea behind that strategy: A holding company thus free of co-determination could arise through the formation of an SUP with registered office in a foreign country to which the existing business is transferred as a contribution in kind.

b) Avoidance strategy no. 2: a foreign SUP as the general partner of a SUP & Co. KG

130. A SUP from another EU country can also be used as the general partner of an SUP & Co. KG (limited liability partnership). The idea behind that strategy: In this constellation, the KG neither falls under the one-third co-determination (due to the *numerus clausus* of included legal forms in § 1(1) DrittelbG) (German One-Third Participation Act) nor – unlike the German GmbH & Co. KG (§ 4 MitbestG 1976) – under parity co-determination. Air Berlin PLC & Co. Luftverkehrs KG for instance has taken advantage of this legal situation.

c) Avoidance strategy no. 3: a foreign SUP as a group subsidiary

131. The SUP can play a role in co-determination avoidance strategies also as a group subsidiary. If the parent company of the group has no co-determination because of being a foreign holding company, § 5(3) MitbestG ensures that co-determination rules apply at least at the subsidiary level.[257] This anti-avoidance protection can – at least this is the idea – however be bypassed if an SUP with registered office in a foreign country is used as a subsidiary which is subject to foreign company and co-determination law (Art. 7(4)(b) SUP directive).

d) The conflict-of-laws answer: a special rule for linking mandatory domestic regulations on corporate co-determination to the domestic real seat

132. Ultimately, the three co-determination avoidance strategies mentioned above are unsuccessful already because the German co-determination laws apply to an SUP from another EU country with administrative seat in Germany as overriding mandatory provisions ("lois d'application immediate"). Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable under international private law (cf. Art. 9(1) Rome I regulation).[258]

133. European law does not preclude this;[259] after all, the Court of Justice in its "Überseering" judgement already recognised employee protection as an overriding

[257] MünchKommBGB/Kindler (fn. 76), marginal no. 585.

[258] On overriding mandatory provisions (lois d'application immediate) as an exception to applicable law see von Hein, in: MünchKommBGB, vol. 10, 6th ed. 2015, introduction to private international law, marginal nos. 286 et seqq.; fundamentally CJEU of 23.11. 1999, Case C-396/96 [1999], I-8453 = EWS 2000, 221 = RIW 2000, 137 (Arblade), marginal no. 30.

[259] Weller, Festschrift Hommelhoff, 2012, p. 1275, 1292 (also on the following); Kindler, Symposium Winkler von Mohrenfels, 2013, pp. 147, 150 et seqq.; MünchKommBGB/Kindler (fn. 76), marginal no. 571 with reference amongst others to Weiss/Seifert ZGR 2009, 542, 549 et seqq.; Staub/Koch (fn. 8),

reason related to the public interest which can justify a restriction of the freedom of establishment.[260] The applicability of German co-determination laws to corporations governed by foreign law is based on an analogy to Art. 9 Rome I regulation.[261] This is because corporate co-determination is not aimed at balancing individual interests but realises basic concepts of public policy of the Federal Republic of Germany in the area of social organisation.[262]

134. There is also a sufficient domestic nexus for enforcement of these concepts if an administrative seat exists within Germany;[263] the intended international applicability of the co-determination laws extends to all companies with a domestic administrative seat. This is evidenced precisely by the legislative materials on the MitbestG 1976, It is true that according to the 1975 Explanatory Report that law "cannot lay claim to be valid for executive bodies of foreign companies…".[264] But under the then current of conflict of laws rules *all* companies with real seat in Germany were subject to German law.[265]

135. If it is clear therefore that companies from other EU countries with administrative seat in Germany are – in conflict-of-laws terms – subject to the co-determination laws as loi d'application immediate, this immediately gives rise, on the level of substantive law, to the question *which foreign company forms* are affected by this.[266] In principle, the co-determination laws cover those foreign company forms which are *functionally equivalent* to the domestic corporations for instance within the meaning of § 1 MitbestG 1976 or § 1 DrittelbG. This does not mean "application by analogy"[267] but substitution. This is a classic concept of private international law which simply means that legal terms within the definition of a substantive rule are fulfilled by aspects of foreign law.[268] It is accepted, for instance, that the terms "Aktienge-

§ 13 d HGB marginal no. 33; W.-H. Roth, IPRax 2003, 117, 125 with fn. 85; Grundmann/Möslein, ZGR 2003, 317, 350 et seq.; Franzen, RdA 2004, 257, 262, 263 et seq.; see also Lutter/Bayer/Schmidt (fn. 4), § 6 marginal no. 62 (p. 101 et seq.); in detail Deinert, Internationales Arbeitsrecht. Deutsches und europäisches Arbeitskollisionsrecht, 2013, § 17 marginal nos. 82 et seq.; for a different opinion see for instance Habersack/Verse (fn. 3), § 3 marginal no. 27; Grigoleit, in: Grigoleit (ed.), AktG, 2013, introduction, marginal no. 22.

[260] CJEU of 5.2.2002, Case C-208/00 [2002], I-9919 = RIW 2002, 945 (Überseering), marginal no. 92.

[261] On the applicability by analogy MünchKommBGB/von Hein (fn. 257), introduction to international private law, marginal nos. 45, 52; differently Zimmer, Internationales Gesellschaftsrecht, 1996, who argues for a specific company-law conflict-of-laws rule whose connecting factor is the employment of employees in domestic businesses (pp. 143 et seqq., 190 et seq.).

[262] Ulmer/Habersack, in: Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 3rd ed. 2013, introduction marginal no. 35; on this formal legal criterion of overriding mandatory provisions in general terms MünchKommBGB/von Hein (fn. 257), introduction to private international law, marginal no. 43.

[263] MünchKommBGB/Kindler (fn. 76), marginal no. 575; already Birk, RIW 1975, 589, 595; Großfeld/Ehrlinghagen, JZ 1992, 217, 222; Franzen, RdA 2004, 257, 258 et seq.; for a different opinion Horn, NJW 2004, 893, 900; Junker NJW 2004, 728, 729; Sandrock, ZVglRWiss. 102 (2003), 447, 486 et seqq.; Thüsing, ZIP 2004, 381, 382.

[264] German Bundestag publication 7/4845, p. 4.

[265] Also correct in this respect Franzen RdA 2004, 257, 259; Ulmer/Habersack/Henssler (fn. 261) therefore point out quite rightly that the Bundestagsausschuss für Arbeit und Sozialordnung (parliamentary committee for labour and social affairs) at the same place explicitly pointed to the inclusion of businesses with a seat in Germany (§ 1 MitbestG marginal no. 6).

[266] On this MünchKommBGB/Kindler (fn. 76), marginal no. 576.

[267] This is argued incorrectly by Zimmer, Internationales Gesellschaftsrecht, 1996, pp. 161 et seqq.; Zimmer, in: Lutter (ed.), Europäische Auslandsgesellschaften in Deutschland, 2005, pp. 365, 370; Weiss/Seifert, ZGR, 2009, 542, 546.

[268] In depth MünchKommBGB/von Hein (fn. 257), introduction to private international law, marginal nos. 227 et seqq.; on substitution in international company law most recently Weller, ZGR 2014, 865, 875 et seqq. (foreign notarisation); short overview in Palandt/Thorn, BGB, 74th ed. 2015, introduction to Art. 3 EGBGB marginal no. 31.

sellschaft" and "Gesellschaft mit beschränkter Haftung" in §§ 13 e–g HGB should be substituted by the respective "equivalent", i. e. comparable foreign legal forms.[269]

136. Which foreign legal forms are suitable in each case needs to be checked on the basis of an evaluative comparison with German company law.[270] The relevant EU directives, above all the publicity directive (2009/101/EC)[271], offer important reference points for this. Judged by these criteria, a British Limited (private company limited by shares) for instance is to be treated as a "Gesellschaft mit beschränkter Haftung" within the meaning of § 1 (1) no. 1 MitbestG, and the same applies to an SUP from another EU country. It is not possible here to expand on the practical difficulties in enforcing the law;[272] they do not at any rate change in any way the character of the co-determination laws as overriding mandatory provisions.[273]

4. Conclusions for the drafting of the conflict-of-laws rule in a SUP directive

137. The above-mentioned problems of co-determination avoidance and the missing parallelism with insolvency law would not arise in the first place if the directive included a conflict-of-laws rule which – like European international insolvency law – uses the effective administrative seat as the connecting factor. Under the recent recast of the European insolvency regulation (EU) 2015/848 (Art. 3(1) and Art. 7 (1))[274], the member state in whose territory the debtor has its centre of main interests (COMI) is the basis both for international jurisdiction and for the law applicable to a company insolvency. The Court of Justice equates this connecting factor with the central administration (real seat).[275]

138. Due to the insolvency-law classification of directors' and shareholder liability in the crisis (see aboce, paras. 120–122), international jurisdiction of the courts in the country where the insolvency proceedings are opened also applies to individual disputes under the "Deko Marty-rule" established by the CJEU, based on Art. 3(1) EIR 2010.[276] This is in line with Art. 6 no. 1 EIR 2015.[277] Under this provision, the courts of the member state where

[269] Fundamentally Kindler, NJW 1993, 3301, 3303 et seqq.; MünchKommBGB/Kindler (fn. 76), marginal nos. 199 et seqq., 883 et seqq.; Staub/Koch (fn. 8), § 13 d marginal no. 10. For an example in European company law, see Art. 7 CD 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 (89/666/EEC).

[270] Staub/Koch (fn. 8), § 13 e marginal no. 6 et seqq.

[271] On this directive see MünchKommBGB/Kindler (fn. 76), marginal nos. 30 et seq.

[272] On the enforcement of the law in status proceedings of foreign companies (§§ 98 et seq. AktG) see MünchKommBGB/Kindler (fn. 76), marginal no. 586; Oetker, Erfurter Kommentar zum Arbeitsrecht, 15th ed. 2015, § 1 marginal no. 5, sees insurmountable "execution problems" here (determining the courts having jurisdiction, enforcement of domestic court judgements vis-à-vis foreign corporations as well as the registration of the representative bodies in the foreign commercial register); in the same vein Ulmer/Habersack/Henssler (fn. 261) § 1 MitbestG marginal no. 8 a.

[273] For a proposal for extending the co-determination laws to foreign companies cf. Kindler (fn. 258), pp. 161 et seq.; similar Zimmer, Internationales Gesellschaftsrecht, 1996, pp. 165 et seq.

[274] For the 2015 European insolvency regulation see fn. 11.

[275] CJEU of 15. 12. 2011, Case C-191/10 [2011], I-13211 = RIW 2012, 166 (Rastelli), marginal no. 32 (text see fn. 241); in favour of the central administration as the general connecting factor for corporations see Kindler, L'amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società, Rivista di diritto internazionale privato e processuale 2015 (forthcoming).

[276] CJEU of 4.12. 2014, Case C-295/13, RIW 2015, 67 (H./. H.K.) = EuZW 2015, 141with note Kindler, marginal no. 24 with reference to CJEU of 12. 2. 2009, Case C-339/07 [2009], I-791 = RIW 2009, 234 (Seagon./. Deko Marty); on this judgement MünchKommBGB/Kindler (fn. 38), Art. 3 European insolvency regulation marginal nos. 86 et seqq.

[277] See fn. 11; on the reform Kindler/Sakka, EuZW 2015, 460 et seqq.; Thole, ZEuP 2014, 39 et seqq.