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# CONFLICT-OF-LAWS RULES BY TREATY: RECOGNITION OF COMPANIES IN A REGIONAL MARKET

*Eric Stein\**

THE term "recognition" has many meanings. We speak in family law of a "recognized child," in public international law of recognizing a newly emerged state or newly installed government, and in private international law (conflict of laws) of recognizing foreign judgments or legal persons. In both public and private international law, it is the nation-state that grants or denies recognition. In public international law, the "recognizing" nation-state expresses "a value judgment acknowledging that a given fact situation is in accord with the exigencies of the international legal order."<sup>1</sup> In private international law (or conflict of laws), on the other hand, the "recognizing" nation-state agrees to extend to its own system certain legal effects attributed to a fact situation in the legal system of another nation-state.

In a pluralistic, horizontally organized world community of nation-states, "recognition" has been a traditional instrumentality for cohesion, even though nation-states have exercised wide discretion in appraising various fact situations and, particularly in public international law, have often employed recognition in pursuit of national foreign policy without reference to the demands of the legal order. However, within a more closely integrated federal or regional community of states, public international law is displaced—to a greater or lesser extent, depending upon the degree of community integration—by "internal" law; and the discretion of one member state in granting or denying recognition of judgments or legal persons, including companies, of another member state is curtailed by normative constraints designed to protect common interests of the community.

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1. Rigaux, *Les personnes morales en droit international privé*, 24 ANNALES DE DROIT ET DE SCIENCES POLITIQUES, 241, 245 (1964).

## I. THE EUROPEAN ECONOMIC COMMUNITY AS A REGIONAL COMMUNITY

The European Economic Community (EEC or Community) is today the most "integrated" regional community of nation-states. It is based on a multilateral treaty—the Treaty Establishing the European Economic Community<sup>2</sup>—which embodies an intricate design for a progressive coalescence of the national economies of the six "sovereign" member states (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands) into a single "Common Market" and eventually into an economic union. The Common Market embraces the "four freedoms": freedom of movement of goods, freedom of movement for workers, freedom of movement for individuals and companies to enter business and to supply services across national frontiers, and freedom of movement for capital throughout the territory of the Community.<sup>3</sup> Moreover, a system of Community-wide rules is necessary in order to ensure a legal order for fair, qualified competition. A common Community-wide policy must govern agriculture, transportation, and commercial relations with nonmember nations. National economic and monetary policies are to be "coordinated" so as to advance growth with stability; and social policies are to be "harmonized." To make this system function smoothly the Treaty provides for a set of new Community institutions, the most important of which are the independent "executive" Commission<sup>4</sup> and the Council of Ministers,<sup>5</sup> which share the lawmaking power, and the Court of Justice.<sup>6</sup>

## II. IS THERE A NEED FOR UNIFORM CONFLICT-OF-LAWS RULES ON RECOGNITION OF COMPANIES THROUGHOUT THE COMMUNITY?

Commercial companies are the dominant mode for the conduct of business in the modern world. Thus, it is not surprising that the Community scheme is particularly concerned with such companies and contemplates that segments of the presently divergent national

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2. Done at Rome March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. See also Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, April 27, 1957, 298 U.N.T.S. 167.

3. EEC Treaty arts. 9 to 37 (goods); arts. 48 to 51 (workers); arts. 52 to 66 (establishment and supply of services); arts. 67 to 73 (capital).

4. EEC Treaty arts. 155 to 163.

5. EEC Treaty arts. 145 to 154.

6. EEC Treaty arts. 164 to 188.

company laws be "coordinated" so as to be more similar to one another in terms of the protection afforded to shareholders, investors, and creditors.<sup>7</sup>

The authors of the EEC Treaty recognized that if companies are to help integrate national markets into a common market—much as American corporations have helped to create a single continental market in the United States—the legal order must enable such companies to progress from the classic import-export pattern to a stage at which they create relatively permanent "establishments" beyond their own states' borders.<sup>8</sup> In American constitutional parlance, the company which has been engaged only in "interstate" business must be free to "enter" another state with a view to doing "intrastate" business there. In order to be able to effect this entry, however, the company must be "recognized" as a legal person in the receiving state; otherwise it will not be able legally to carry on business there, to make contracts, or to sue and be sued in local courts. An analogous situation prevails in the EEC. If a company organized in one member state wishes to do business in another member state, it must be "recognized" in the receiving state as a legal person.<sup>9</sup> The freedom to establish a business (freedom of establishment)<sup>10</sup> and the freedom to supply services across national frontiers<sup>11</sup>—freedoms which the EEC Treaty sought to ensure throughout the Community for the benefit of the companies of member states—could not be effectively achieved without the concomitant assurance of "recognition" of such companies. Although the obligation to recognize in this context appears to be implicit in the Treaty, the member states undertook explicitly in article 220<sup>12</sup> to negotiate about securing "mutual recognition of companies within the meaning of article 58."<sup>13</sup>

7. See generally, Scholten, *Company Law in Europe*, 4 COMMON MARKET LAW REVIEW [C.M. L. REV.] 377 (1967); Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM. J. INTL. L. 1, 16-17 (1964).

8. U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET ¶ 105 (1964).

9. See Beitzke, *Anerkennung und Sitzverlegung von Gesellschaften und juristischen Personen im EWG Bereich*, 127 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [Z. GES. HANDELSR. U. WIRTSCHR.] 1, 2 (1964) [hereinafter Beitzke, *Anerkennung*]; Grossfeld, *Die Anerkennung der Rechtsfähigkeit juristischer Personen*, 31 RABELS ZEITSCHRIFT [RABELS Z.] 1 at 16-17 (1967), [hereinafter Grossfeld, *Die Anerkennung*].

10. EEC Treaty arts. 52 to 58.

11. EEC Treaty arts. 59 to 66.

12. EEC Treaty art. 220: "Member States shall, insofar as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: . . . —the mutual recognition of companies within the meaning of Article 58, second paragraph. . . ."

13. For the text of article 58, see note 36 *infra*.

In the absence of uniform conflict-of-laws rules, the question whether a foreign company will be recognized or denied recognition is determined in each member state by its own conflict-of-laws rules which serve to identify the applicable law. These conflict-of-laws rules vary considerably from state to state. In the Netherlands the applicable law is the law of the state of the company's incorporation,<sup>14</sup> while in the other five member states the law of the state of the company's "real seat" (central administration) applies.<sup>15</sup> The "real seat" rule is reflected in national legislation, case law, and in some treaties; but there are important variations in its application among those states which adhere to it.<sup>16</sup> It is said that so long

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14. Law of July 25, 1959, [1959] Staatsblad No. 256. See van der Heijen & van der Grinten, *HANDBOEK VOOR DE NAAMLOOZE VENNOOTSCHAP NAAR NEDERLANDSRECHT* 76, 83-85 (8th ed. 1968); E. RABEL, 2 *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 34 (2d ed. 1960).

15. See note 16 *infra*.

16. *France*: Art. 3 of the Law of July 24, 1966, [1966] J.O. 642, [1966] D.S.L. 265, on commercial companies provides: "Companies whose [real] seat (*siège social*) is situated on French territory are subject to French law. Third persons may rely on the registered seat but the company may not invoke it as against third parties if its [real] seat is situated in another place" (i.e., in a place other than the registered seat). See comment in F. LEMEUNIER, 1 *LA REFORME DES SOCIÉTÉS COMMERCIALES* 14 (1966). However, article 154 of the same law (which follows the earlier rule contained in the Ordinance of January 7, 1959, [1959] J.O. 640, [1960] B.L.D. 447) sanctions a transfer of the seat to another country, upon approval in an extraordinary shareholders' meeting, without the loss of legal personality of the company, but only if the receiving country has concluded with France a "special convention" permitting the acquisition of its "nationality" and preserving the legal personality upon transfer to its territory. See Convention Concerning Conditions of Residence Between France and Belgium, Oct. 6, 1927, [1927] D.P. IV. 396 (France), 66 L.N.T.S. 49. See also H. BATIFFOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* No. 193-98 (3d ed. 1959).

*Federal Republic of Germany*: In one German case, a company incorporated in a state of the United States for the exploitation of Mexican mines, with its main office in Hamburg, fraudulently sold shares in Germany to German residents. In a suit by defrauded shareholders, the German courts refused to consider the company an American corporation and thus refused to apply the law of the state of its incorporation. Since the company failed to comply with the requirements of German stock-company law, it was not considered a German stock company; and the courts consequently applied the German law on noncorporate associations. Judgment of March 31, 1904, 9 DJZ 555 (*Deutsche Juristenzeitung*), 33 JW 231 (*Juristische Wochenschrift*). See also Judgment of Jan. 19, 1918, RGZ 73, 76; Judgment of Jan. 19, 1882, 7 RGZ 68. On the other hand, in the situation in which the company does not have its real seat in Germany and the state of the company's real seat follows the incorporation principle (for example, a Delaware corporation with its real seat in Kentucky), German courts will apply the law of incorporation with respect to that company, and not the law of the real seat. See the case of *Eskimo Pie Corp.*, 117 RGZ 215, 217 (1927). Some writers advocate the "law of incorporation" rule: see, e.g., Beitzke, *Anerkennung* 13 and references in that Article.

*Belgium*: Article 197 of the Code de commerce, CODE COMM. art. 197 (Pasinomie 1935), provides that all companies whose "principal establishment" is in Belgium are subject to Belgian law; and article 196 states that companies organized and having their seat (*siège*) abroad may conduct their operations and appear in courts in Belgium. In 1965 the Cour de cassation in *Lamot v. Société Lamot Ltd.*, 65 REVUE PRATIQUE DES SOCIÉTÉS 136 (1966), held that these provisions allow an English company to transfer

as recognition is governed by divergent national rules, freedom of establishment within the Community cannot be properly safeguarded.<sup>17</sup> In addition the need for recognition may arise and must be ensured outside the context of establishment and supply of services. Thus a company, organized and operating in a member state, can be denied standing to sue in another member state on a contract for sale of goods, unrelated to any supply of services, unless the company is recognized in that other state as a legal person with a capacity to sue. For these reasons, uniform conflict-of-laws rules respecting recognition of companies by member states may be desirable for the realization of a Common Market.<sup>18</sup>

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its "real seat" to Belgium without a loss of legal personality, but that they subject the company to the mandatory rules of Belgian company law.

*Luxembourg:* Article 159 of the Law of Aug. 10, 1915, on commercial companies follows the Belgian article 197; and article 158 of that law follows the Belgian article 196.

*Italy:* Article 2505 of the Codice civile, C. Civ. art. 2505 (Hoepli 1964), states: "Companies organized abroad which have on the territory of the [Italian] State the seat of their administration or the principal object of the enterprise (sede dell'amministrazione ovvero l'oggetto principale dell'impresa) are subject to all provisions of the Italian law, including those on the validity of their constitutive act." See also C. Civ. arts. 2437, 2506-10 (Hoepli 1964).

On these problems generally, see Conard, *Organizing for Business*, in 2 AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET—A LEGAL PROFILE 1, 61-65 (E. Stein & T. Nicholson ed. 1960); J. RENAULD, DROIT EUROPÉEN DES SOCIÉTÉS 2.28-2.35, 2.65-2.66, 6.04-6.07 (1969).

With respect to the United States, see A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 408-23 (1962); and R. LEFLAR, AMERICAN CONFLICTS OF LAW 55-68 (1968). With respect to the United Kingdom, see A. DICEY & J. MORRIS, ON THE CONFLICT OF LAWS 481-97 (8th ed. 1967).

17. See Beitzke, *Zur Anerkennung von Handelsgesellschaften im EWG-Bereich*, 14 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 91, 99 (1968) [hereinafter Beitzke, *Zur Anerkennung*]; Dieu, *La reconnaissance mutuelle des sociétés et personnes morales dans les Communautés européennes*, 1968 CAHIERS DE DROIT EUROPÉEN 532, 534; Goldman, *La reconnaissance mutuelle des sociétés dans la Communauté économique européenne*, in ÉTUDES JURIDIQUES OFFERTES À LÉON JULLIOT DE LA MORANDIÈRE PAR SES ÉLÈVES ET SES AMIS 175, 176-85 (1964) [hereinafter Goldman, *La reconnaissance*], in which the differences in the national statutes, case law, and treaties are described in detail. These differences, and the additional reasons why a new convention was considered necessary, are as follows: (1) The Netherlands applies the "incorporation theory," while the other five signatory states follow the "real-seat" theory; (2) the real-seat theory could result in a refusal of recognition when the real seat of the foreign company is in the state in which recognition is sought—as it does in the Federal Republic of Germany—or it could lead to the application of purely local (forum) law to such a company—as it does, for example, under article 197 of the Belgian Code de commerce, as interpreted by the Cour de cassation (see note 16 *supra*); (3) the duty of recognition under existing bilateral agreements and under the Hague Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations, 1 AM. J. COMP. L. 277 (1952) (English text) [hereinafter Hague Convention], does not encompass all companies and legal persons covered by EEC article 58; and (4) the traditional public-policy exception is much too broad for Community purposes (see text accompanying notes 85-98 *infra*).

18. Beitzke, *Zur Anerkennung* 91.

When national company laws become more similar as a result of the "coordination" and "spontaneous assimilation" discernible in the current national-law reforms within the member states,<sup>19</sup> the need for uniform conflict-of-laws rules on recognition of companies will undoubtedly be reduced. But the need for such uniform rules will by no means be eliminated, since company laws will surely continue to differ in many respects. Moreover, these company laws will still be a part of the respective national statutory systems and will thus remain subject to change by the national lawmaker. Consequently, it is unlikely in the foreseeable future, if ever, that company law, unlike, for instance, restrictive-practices law,<sup>20</sup> will become "federal-type" Community law. It will, therefore, continue to be necessary to look to the appropriate national conflict-of-laws rules in order to determine whether a foreign company will be recognized as a legal person and, if it is so recognized, what law should govern its internal and external relationships.<sup>21</sup> Although the problem has traditionally been posed in terms of these two distinct and separate questions, some believe that there is little sense in such separation.<sup>22</sup> Indeed from a practical viewpoint, "any legal person is such only in relation to a specific legal issue, such as his capacity to sue, to be sued, or to hold property," and it is in a sense artificial to speak of a recognition of a legal person in the abstract.<sup>23</sup>

### III. BASES FOR RECOGNITION: THE "REAL SEAT" RULE OR THE "LAW OF INCORPORATION" RULE

#### A. *The Competing Interests*

The modern functional rationale for the Anglo-American—and Dutch—rule of incorporation is the need for certainty and maxi-

19. See E. STEIN, HARMONIZATION OF "EUROPEAN" COMPANY LAWS—THE PROCESS OF NATIONAL REFORM AND TRANSNATIONAL COORDINATION ch. IV (to be published in 1970).

20. Articles 85 and 86 of the EEC Treaty list several restrictive practices which are "incompatible with the Common Market."

21. Beitzke, *Anerkennung* 10; Grossfeld, *Die Anerkennung* 3.

22. Drobniq, *Kritische Bemerkungen zum Vorentwurf eines EWG-Übereinkommens über die Anerkennung von Gesellschaften*, 129 Z. GES. HANDELSR. U. WIRTSCHSR. 93, 113-14 (1966), takes the view that recognition is a real issue only if it is linked with a conflict-of-laws rule determining which law governs the internal and external relationships of the foreign company.

A third and separate question, in addition to the two stated in the text, relates to the prerequisites for the "establishment" of the foreign company, or—in American terms—for its "qualification" to "do business" locally. In the absence of treaty obligations, these prerequisites are determined by the national law of the state of establishment. See Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C. L. REV. 1 (1968).

23. A. EHRENZWEIG, *supra* note 16, at 408.

imum uniformity in the choice of law. There can be no doubt about the situs of incorporation of a company, no matter where the actual corporate administration and operations may be. The "real seat" rule, on the other hand, favors the law of the central administration or principal place of business for choice-of-law purposes. The rationale is that only that approach secures proper regard for economic reality and prevents fraud on, or "abuse of, the law."<sup>24</sup> This rule, which is followed to a varying degree in all member states except the Netherlands, has been criticized on the ground that the task of determining the location of the company's real seat is often difficult and "might impose a heavy burden upon the litigants and the courts in close cases."<sup>25</sup>

In terms of the private and governmental interests involved, the problem may be posed in the form of a series of questions: When private parties organize a company, should they enjoy the freedom or "autonomy" to choose the governing law for the company, just as they enjoy similar freedom—particularly on the Continent, and to a somewhat more limited extent in the United States—in selecting the governing law for a contract?<sup>26</sup> Or is it necessary, in view of certain interests of a higher order,<sup>27</sup> for the company to be governed by the law of the state of its "real seat" from which it is administered? At times, the question is posed in a less detached formulation, with a pointed reference to the Delaware and New Jersey experience: Should a state, whether one of the United States or a member state of the EEC, be permitted to adopt, in pursuit of its own economic interests, an "exorbitantly" liberal company law with the purpose of attracting an inordinate number of companies which in fact would have little more than a formal connection with its territory? And should that state be entitled to expect other states—in the context of economic intercourse—to "recognize" such companies as properly constituted legal persons?<sup>28</sup>

A recent German study of policy considerations underlying these two competing principles stresses the difference, in terms of the

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24. *Id.* at 411; H. BATIFFOL, *supra* note 16, at No. 194.

25. Reese & Kaufmann, *The Law Governing Corporate Affairs; Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1127 (1958).

26. G. KEGEL, *INTERNATIONALES PRIVATRECHT* 205-12 (2d ed. 1964); with respect to the autonomy of the parties generally, see Yntema, "Autonomy" in *Choice of Law*, 1 AM. J. COMP. L. 341 (1952).

27. See text following note 30 *infra*.

28. With respect to the movement in the United States opposing an excessively broad application of the incorporation theory (the problem of the "tramp" or "pseudo-foreign corporation"), see Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193, 194-96 (1958); and Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 138-43 (1955).



socioeconomic impact, between applying conflict-of-laws rules to simple contracts and applying them to commercial companies which today constitute the most common organizational form of significant enterprise in any national economy.<sup>29</sup> Whereas the contract law contemplates the widest autonomy of the parties, the company law in most Continental states contains a great number of mandatory rules which reflect national legal and economic policies.<sup>30</sup> As a result, the state naturally seeks to have its law applied to all those enterprises which center their activities on its territory; it wants to make sure that these enterprises do not "escape" its control by claiming to be governed by the law of another state with perhaps a more liberal or, in any case, a different system. A variety of governmental interests, real or imaginary, may be involved, including the protection of local creditors and investors and protection of the competitive position of local companies. The assumption is, of course, that significant systemic differences exist between the legal orders concerned, and that as these differences give way to a measure of consensus on questions of economic, social, and legal policy, the intensity of the governmental interest of the national lawmaker in the application of its own law will decrease. Then, the freedom of parties to choose their own law may readily be given a broader scope, as is contemplated by the incorporation rule.

In practical terms, the problem in the EEC today is posed by the fact that the Dutch law resembles more the "liberal" or permissive "enabling type" act, such as is found in Delaware, than it does the laws of the other five member states, which are substantially more regulatory and restrictive.<sup>31</sup> The fear persists in some quarters within the Community that because of the greater freedom afforded by the Dutch law, entrepreneurs will be lured to incorporate in the Netherlands to the prejudice of the other member states with stricter company laws.

The principle of incorporation has been meeting with increasing favor from lawyers in Germany, France, Switzerland, and Italy;<sup>32</sup> and it has been gaining ground in international forums such as the Institute of International Law,<sup>33</sup> and in the more recent international

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29. Grossfeld, *Die Anerkennung* 30.

30. *Id.* at 22-29. See also the conclusions of the Procureur Général at the Belgian Cour de cassation in two ancient cases involving recognition of a French stock company: Judgment of Feb. 8, 1849, [1849] Pas. Belge 1. 221; Judgment of Jan. 20, 1851, [1851] Pas. Belge 1. 307. Cf. Judgment of July 22, 1847, [1847] D.P. II 2. 171 (French cours royales).

31. See note 15 *supra*.

32. See Beitzke, *Anerkennung* 13; van Hecke, *Nationality of Companies Analysed*, 9 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT* 223, 227 (1961).

33. See the rules of the Institute of International Law, approved on Sept. 10, 1965,

agreements, such as the 1956 Hague Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations.<sup>34</sup> The Hague Convention, which has not yet come into force, was conceived as a treaty not limited to any particular region or regional market, although thus far all the signatories are from Western Europe. Article 1 of the Hague Convention enunciates the incorporation principle in general terms,<sup>35</sup> but article 2 significantly limits the reach of that principle: "If a company organized in one state establishes its real seat in another state it must be recognized in a third state only if the state of the real seat has accepted the incorporation theory." Thus the Hague Convention embraces the incorporation principle only qualifiedly.

If the opposition to the rule of incorporation has been receding somewhat, this trend may be due in some measure to the integrating effect of the rapidly growing international trade, to the emergence of the multistate corporation which no longer operates in the confines of a single nation-state, and generally to intensified transnational intercourse. But as article 2 of the Hague Convention demonstrates, the trend is taking effect only gradually.

### B. *The Regional Context*

The important article 58 of the EEC Treaty<sup>36</sup> clearly mirrors the changing currents within a regional context. Although it ostensibly concerns only admission to business activities and not conflict-of-laws

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and recommended for adoption "to all States"; the rules are reproduced in *Institut de Droit International: The Warsaw Session*, 60 AM. J. INTL. L. 517, 523 (1966) [hereinafter I.L.L. Draft], and discussed in Drucker, *Companies in Private International Law*, 17 INTL. & COMP. L.Q. 28 (1968).

34. See note 17 *supra*. Five ratifications are required for the Convention to come into effect. Belgium, France, the Netherlands, Spain, and Luxembourg signed; and all but Spain and Luxembourg ratified.

35. Article 1 provides:

Legal personality, acquired by a company, association, or foundation under the law of the contracting State where the formalities of registration or publication have been complied with and where its charter seat is located, shall be recognized as of course in the other contracting States, provided that, in addition to the capacity to proceed in court, it imports at least capacity to hold property and to enter into contracts and other legal acts.

Legal personality, acquired without formality of registration or of publication, shall be recognized as of course, under the same condition, if the company, association, or foundation has been established in accordance with the law that governs the same.

36. Article 58 provides:

Companies constituted in accordance with the law of a Member State and having their registered office, central administration or principal establishment within the Community shall, for the purpose of applying the provisions of this Chapter, be treated in the same way as natural persons who are nationals of member states.

The term "companies" shall mean companies under civil or commercial law including co-operative companies and other legal persons under public or private law, with the exception of non-profit companies.

rules, it necessarily assumes that the admitted company will be recognized, since without recognition the admission to do business would be illusory. Article 58 postulates Community-wide freedoms of establishment and of supply of services<sup>37</sup> for companies and legal persons which are organized in accordance with the law of a member state and *have their registered office, central administration, or principal place of business* within the Community. Thus, it does not require that the "real seat" (central administration) be in the state under whose law the company is organized or, for that matter, that it be anywhere in the Community.<sup>38</sup> A literal interpretation would suggest that merely a registered office anywhere within the Community territory would suffice to satisfy article 58. This broad interpretation, however, has not been entirely accepted because, pursuant to article 52, paragraph 1, individual nationals of the member states may claim freedom of establishment in another state only if they are already "established" within the Community, and because companies are to enjoy the same, but not more extensive, benefits as natural persons.<sup>39</sup> Accordingly, the General Programs for the Removal of Restrictions on the Right of Establishment and on the Free Supply of Services, adopted by the Council of Ministers, provide that when the companies "have only their registered office within the Community . . . , their business activity shall show a continuous and effective link with the economy of a member state . . ." before they can claim the benefits of the Treaty.<sup>40</sup>

The liberal posture embodied in article 58 is obviously related to the coordination of national company laws which is prescribed by the Treaty. This coordination effort—and generally the harmonization of national laws and economic and social policies—are expected to advance freedom of establishment and also remove the obstacles to a more liberal recognition practice. As a short-range objective, however, the member states agreed that the obligation to grant recognition should be strengthened; and they chose an international convention as the vehicle to achieve that objective.

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37. Although article 58 expressly deals only with establishment, article 66 provides that article 58 shall also apply to supply of services.

38. See Beitzke, *Anerkennung* 13; Dieu, *supra* note 17, at 539-43; Goldman, *La reconnaissance* 189-94; Grossfeld, *Die Anerkennung* 17.

39. EEC Treaty art. 58.

40. 5 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES [E.E.C. J.O.] 36 (1962). See also *id.* at 33. In order to provide a framework for a progressive implementation of the Treaty provisions on the freedoms of establishment and of supply of services, the Council of Ministers adopted the two "General Programs," which define categories of national discriminatory restrictions on access to the many enumerated occupations and professions, and fix deadlines within which these restrictions must be removed.

IV. CONVENTION ON THE MUTUAL RECOGNITION  
OF COMPANIES AND LEGAL PERSONS

A. *The Origin*

The task of drafting the Convention on the Mutual Recognition of Companies and Legal Persons<sup>41</sup> (1968 Convention or Convention on Recognition of Companies) was entrusted to a working group composed both of staff members of the EEC Commission and of experts appointed by the member governments.<sup>42</sup> With Professor Berthold Goldman of the Paris Law Faculty as an effective, albeit stern, chairman, the group labored for three years. It had at its disposal a report prepared by Professor Beitzke,<sup>43</sup> and it completed the first draft of the Convention on June 11, 1965. The Commission concurred in this draft on January 5, 1966; and the final text, containing certain modifications desired by the Governments, was ready in October 1967. The text was to be signed in December 1967, but this plan did not reach fruition because of the Netherlands' reaction to General de Gaulle's attitude toward the admission of the United Kingdom to the EEC.<sup>44</sup> The 1968 Convention was finally

41. Convention sur la reconnaissance mutuelle des sociétés et personnes morales, signed on Feb. 29, 1968, 4 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [REV. TRIM. DR. EUROP.] 400 (1968) [hereinafter 1968 Convention]. The text of the 1968 Convention in the four official languages and in an unofficial English translation is reproduced in 12 BULL. E.E.C. SUPP. No. 2 (1969). An unofficial English translation of the 1968 Convention may be found in 2 CCH COMM. MKT. REP. ¶ 6083 (1968).

Extensive literature deals with the problem of the relationship between the 1968 Convention and the recognition of companies in the EEC. See J. RENAULD, *supra* note 16, at 6.02; Beitzke, *Zur Anerkennung*; Capotorti, *Il problema del reciproco riconoscimento delle società nella Comunità economica europea*, 11 RIVISTA DELLE SOCIETÀ 969 (1966); F. CARUSO, *LE SOCIETÀ NELLA COMUNITÀ ECONOMICA EUROPA* 217 (1969); Cerexhe, *La reconnaissance mutuelle des sociétés et personnes morales dans la Communauté économique européenne*, 1968 REVUE DU MARCHÉ COMMUN 578 (1968); Dieu, *supra* note 17; Drobnig, *Conflict of Laws and the European Economic Community*, 15 AM. J. COMP. L. 204, 207-10 (1966-67); Drobnig, *supra* note 22; Gessler, *Gegenseitige Anerkennung von Gesellschaften und Juristischen Personen im EWG-Bereich*, 1967 DER BETRIEB 324; Goldman, *Le projet de convention entre les états membres de la Communauté économique européenne sur la reconnaissance mutuelle des sociétés et personnes morales*, 31 RABELS Z. 201 (1967) [hereinafter Goldman, *Le projet*]; Goldman, *The Convention Between the Member States of the E.E.C. on the Mutual Recognition of Companies and Legal Persons*, 6 C.M. L. REV. 104 (1968-69); Goldman, *La reconnaissance*; van der Grinten, *Erkenning van vennootschappen en rechtspersonen in de Europese Economische Gemeenschap*, 14 SOCIAAL-ECONOMISCHE WETGEVING 201 (1966); Grossfeld, *Die Anerkennung* 16-21, 46-48; Houin, *Où en est le droit des sociétés dans le Marché commun*, 4 REV. TRIM. DR. EUROP. 131, particularly 145-47 (1968); van Hecke, *Erkenning, zetelverplaatsing en fusie*, in EUROPEES VENNOOTSCHAPSRECHT, LE RÉGIME JURIDIQUE DES SOCIÉTÉS DANS LA CEE 149 (1968).

42. See *Rapport concernant la Convention sur la reconnaissance mutuelle des sociétés et personnes morales*, Rapporteur: Goldman, 4 REV. TRIM. DR. EUROP. 405, at para. 1 (1968) [hereinafter *Rapport Goldman*]. See also Beitzke, *Zur Anerkennung* 91.

43. Beitzke, *Anerkennung* 1-47.

44. See Beitzke, *Zur Anerkennung* 91.

signed on behalf of the six Governments by the Ministers of Foreign Affairs on February 9, 1968.

A clause in the preamble affirms that the ministers approved the 1968 Convention when "*meeting within the forum of the Council.*" The ministers employed this somewhat controversial formula in the past when they had reached an agreement on a matter not specifically authorized in the Treaty, but falling generally within its orbit.<sup>45</sup> In the Commission's view, the recourse to this procedure endowed the 1968 Convention with a status different from an ordinary treaty: The agreement was, a Commission spokesman declared, "the first European Convention supplementing the Treaty of Rome."<sup>46</sup> Although this factor may be politically significant, the 1968 Convention is still an interstate treaty governed in principle by international law. It is important to note that the Convention did not become a "Community act" in the technical sense and thus presumably would *not* fall within the jurisdiction of the Community Court of Justice.<sup>47</sup> Nevertheless, in addition to the fact that it was drafted under the auspices of the EEC, the text of the 1968 Convention confirms the close link between the Convention and the Community.<sup>48</sup> Moreover, the fact that the 1968 Convention was concluded exclusively among the member states of the Community and will come into effect only after all members have ratified

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45. See *Rapport fait au nom de la Commission juridique sur les actes de la collectivité des Etats membres de la Communauté ainsi que sur les actes du Conseil non prévus par les traités*, Rapporteur: Burger, [1968-1969] EUR. PARL. DOCS., No. 215 (1969), and literature cited therein.

46. Comm. Spokesman's Group (EEC), P-14/68, Information Memo (Brussels, undated).

47. According to article 173 of the EEC Treaty, the Court of Justice has the authority "to review the lawfulness of acts other than recommendations or opinions of the Council and the Commission." The most important reviewable "acts" (regulations, directives, decisions) are defined in article 189.

48. See, for instance, the references to the EEC Treaty, specifically to articles 220 and 58, in the preamble to the 1968 Convention; article 10 of the 1968 Convention (discussed in text accompanying notes 96-98 *infra*); the last clause of article 11 of the 1968 Convention, indicating the controlling role of the EEC Treaty; articles 12, 13, 15, 16, and 19 of the 1968 Convention assigning certain ministerial functions to the Secretary General of the Council of the Communities; article 18 of the 1968 Convention, requiring the President of the Council of the Communities to call a conference for a revision of the Convention if requested by a contracting party; and the 1968 Convention's articles 19 (four authentic texts), 17 (unlimited duration) and 14 (requirement of ratification by all six members) which were obviously inspired by the corresponding articles in the EEC Treaty. It was also agreed to publish the 1968 Convention for information purposes in the Official Journal of the Communities (E.E.C. J.O.), *Rapport Goldman* para. 45. The 1968 Convention refers throughout to "Contracting States" and "territories to which the present Convention applies"; but the preamble makes it clear that the states that concluded the 1968 Convention were "The High Contracting Parties to the Treaty Establishing the European Economic Community."

it<sup>49</sup> indicates the close relationship between the Convention and the Community.

The original draft of the 1968 Convention contained an article similar to the corresponding provision in another "European Convention," the Convention on Judicial Jurisdiction and Execution of Judgments in Civil and Commercial Matters.<sup>50</sup> This article reflected the assumption that any state which in the future would join the Community would be required to adhere to the Convention on Recognition of Companies—perhaps with certain adjustments to be negotiated at the time—as well as to the EEC Treaty itself. This provision was dropped in the final text, and all that remains is a joint declaration which is included in a Protocol annexed to the Convention and in which the parties declare their readiness to negotiate with any state "associated" (and by inference with any state that will become associated) with the Community, with a view toward mutual recognition of companies along the lines of the basic principles of the 1968 Convention and in the context of the agreement of association.<sup>51</sup> However, in the minutes of their meeting, the Ministers recorded their unanimous opinion that any state which joins the Community must also adhere to the 1968 Convention. This statement is of immediate interest in view of the impending negotiations with the United Kingdom, Denmark, Ireland, and Norway concerning admission to membership in the Community.

### B. *The Benefiting Companies and Legal Persons*

According to article 1 of the 1968 Convention, all companies formed under civil and commercial law, including cooperatives,

49. Art. 14. The 1968 Convention was approved by the French Parliament, Law of Dec. 20, 1969, [1969] J.O. 12436.

50. Art. 63. That Convention was signed on Sept. 27, 1968. The French text was published by Conseil des Communautés européennes, undated. The English unofficial translation is in 12 BULL. E.E.C. SUPP. No. 2 (1969); and authentic texts are given in the respective French, German, Dutch, and Italian versions of the same supplement. See Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments—Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149 (1968); Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969); Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967); Nadelmann, *The Outer World and the Common Market Experts' Draft Convention on Recognition of Judgments*, 5 C.M. L. REV. 409 (1968).

51. EEC Treaty article 238 provides that: "The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures." A number of such agreements have been concluded, but the content varies considerably.

must be recognized, without more, if they were organized under the law of a state party to the Convention,<sup>52</sup> and if they have their registered seat (*siège statutaire, satzungsmässiger Sitz*) in a territory to which the Convention applies. Article 8 makes it clear that any such company may not be denied recognition even if it is not considered a full-fledged legal person under the law in the state in which it was formed; the company must be recognized so long as, under that law, it has the capacity to sue or be sued in its own name, as in the case of the German partnership (*offene Handelsgesellschaft*). In addition, article 2 extends the benefit of recognition to all legal persons organized under public or private law, other than companies, so long as they meet the same conditions as companies must and so long as they are engaged in an "economic activity" normally performed for remuneration.

A comparison of this definition of the benefiting companies and legal persons with that contained in article 58 of the EEC Treaty reveals some interesting differences.<sup>53</sup> First, while article 58 appears to exclude "non-profit companies,"<sup>54</sup> the 1968 Convention benefits companies of civil and commercial law, whatever the purpose or nature of their activities; their legal form, not their purpose, is the determining factor. Thus companies of civil law are included under the 1968 Convention, even though under the laws of some member states they may be organized for a nonprofit purpose.<sup>55</sup> On the other hand, companies of commercial law are conclusively presumed to engage in "commercial" activity and thus, under the 1968 Convention definition, to pursue a gainful purpose, even though in fact they may not be so doing in an isolated case.<sup>56</sup>

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52. The term "state" will hereinafter primarily be used to indicate a state party to the Convention.

53. See, Beitzke, *Zur Anerkennung*; Cerexhe, *supra* note 41, at 582; Dieu, *supra* note 17, at 537; *Rapport Goldman* para. 9-14; Goldman, *Le projet* 214; van der Grinten, *supra* note 41, at 204-08.

54. Cerexhe suggests that article 58, "despite its rather paradoxical language," in effect does not purport to require gainful purpose for companies of civil or commercial law. Cerexhe, *supra* note 41, at 584.

55. Under § 705 of the German Civil Code, BGB § 705 (Kolhammer 1957), a company formed pursuant to the Civil Code may pursue any purpose, including a nonprofit purpose. Such a company, however, is excluded from the coverage of the 1968 Convention, because it cannot sue or be sued in its own name. See §§ 50, 736 of the Zivilprozessordnung, ZPO §§ 50, 736 (C.H. Beck 1967). See also Beitzke, *Zur Anerkennung* 93. On the other hand, the *società semplice* of the Italian law and the *vennootschap onder firma* of the Netherlands law are included within the coverage of the 1968 Convention. See Declaration commune No. 1, attached to the 1968 Convention.

56. Such a company might be a charitable institution run by a stock company, as provided for in § 6 of the German Commercial Code, HGB § 6 (C. H. Beck 1968). With respect to the German partnership (*offene Handelsgesellschaft*) under commercial law, see HGB § 105 (C. H. Beck 1968), which requires a "commercial" and therefore gainful purpose (*Handelsgewerbe*).

A second extension of the 1968 Convention's coverage beyond the scope of article 58 of the EEC Treaty, stems from article 2 of the Convention which extends coverage to all legal persons other than companies, provided they meet the prerequisite of economic activity normally performed for remuneration.<sup>57</sup> This new verbal formulation<sup>58</sup> was substituted for the "gainful purpose" prerequisite of article 58 because that article, if construed narrowly, might not include certain enterprises which, the national experts felt, should be covered by the Convention. The experts particularly had in mind nationalized enterprises; mixed private-public companies providing public services; and certain modern organizational forms of economic activity which are of entirely private nature, such as companies established by industrial enterprises to supply those enterprises with services relating to research, market surveys, or the protection of industrial property rights—fields in which a profit motive may not be directly involved. Yet the experts were fully aware of the vagueness of the new concept when they drafted the provision.<sup>59</sup>

### C. Prerequisites for Recognition: Optional Limitations

For recognition purposes, it is sufficient for the companies and legal persons covered by articles 1 and 2 to have their registered seat *anywhere* within the Community, even if they have their real seat outside the Community. For instance, a company organized under Dutch law with a real seat in the United States would be covered by the recognition provisions of the 1968 Convention. Thus a registered seat—not a real seat—is the minimum contact required for a claim for recognition. This requirement is, as has been shown, in accord with the *literal* reading of article 58 relating to the freedoms of establishment and of supply of services.<sup>60</sup> The "real seat" is defined in article 5 of the 1968 Convention as the place of the "central administration." This definition coincides with that of the Hague Convention and with that of the national law in the member states.<sup>61</sup> If this were the entire story, the victory of the incorpora-

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57. More specifically, such legal persons are included under article 2 if their principal or accessory purpose is "economic activity normally performed for remuneration," or if they actually engage in such activity on a continuing basis without thereby infringing the law under which they were formed.

58. *But see* EEC Treaty article 60 which speaks of "services normally supplied for remuneration."

59. *Rapport Goldman* paras. 10-12.

60. *See* note 37 *supra* and text accompanying notes 37-38 *supra*.

61. *Rapport Goldman* para. 18. I.L.L. Draft (discussed *supra* note 33) defines "the actual seat of a company" as "the place at which it has its principal center of control and management even if the decisions which are taken at that place follow directives



tion principle would be complete with regard to recognition. However, following the pattern of the Hague Convention,<sup>62</sup> the concession made in the first two articles by the "real seat" advocates is in part taken back in articles 3 and 4.

First, in article 3, each state is left free to declare that it will deny recognition to any company whose real seat is outside the territories to which the 1968 Convention applies, if the company does not maintain a *genuine link* (*lien sérieux, wirkliche Verbindung*) with the economy of one such territory. This rather vague limiting clause differs somewhat from the corresponding, and equally vague, limitation grafted upon article 58 of the EEC Treaty by the above-mentioned General Programs,<sup>63</sup> and it may cause difficulties of interpretation. It is clearly designed to prevent a non-Community enterprise from claiming recognition within the Community on the basis of nothing more than a "post office box" address (a registered seat) in the Netherlands.

Second, article 4 deals with the status of a company which claims recognition in the signatory state where its real seat is located, but which was organized under the law of another signatory state, in which it has its registered seat. In such a situation, under the prevailing national laws, if the real seat were located in the Federal Republic of Germany, recognition of such a company in that country could be denied, whereas if the real seat were in Belgium, Italy, Luxembourg, or (since the 1966 reform) France, the law of the real seat would be applied *without* denial of recognition.<sup>64</sup> The 1968 Convention formula for dealing with this situation was worked out in a special meeting of the Ministers of Justice of Belgium, the

given by shareholders who reside elsewhere." Drucker, *supra* note 33, at 34. With respect to the concept of "central administration," see E. RABEL, *supra* note 14, at 40-41.

62. See text accompanying note 35 *supra*.

63. The General Programs require "a continuous and effective link with the economy of a Member State." See note 40 *supra*. The Goldman report acknowledges, but does not explain the divergence. See *Rapport Goldman* para. 18. The International Court of Justice has held that a state cannot lay down rules governing the grant of its nationality and claim that these rules

are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defense of its citizens by means of protection as against other States.

*Lichtenstein v. Guatemala* (Nottebohm case), [1955] I.C.J. Rep. 4, 24 (emphasis added). See also the concept of "real connection," discussed in note 66 *infra*.

64. See *Rapport Goldman* paras. 3-4; CODE COMM. art. 197 (Pasinomie 1935) (Belgium); C. Civ. art. 2505 (Hoepli 1964) (Italy); article 159 of Luxembourg's Law of Aug. 15, 1915, concerning Commercial Companies; article 3 of the French Law of July 24, 1966, [1966] J.O. 642, [1966] B.L.D. 353. See note 16 *supra*.

Theoretically, a refusal of recognition in this case could be justified on the ground that such a company is entitled to equal, but not more favorable, treatment as compared with local companies. See text accompanying note 74 *infra*.

Netherlands, and Luxembourg. The ministers considered the problem in the context of a company which had been incorporated in good faith in the Netherlands, and which, after it had operated for a time in and from the Netherlands, decided for good business reasons to transfer its central administration (real seat) to another signatory state. According to the final solution embodied in article 4 of the 1968 Convention, a state may declare that it will apply the mandatory provisions of its own law to a foreign company whose real seat is in its territory. However, it may apply its nonmandatory (optional) provisions to that company only if the company's charter does not contain a reference to the law of the state under which it was formed or if the company is unable to show that it has in fact conducted its activity during a "reasonable time" in the state of its formation.

One problem with the formula is that it may be difficult to determine in some instances whether a provision is mandatory or optional in a given system. The mandatory provisions of company law generally include rules on the formation of companies. Thus, the argument could be made that if, according to the mandatory rules of the state in which the foreign company has its real seat, the company is not validly constituted, it may be denied recognition. The Dutch experts strongly opposed such an interpretation as defeating the objective of recognition, and they received substantial support from some other delegations. Without taking a position on this argument, the German delegation posed a series of searching questions and demanded that a uniform interpretation be agreed upon. Evidently the German experts were troubled by a political nightmare: A foreign company, possibly organized abroad by Germans with German capital, could maintain its central administration in German federal territory and claim recognition there as a foreign company, even though the workers would not be represented on the company's supervisory board as required by the federal law on workers' "codetermination."<sup>65</sup> The German demand, however, was opposed by some who argued that the experts should not be expected to interpret their own texts and by others who considered the problem of limited practical importance. Apparently, the experts have not reached an understanding on an interpretation. Thus, any problems that may arise under article 4 will have to be resolved on a case-by-case basis, without reference to an agreed inter-

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65. With respect to the "codetermination" in the Federal Republic of Germany, see Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 30, 64-75 (1966), with references to the German federal legislation.

pretation. Nevertheless, the text of article 4 itself makes fairly clear the intention of the draftsmen. They intended to prohibit a refusal of recognition by the state of the real seat, and instead—as a compromise—authorized that state to impose its own law on the recognized company. The practical effects of this formula are uncertain and could vary from state to state depending on local law. The formula has all the disadvantages of complexity and ambiguity that characterize a laborious compromise. Although the solution represents some progress over the Hague Convention,<sup>66</sup> the prospect of living under two different company-law systems is fraught with so many uncertainties, particularly if the requirements of the two systems should not be compatible, that the affected company is likely to feel compelled to transfer its real seat to the state in which it was formed, in order to avoid the operation of article 4.<sup>67</sup>

The state's option under article 4 to impose its own law upon a foreign company is limited to the case in which the company's real seat is in its own territory; if the real seat is in a different territory, article 4 does not apply. More specifically, a company organized in state *A*, with its real seat in state *B*, must be recognized in state *C* even if state *B* follows the real-seat principle. This result is another small improvement over the Hague Convention formula which demands recognition in this situation only if state *B* adheres to the principle of incorporation.<sup>68</sup> The result called for by the Convention on Recognition of Companies is desirable in this case since the interest of the "third" state, where recognition is claimed, in having its own law applied is not as pervasive as it might be if the real seat were also located in its territory. But the adopted solution could still lead to a situation in which a company is viewed in a third state as governed by the law of the state of its formation, while the state of

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66. Article 2 of the Hague Convention (*see note 17 supra*) allows *refusal* of recognition in this situation unless the real seat is transferred to a state which follows the principle of incorporation. Similarly, articles 3 and 4 of the I.L.L. Draft would permit refusal of recognition by the state of the real seat if the company's charter does not accord with the law of that state, *unless* (and this is a deviation from the Hague solution) the company carries its principal business activity in the state of incorporation (article 3) or has "*real connection*" with the territory of that state (article 4). This "*real connection*" must be established by facts other than the mere indication of a registered office, and may in particular consist of a place of business in the territory, of the origin of the share or loan capital of the company, of the nationality or habitual residence of the shareholders or of those in control of the company" (article 4).

67. *See* Beitzke, *Zur Anerkennung* 94; van der Grinten, *supra* note 41, at 208. In order to reduce the threat to legal security that is posed by the options left open in articles 3 and 4, the 1968 Convention provides that the states which desire to take advantage of those options must make the necessary declarations, *at the latest, when they deposit their instrument of ratification* (article 15).

68. Hague Convention art. 2(2). *See also* articles 3 and 4 of the I.L.L. Draft.

the real seat is free to apply its own mandatory law to the company pursuant to article 4. The fact that article 4 allows for such an outcome indicates that the 1968 Convention does not achieve the fullness of uniform treatment which is a major, if not the paramount, objective of conflict-of-laws rules.<sup>69</sup>

#### D. *Effects of Recognition*

Reflecting the "traditional solution of private international law,"<sup>70</sup> which is also apparent in the Hague agreement, article 6 of the 1968 Convention provides that a company or legal person which is entitled to recognition by virtue of the Convention shall have the same capacity that it has under the law of the state in which it was organized. But here again the 1968 Convention contains limitations designed to ensure the forum state a degree of freedom to apply its own law.<sup>71</sup>

The first such limitation derives from article 4 which can come into play, as has been stated,<sup>72</sup> when the real seat of the company is situated in the state in which recognition is sought while the situs of incorporation is in another member state. Among the rules of its own law which the state of the real seat is free to apply to the foreign company might be a provision affecting the capacity of the company.<sup>73</sup>

Second, pursuant to article 7, the state in which recognition is claimed may deny the foreign company specific rights which under its own law are also denied to local companies of a "corresponding type." Any such limitation, however, cannot have the effect of depriving the foreign company of its *basic* capacity to be the subject of rights and obligations, to enter into contracts and undertake other legal acts, and to sue and be sued.<sup>74</sup> Furthermore, the foreign company which receives such limited recognition cannot itself invoke in court the limitations allowed by article 7. Thus, the limitations are exclusively for the protection of local parties that contracted with the company.<sup>75</sup>

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69. See Grossfeld, *Die Anerkennung* 47. But see Beitzke, *Anerkennung* 20.

70. "Conformément à une solution traditionnelle du droit international privé . . ." *Rapport Goldman* para. 23.

71. For analogies in American law, see A. EHRENZWEIG, *supra* note 16, at 409, 413.

72. See text accompanying note 68 *supra*.

73. *Rapport Goldman* para. 23.

74. Cf. Hague Convention art. 6. Further limitations are permitted in article 6 of the I.I.L. Draft.

75. This was considered by some an improper discrimination against foreign companies. See, e.g., van der Grinten, *supra* note 41, at 209. But see *Rapport Goldman* para. 25.

The limitations on recognition which are possible under articles 4 and 7 are based on a rather esoteric distinction between two concepts: on the one hand the "general capacity" consisting of the "abstract aptitude to take part in legal life"<sup>76</sup> as "a distinct entity" which is determined exclusively by the law of the state of incorporation; and on the other hand, the specific rights "which form the concrete content of the general capacity"<sup>77</sup> and which in the first instance are also determined by the law of the state of incorporation, but which the state where recognition is sought may deny by reference to its own law,<sup>78</sup> within the limits described above.<sup>79</sup> This abstract analysis lends support to those who consider it futile to attempt to draw a sharp distinction between "recognition" and the conflict-of-laws rules which determine the law governing the capacity and specific rights of the foreign company.<sup>80</sup>

When one speculates on the future application of these limitations, he must keep in mind that the 1968 Convention seeks to ensure certain minimum rights normally associated with and derived from recognition, but does not deal with the freedoms of establishment and of supply of services, which involve rights *connected with specific activities*.<sup>81</sup> Thus, on the one hand, a German company need not be established in France, or supply services there, in order to claim the right to sue in a French court on its contract to purchase goods or to hire personnel in France; its right to sue derives from the recognition in France of its general capacity and is specifically guaranteed by article 7 of the Convention.<sup>82</sup> On the other hand, if under French law a local limited-liability company is excluded from the banking business, a German limited-liability company—of a "corresponding type"—could also, presumably, be excluded from that business in France, again, in accordance with article 7. Moreover, the German company, in seeking to enter the banking business in France, could not rely on the EEC Treaty provisions concerning establishment and supply of services, since, under those provisions, France is required to accord the German company only equal treatment with that accorded to its own companies.<sup>83</sup>

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76. *Rapport Goldman* para. 24.

77. *Id.*

78. *Id.* See Hague Convention art. 5.

79. See text accompanying notes 74 and 75 *supra*.

80. See text accompanying note 23 *supra*.

81. See also Hague Convention art. 7.

82. That right is also a necessary corollary of the rights of establishment and supply of services, as applied to specific occupations and professions. See note 40 *supra* and accompanying text.

83. See note 30 *supra* and accompanying text.

There is, finally, another group of restrictions related to article 7 which may be illustrated by the rule in German law confining membership on the executive board (*Vorstand*) of German stock companies to natural persons and making legal persons ineligible for membership. It could hardly be argued that a foreign stock company formed in a state which does not have such a restriction could be denied recognition in the Federal Republic under article 7 solely because its executive board includes another company—that is, a legal rather than a natural person—among its members. Professor Goldman takes the optimistic view that this type of question is not likely to arise very often in practice. In his opinion, the differences among the national laws governing the two types of companies that one is most likely to encounter in transnational business—that is, the stock company and limited-liability company—are no longer very marked so far as the rules concerning capacity are concerned; and the differences which do exist will be further reduced in response to the coordination of national laws.<sup>84</sup> Some may argue, however, that Professor Goldman is overly optimistic about the amount of progress which can be achieved through coordination.

#### E. *The Exception of Public Policy (Ordre Public)*

In the field of conflict of laws, the exception of public policy (*ordre public*) traditionally enables the forum state to refuse to apply foreign law which would otherwise govern under its own choice-of-law rules. Thus, for instance, the Hague Convention stipulates that its provisions governing recognition may be disregarded by a signatory state on the ground of *ordre public*.<sup>85</sup>

In the framework of the EEC, a public-policy exception formulated in such general terms as that of the Hague Convention appeared inappropriate. For that reason the draftsmen of the Convention on Recognition of Companies sought to restrict the scope of the exception; in article 9 they limited the application of that exception to situations in which the company claiming recognition contravenes—through its charter *purpose*, through the *objective* which it seeks to achieve, or through the *activities* in which it is in fact engaged<sup>86</sup>—the principles which the forum state considers a matter of

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84. See Goldman, *La reconnaissance* 194-96.

85. Hague Convention art. 8.

86. This formula, enumerating the "purpose," "objective," and actual activity, is an expanded version of the clause in the Franco-German Convention of Establishment and Navigation of 1956, which served as its inspiration. It is designed to prohibit states from refusing recognition on the basis of rules governing the *constitution* and *functioning* of the company. See *Rapport Goldman* paras. 28, 29-30.

public policy "in the private international-law sense."<sup>87</sup> The draftsmen, however, did not attempt to provide a uniform definition of the concept of public policy "in the private international-law sense."<sup>88</sup> This approach somewhat resembles the approach taken in the United States, where the exception of public policy remains operative among the states of the Union. Although in principle the scope of the exception in this country is defined by state law, its reach has been reduced by the courts in the choice-of-law setting, and its application in that setting is subject only to a very loose control of the United States Constitution.<sup>89</sup> In a somewhat different setting, however, American courts, relying on the full faith and credit clause of the Constitution, have for all practical purposes eliminated public policy as a ground for the refusal to "recognize" the *judgments* of sister states.<sup>90</sup>

It was suggested during the negotiations on article 9 of the 1968 Convention that the concept of public policy should be made a part of Community law, common to all states and applicable not only to recognition of legal persons, but also in other contexts, such as that involving the Convention on Judicial Jurisdiction and Execution of Judgments.<sup>91</sup> The Governments, however, evidently were unwilling to go that far in the direction of unification. On its face, article 9 seems to assume that, subject to the above-mentioned vague limitation,<sup>92</sup> it is for each state to supply its own definition of "public policy" in applying the exception. Nevertheless, in view of the consistent case law of the national courts of the signatory states, public policy "in the private international-law sense" was clearly intended to encompass only the fundamental political, social, and economic precepts of the forum state; in any case it was understood to be less comprehensive than the French "internal public policy" (*ordre public interne*).<sup>93</sup> Thus, although the uncertainty of the protean

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87. See Article 9 of the 1968 Convention.

88. See generally Beitzke, *Zur Anerkennung* 96; Cerexhe, *supra* note 41, at 588-90; Dieu, *supra* note 17, at 545; *Rapport Goldman* paras. 27-32; van der Grinten, *supra* note 41, at 209.

89. For a discussion of constitutional impact in the choice-of-law setting, see A. EHRENZWEIG, *supra* note 16, at 28-33.

90. See *Hughes v. Fetter*, 341 U.S. 609 (1951). See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 196, 272-73, 625-26 (1963); A. EHRENZWEIG, *supra* note 16, at 138-39; Reese & Kaufmann, *supra* note 25, at 1137, 1143.

91. See note 50 *supra*.

92. See text accompanying note 88 *supra*.

93. Article 30 of the Introductory Law to the German Civil Code, EGBGB art. 30 (Palandt 1969), which deals with the German equivalent of what the Convention describes as the "ordre public in the private international law sense," provides that "the application of a foreign law is excluded if the application would be contrary to

concept of public policy has been reduced somewhat in the 1968 Convention, it probably still encompasses not only certain fundamental rules of statutory national law, but also the underlying principles and policies as well.

Article 9 singles out one specific instance in which the exception of public policy may not be invoked. It provides that if the so-called "one-man company" may lawfully exist in its own state, it cannot be denied recognition in the other states on the ground of public policy.<sup>94</sup> Although national company laws in the Community at present do not allow a company to be initially organized by a single founder, both German and Dutch laws do acknowledge the continuing existence of a company even if, after its formation, all of its shares are acquired by the same person; and French law follows this view with regard to *foreign* companies when the law governing those companies acknowledges such continuing existence. The Belgian courts, however, have steadfastly refused, on grounds of public policy, to recognize such "one-man" companies.<sup>95</sup> From the viewpoint of the Belgian Government, this provision of article 9 offers a convenient opportunity for replacing an outdated and obnoxious judge-made rule.<sup>96</sup> Article 9 does not provide an express answer to the question whether the forum state could impose personal liability on the single shareholder, but perhaps a subsequent directive on the coordination of the company laws might tackle this thorny problem.

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good morals or to the purpose of a German law." Despite this broad language, the courts construe the exception narrowly, permitting refusal only if the application of foreign law should "attack directly the foundations of the German political or economic life" or if it should be "outright unbearable for the German legal order in terms of its legal concepts and in its measure of good morals." G. KEGEL, *supra* note 26, at 184-87 (citing cases as 184-85). Similarly, article 31 of the Italian Codice Civile, C. Civ. art. 31 (Hoepli 1964), provides in broad language that in no case may foreign laws, regulations, entities, or contracts have effect in Italy "if they are contrary to the public order or good morals (*costume*)." Yet the courts have limited the exception to ensuring "respect of the highest and most essential interests" of the Italian legal order. Parazza v. Garde, 6 Giust. Civ. I 242 (1955), (Corte di Cassazione), and other cases cited in V. MARTINO, CODICE CIVILE, COMMENTO CON LA GIURISPRUDENZA 33 (4th ed. 1964). In France, a distinction is made between "ordre public interne" (or more accurately, "ordre public au sens du droit civil interne") which is illustrated by article 6 of the Code civile, C. Civ. art. 6 (172d ed. Petits Codes Dalloz 1965), providing that parties cannot derogate by contract *mandatory rules* of the law—and "ordre public international" (or more precisely, "ordre public au sens du droit international privé"). See H. BATIFFOL, *supra* note 16, at No. 367. In France, still another notion of "ordre international public" concerns "les grands problèmes internationaux."

94. See also *Rapport Goldman* paras. 28-29.

95. See I J. VAN RYN, PRINCIPES DE DROIT COMMERCIAL §§ 492-93 (1954).

96. In fact, the Belgian Government is presently considering reforming its company law relating to one-man companies. The reform law would allow a stock company to act as a sole founder in forming a subsidiary. This proposal goes beyond any national law in the Community in allowing formation of a one-man company.



Article 10, which also relates to the public-policy exception, makes it clear that any "principles and rules" of national law that are contrary to the EEC Treaty may not be considered national public policy for the purpose of denying recognition under article 9. The experts apparently had in mind certain principles—such as discrimination on the ground of nationality in the field of establishment—which, although eliminated among the members of the Community, may remain applicable in the member states vis-à-vis nationals of countries outside the Community.<sup>97</sup> Yet article 10 would probably also apply to the non-self-executing provisions of the EEC Treaty or to Community directives, if a member failed to implement those provisions in its national law, although the experts obviously did not wish to contemplate the likelihood of such non-compliance. One interesting practical effect of article 10 may be that, in case of litigation before a national court concerning recognition, that court may be required, in accordance with article 177 of the EEC Treaty,<sup>98</sup> to refer to the Community Court of Justice the question of interpretation of that provision of the EEC Treaty which the relevant national policy is alleged to contravene.<sup>99</sup>

#### F. *Toward a Uniform Interpretation?*

The Community Court of Justice would seem to be the logical forum for ensuring an effective application and, above all, a uniform interpretation of the 1968 Convention, since national courts are likely to diverge in their interpretation of some of the Convention's general and often ambiguous formulas. But, as indicated above, the jurisdiction of the Community Court does not extend to the 1968 Convention,<sup>100</sup> although it could be so extended if a clause to that effect were included in the text of the Convention. One possible legal basis for a clause so extending the Court's jurisdiction might be found in article 182 of the EEC Treaty, which enables the Court to assume jurisdiction over Treaty-connected disputes between two member states if those disputes are submitted to the Court by virtue of a special agreement (*compromis, Schiedsvertrag*). If article 182 were used as the basis for jurisdiction, however, such jurisdiction could extend only to disputes *between member states* and could not

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97. See *Rapport Goldman* para. 21.

98. EEC Treaty art. 177: "The Court of Justice shall be competent to make a preliminary decision concerning: (a) the interpretation of this Treaty. . . ."

99. See *Cerexhe*, *supra* note 41, at 590.

100. See note 47 *supra* and accompanying text.

extend to controversies between private parties. Considering the nature of the 1968 Convention, this limitation would gravely impair the utility of the Court's role. Moreover, the majority of the experts reportedly interpreted article 182 to require a special agreement for each separate dispute. Such a narrow interpretation seems to preclude using article 182 as a basis for jurisdiction.

A more promising basis for a clause in the 1968 Convention giving the Community Court of Justice jurisdiction over Convention disputes is offered by article 177 of the EEC Treaty.<sup>101</sup> According to that provision, a national court, hearing a case between private parties, may—and if it is a court of last instance, must—certify to the Community Court any question of “interpretation . . . of acts of the institutions of the Community,” if a ruling on this question is necessary to reach a decision in the case. By inserting an appropriate clause in the Convention, it would be possible to extend the authority of the Court under article 177 to cases before national courts involving questions of interpretation of the Convention. No amendment of the EEC Treaty would seem necessary to achieve this purpose. At the time the 1968 Convention was drafted, however, the member states were apparently not prepared to take this further step toward legal integration. It was argued that the Court of Justice was essentially equipped to deal only with questions of “public law,” and that it would have to form a separate chamber to deal with “private-law” cases of the sort that arise under the Convention. A more weighty argument was based on the proposition that the question of the extension of the Court's role was of a more general scope, because it arose in connection with all the “European” conventions negotiated in accordance with article 220. According to that argument, since different arrangements might be required for different conventions, an amendment to the EEC Treaty might be more appropriate for dealing with the problem. Thus, the working group confined itself to the promulgation of a joint declaration which was attached to the 1968 Convention<sup>102</sup> in which the parties affirmed their readiness to study the possibility of broadening the jurisdiction of the Court and negotiating an agreement to that effect. A special group has in fact been established for this purpose,<sup>103</sup> and it has reportedly reached an agreement on a draft Pro-

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101. See note 97 *supra*.

102. Declaration commune No. 3, attached to 1968 Convention.

103. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES 1968, 88 (1969).

TOCOL that would extend the Court's jurisdiction so as to enable it to interpret the 1968 Convention in cases certified to it from national courts in accordance with article 177.

#### V. CONCLUSION

In the context of a regional integrated market, law on the recognition of companies should serve to advance the security and growth of transnational intercourse and to free the corporate decision-maker from unnecessary legal restraints. Perhaps because the negotiations for the EEC Convention on Recognition of Companies began at a relatively early date, when the Common Market was still more a hope than a reality, the Convention in some respects falls short of meeting this purpose. It does advance toward a stricter obligation to recognize and toward a greater uniformity in the choice-of-law rules accompanying recognition; but because of the many options left open to the member states, the 1968 Convention fails to ensure true uniform treatment and legal certainty in the practice of recognition. The complexity of the solutions embodied in the 1968 Convention was due largely to the divergence among the national laws, particularly to the divergence between Dutch law, which follows the incorporation principle, and the laws of the other five states, which still largely adhere to the real-seat principle. Moreover, the differences in the application of the "real seat" rule between the Federal Republic of Germany and the other four members also posed a problem.<sup>104</sup>

One may only speculate what sort of document the experts could have produced if they had directed their considerable talents and expertise toward devising a truly new framework for recognition, based on a realistic analysis of the common governmental and private interests in a modern economic union, rather than devoting so much attention to devising ingenious escape mechanisms designed to pacify traditional national fears and concerns. Actually, in its basic approach and technique, the 1968 Convention differs little from the Hague Convention, which of course was not conceived in the context of an integrated regional market. Yet the EEC Convention has without question introduced improvements both over the prevailing state of the national laws and over the Hague Convention. It has broadened the circle of the benefiting legal persons, it has increased the acceptance of the incorporation principle in situations in which the registered and real seats of the company are sepa-

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104. See note 16 *supra*.

rated, and it has somewhat reduced the scope of the public-policy exception. One may expect that the convention on safeguarding the legal personality of a company in case of the transfer of its seat, a convention which still remains to be negotiated in accordance with article 220 of the EEC Treaty,<sup>105</sup> will carry the trend toward harmonization further, particularly since mutual knowledge of national laws will be increased and the differences among them will be reduced both by national reforms and, it is also hoped, by Community coordination.

In any event, one's judgment of the EEC Convention on Recognition of Companies must be tempered by an understanding of the political realities in Europe at the time the Convention was drafted, including the fact that it was the first agreement reached in accordance with article 220 to supplement the EEC Treaty, and thus was blessed with all the exaggerated care that lawyers everywhere tend to lavish upon a "precedent." To an American lawyer, hardened by the disconcerting process of interest analysis which characterizes the current uncertain state of the conflict-of-laws doctrine in the United States, the formulas of the Convention appear at the same time too rigid to meet the vagaries of actual life and too vague to be of real help. One must keep in mind, of course, that the Congress of the United States has never even entered the precincts of the choice-of-law area—although it has had ample and unquestioned constitutional power to do so, under the full faith and credit clause and the interstate and foreign commerce clause—but rather has abandoned that area, for better or for worse, to the courts. In fact, the full faith and credit clause itself, as interpreted by the United States Supreme Court, has proved to be a weak reed in the choice-of-law field.<sup>106</sup> Nevertheless, numerous company-related problems in the choice-of-law field have been indirectly eliminated in the United States by the enactment of federal legislation in other areas, particularly in the securities area.<sup>107</sup>

In the final analysis, the EEC Convention on the Mutual Recognition of Companies and Legal Persons must be viewed in the broader perspective of the on-going effort to fashion a modern legal framework for transnational "European" business. This effort proceeds at three levels: the coordination of conflicting national policies, including economic, monetary, regional, and subsidies

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105. EEC Treaty art. 220.

106. See A. EHRENZWEIG, *supra* note 16, at 28-33.

107. See Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1964), and Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-hh (1964).

policies; second, the harmonization of national laws, including company, tax, and industrial-property laws, and the creation of new transnational legal forms, such as the proposed "European" patent or "European" company form; and third, the unification of national conflicts-of-laws rules affecting the "mobility" of national companies. The Convention on Recognition of Companies falls within the third category, as do the proposed conventions on transnational mergers,<sup>108</sup> transfer of company seats,<sup>109</sup> and bankruptcy law.<sup>110</sup> It demonstrates the difficulties incumbent in fashioning uniform conflict-of-laws rules among nations with divergent national laws, even when those nations are making a conscious effort to minimize the differences in their laws in the framework of an integrated regional community.

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108. EEC Treaty art. 220; the proposed Convention is contained in Comité des experts de l'Article 220 alinea 3 du traité C.E.E., Avant projet de Convention en matière de fusions internationales, 5873/XIV/69F (mimeographed draft).

109. EEC Treaty art. 220.

110. The proposed Convention is contained in Kommission der Europäischen Gemeinschaften, Vorentwurf eines Übereinkommens über den Konkurs, den Vergleich und Konkursähnliche Verfahren, 5267/XIV/68-D (mimeographed draft).