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Delphine Nougayrede

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## After the Panama Papers: A Private Law Critique of Shell Companies

DELPHINE NOUGAYRÈDE\*

### I. Introduction

“Shell companies,” summarily defined as companies devoid of physical or human substance,<sup>1</sup> continue to regularly appear at the center of international scandals. The Panama Papers stand out as the most memorable of the “Papers” and “Leaks” series that made media headlines.<sup>2</sup> To most international practitioners of corporate finance and transactions, however, these revelations did not come as a surprise, as shell companies have been at the center of corporate and tax planning for decades. A few alarm bells were rung by the Organisation for Economic Co-Operation and Development (OECD) and the Financial Action Task Force (FATF) in the early 2000s<sup>3</sup> in connection with the use of these structures for tax evasion and money laundering, but the critique took on a new dimension after the 2008 financial crisis and seems now to have become the prevailing orthodoxy in policy-making circles. In 2015, for example, the United Nations Conference on Trade and Development (UNCTAD)’s annual World Investment Report

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\* Lecturer-in-law, Columbia Law School, Senior research fellow, Columbia Center for Global Legal Transformation, practicing corporate and commercial lawyer. The research for this article was supported by the Max Planck Institute for Comparative and Private International Law in Hamburg, to which the author expressed her thanks. She also thanks the organizers and participants of a 2018 workshop at SOAS University of London on the topic “Sovereignty and Offshoring,” at which a prior version of this paper was presented, and in particular Kristin Surak of SOAS and Tonya Putnam of Columbia University. All errors are her own.

1. On this definition of “shell companies,” *see infra* Section II. Generally, in this article, the terms “company” and “corporation” will be used interchangeably, as will “company law” and “corporate law.”

2. The most recent leaks, at the time of writing, were the 2017 Malta Files and Football Leaks (both produced by the European Investigative Collaborations, a consortium of journalists) as well as the November 2017 Paradise Papers and 2018 West Africa Leaks produced by the International Consortium of Investigative Journalists (who were also at the origin of the 2013 Offshore Leaks, 2014 LuxLeaks, 2015 Swiss Leaks and 2016 Panama Papers). *See* Shu-Yi Oei & Diane Ring, *Leak Driven Law*, 65 UCLA L. REV. 532, 545–58 (2018) (for a summary of data leaks up until the Panama Papers).

3. FIN. ACTION TASK FORCE, FATF 40 RECOMMENDATIONS (2003); FIN. ACTION TASK FORCE, GUIDANCE ON TRANSPARENCY AND BENEFICIAL OWNERSHIP 4 (2014); FIN. ACTION TASK FORCE, THE MISUSE OF CORPORATE VEHICLES, INCLUDING TRUSTS AND COMPANY SERVICE PROVIDERS (2006); ORG. FOR ECON. CO-OPERATION & DEV. [HEREINAFTER OECD], BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES 3 (2001).

dedicated its policy chapter to the “pervasive” and “outsized” use of offshore investment hubs through the use of “letterbox companies” by multinational corporations and the resulting decline in tax revenues received by developing countries.<sup>4</sup> The following year, its policy chapter analyzed the “blurring” of investor nationality from multiple tiers of corporate ownership, transit investment through third countries, round-tripping and “mailbox companies,”<sup>5</sup> concluding that overly-complex corporate structuring made it increasingly difficult for governments to devise and implement effective policies on foreign investment. Even within a legal system like Britain—traditionally very deferent to private ordering in general—a leading scholar wrote:

[T]here is a sense, which does not really go away, that as corporate structuring has become more and more focused on the maximization of assets and profits, which is in turn brought about by managing to make liabilities, whether personal, trade or fiscal, somehow vanish, the common law has been rather too ready to shrug its shoulders.<sup>6</sup>

Much of this corporate structuring, of course, relies on the use of shell companies registered in a small number of well-known hub jurisdictions. The response at present has been to accelerate intergovernmental measures that were already under way to combat tax evasion and money-laundering.<sup>7</sup> These measures involve creating new stores of information through two types of channels: first, exchange of financial account information across borders,<sup>8</sup> and second, domestic registries of beneficial owners of companies.<sup>9</sup> It will be a few years before the empirical effects of these new measures can be evaluated, but it already seems they suffer from a number of inherent weaknesses. They are, first of all, geographically incomplete, due to the

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4. U.N. Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance*, at 189–90, 200, U.N. Doc UNCTAD/WIR/2015 (2015).

5. See U.N. Conference on Trade and Development, *World Investment Report 2016: Investor Nationality: Policy Changes*, at 144, 160, 185–87, U.N. Doc UNCTAD/WIR/2016 (2016) (“[C]omplex ownership of investment projects or foreign participated companies—i.e. multiple cross-border ownership links to the ultimate owner through intermediate entities. . . at a minimum . . . make the application of rules and regulations on foreign ownership more challenging.”). A particularly salient problem is “how to avoid investors using artificial entities (mailbox companies) . . . to unduly gain access to treaty benefits.” UNCTAD refers to this as the “multilateralizing effect” of ownership complexity.

6. ADRIAN BRIGGS, *PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS*, ¶ 10.32 (2014).

7. Press Release, Economic and Social Council, International Cooperation to End Tax Crimes Crucial for Achieving Sustainable Growth Agenda, Speakers Say as Development Financing Forum Concludes, U.N. Press Release ECOSOC/6840 (May 25, 2017).

8. See *Automatic Exchange of Information*, OECD, <http://www.oecd.org/tax/automatic-exchange/> (last visited Feb. 3, 2019); see also *Brief on the State of Play on the International Tax Transparency Standards*, OECD at 1 (Sept. 2017), <https://www.oecd.org/tax/exchange-of-tax-information/brief-and-faq-on-progress-on-tax-transparency.pdf>.

9. See, e.g., Council Directive 2015/849, art. 114, 2015 O.J. (L 141) 5, 30–31 (EU).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 329

resistance of certain jurisdictions and particularly the United States.<sup>10</sup> Secondly, even in the jurisdictions that are participating in these measures, effectiveness will be dependent on national regulators and enforcement agencies and on the extent of resources devoted to them by national governments. Many of these domestic agencies will, furthermore, face a conflict of interest between their desire to participate in multilateral initiatives (if only for reputational reasons) and the political need to support domestic professional constituencies economically dependent on corporate and financial services to non-residents. A third difficulty is that the effectiveness of the new measures will depend on the quality of information that is maintained by local service agents, which as will be explained below can be problematic. In the face of the new disclosure rules, novel methods of structuring and concealment will probably also be devised by the corporate services professions.<sup>11</sup> It is to be feared, therefore, that the new regulatory measures will not be enough to put an end to the harmful effects of shell company proliferation in the global economy.<sup>12</sup>

In this context, if one accepts that there is indeed a problem with shell company proliferation in the first place,<sup>13</sup> should it not then be necessary to

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10. On the United States and its position on exchange of information and corporate transparency, see below.

11. See, e.g., MARK FENWICK & ERIK P.M. VERMEULEN, FOCUS 14: DISCLOSURE OF BENEFICIAL OWNERSHIP AFTER THE PANAMA PAPERS 50 (2016) (“Much of the commentary in the immediate aftermath of the release of the Panama Papers was characterized by . . . calls for stricter and more stringent rules that attempt to force more information into the public domain. Unsurprisingly, the regulatory strategies particularly focus on the disclosure of ‘ultimate beneficial ownership’ as a prerequisite in preventing tax evasion, tax avoidance, money laundering, and corruption (for example, see Economist 2016).”). The authors then comment that

[i]f people are determined to conceal, or at least obscure, their beneficial ownership of a company, then they are going to be able to find the techniques to do so. There are enough lawful strategies available to make this possible even without having to have recourse to misrepresentation. From this perspective, simply ratcheting up the disclosure requirements to force the information into the public domain seems unlikely to be effective and merely encourages new and more imaginative means of circumvention.

*Id.*

12. It is revealing that very few consolidated figures are available on the number of global incorporations, particularly in offshore hubs. In 2013, The Economist estimated total incorporated companies at 1,045,000 in Hong Kong, 945,000 in Delaware, 473,000 in the British Virgin Islands, 92,000 in the Cayman Islands, 33,000 in Jersey and 17,000 in Bermuda; these figures were on the basis of combined sources and seem inferior to other estimates. See Matthew Valencia, *Storm Survivors*, THE ECONOMIST, Feb. 16, 2013, at 2. The OECD’s estimate of BVI incorporation numbers in 2013 was 850,000. See OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES PEER REVIEWS: VIRGIN ISLANDS (BRITISH) (2013).

13. The idea that there is a problem tends to be resisted in the legal and finance professions, in sharp contrast with the general public’s indignation that followed the Panama Papers and subsequent scandals. As US President Barack Obama pointed out at the time, “the problem is that a lot of this stuff is legal, not illegal.” See Rupert Neate & David Smith, *Obama Calls for*

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

330 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

also examine the private law reasons for their success as legal institutions, i.e. beyond their tax benefits and the anonymity they sometimes confer? What constitutive elements of existing private law systems underpin their success, what do these underpinnings tell us about the evolution of private law over recent decades, and what private law tools can still be deployed to address their proliferation? While these wider questions form the intellectual backdrop behind this paper,<sup>14</sup> this paper is limited to two specific fields of analysis. The first field is the private international law (continental Europe's equivalent of "conflicts of law" in the US) applicable to companies. Before anonymity or tax benefits, the first reason shell companies were able to become a fixture of global financial flows is their quasi-unconditional international recognition as legal persons endowed with the full range of civil rights: the capacity to own assets, enter into contracts, sue, and offer limitation of liability. In historical light, these benefits should be viewed as privileges, yet they now come at virtually no cost. By their very definition, shell companies do not need to have physical substance, offices, or employees in their jurisdictions of incorporation.<sup>15</sup> Their corporate organs can be composed of professional nominees for whom fiduciary duties can be reduced or even eliminated by operation of law or contract.<sup>16</sup> In recent decades, private international law moved to entrench the unilateral power of the domestic law of incorporation to govern all questions of corporate existence and governance, over and above the private laws of where shareholders reside, activities are managed, assets are held, or income is generated; in the United States, this theory is known as the "internal affairs doctrine".<sup>17</sup> In comparative terms, the influence of legal systems more attentive to the requirement that there be actual local substance behind legal personality, i.e. the so-called "real seat" jurisdictions like Germany and others, is in decline.<sup>18</sup> Contrary to these evolutions, the normative position that is defended in this paper is that if one adopts a wider view of the interests at stake, the real seat theory of corporate existence is intrinsically superior, and therefore jurisdictions in which foreign shell companies deploy their effects should retain the ability to re-characterize, disregard or look

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*International Tax Reform Amid Panama Papers Revelations*, THE GUARDIAN (Apr. 5, 2016), <https://www.theguardian.com/news/2016/apr/05/justice-department-panama-papers-mossack-fonseca-us-investigation>; see also Brooke Harrington, *Panama Papers: The Real Scandal is What's Legal*, THE ATLANTIC (Apr. 6, 2016), <https://www.theatlantic.com/business/archive/2016/04/panama-papers-crimes/477156/>.

14. This approach follows in the footsteps of scholars like Katharina Pistor, who have sought to map out the wider socio-economic effects throughout history of key private law institutions such as property, contract, corporations and trusts. See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (forthcoming May 2019).

15. See discussion *infra* Section II.

16. See discussion *infra* Section IV.B.

17. Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW AND CONTEMP. PROBS. 161, 162 (1985). *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987).

18. See discussion *infra* Section III.B.

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behind these companies, or at the very least apply domestic governance standards to them, with minimal or no deference to the laws of the place of incorporation.

The second axis of analysis regards the theory and substantive standards of corporate law itself. The competing “theories of the corporation” debated by legal theorists a century ago are now confined to legal history. They have been replaced by contractarian, law and economics influenced theories that pay little attention to the institutional dimension of legal personality or corporate “seat.”<sup>19</sup> While a debate on the “race to the bottom” of corporate law did take place within the United States and European Union, there is no academic consensus.<sup>20</sup> Yet it would seem quite evident, certainly to most practitioners, that active competition is indeed taking place on a planetary level between incorporation hubs seeking to serve an increasingly global market,<sup>21</sup> and that the very existence of that market is dependent on continuation of the current paradigm of unconditional international recognition of corporate personality. This article will also argue that some of the consequences of the competition between incorporation hubs have been to reduce local substance obligations, over-extend corporate services supply chains and dilute the responsibility of agents and fiduciaries participating in the chain.<sup>22</sup>

How did all of this come about in the first place? What we see today is the combined result of singular evolutions over several decades that occurred in parallel and may be, to a certain extent, entirely unrelated. The jurisprudential decline of corporate “theories of the corporation” and ascent of contractarian analyses was integral to the law and economics movement that began in the seventies in the United States. In the European Union, the real seat theory met its demise as a result of the European Court of Justice’s (ECJ) peculiar mode of protection of intra-EU freedom of establishment. In the emerging world and particularly post-communist countries, legacy private law systems remain under the influence of positivist legal traditions that are naturally deferent more to form than substance or economic reality. The geographical extent of the English colonial legacy distributed not only the incorporation theory but also the traditional English deference to limited liability and high English threshold in corporate veil piercing. And finally, many jurisdictions have become dependent for economic success on preservation of the global market for incorporation services. All these

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19. See discussion *infra* Section III.E.

20. The literature on this topic is voluminous. For two comparatively recent contributions regarding the EU and US respectively, see Andrea Zorzi, *A European Nevada? Bad Enforcement as an Edge in State Competition for Incorporations*, 18 EUR. BUS. ORG. L. REV. 251 (2017), and Marcel Kahan, *The State of State Competition for Incorporations* 23–32 (NYU Law & Econ. Research Paper No. 14–19, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=24746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=24746) 58.

21. See discussion *infra* Section III.D.

22. See discussion *infra* Section IV.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

332 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

individual factors snowballed to solidly entrench the systemic role that shell companies now play in the global economy.

This article is structured as follows. Section 1 begins with a brief definitional overview using examples from fields that are exterior to corporate law. Indeed, to understand what a “shell” company is, one must paradoxically look outside of corporate law. This section will emphasize how in public law disciplines, the general objective has been to disregard or set aside legal personality in order to achieve more desirable outcomes. In contrast, Section 2 will examine the private law persistence of quasi-unconditional recognition of these structures, particularly in the field of private international law. It will address the accumulation of trends and evolutions that led to the current situation where shell companies have become a constitutive element of the global economy that is perceived as entirely normal from a private law standpoint. Section 3 will then set out some of the more harmful consequences of these combined evolutions on the substantive standards of corporate law itself, in the form of excessive corporate confidentiality and dilution of fiduciary duty. Before the final conclusion, Section 4 will attempt to identify what remedial private law measures could still be possible, however, even within the present prevailing paradigms of corporate and private international law. The remedies that are examined include statutory limitations of rights, reducing or removing any deference to the incorporation law in international corporate veil piercing proceedings, and compiling international “best standards” of substantive corporate law that could serve as soft law benchmarks similar to current FATF/OECD initiatives in the fields of taxation and money laundering.

To conclude this introduction, it is worth mentioning that while this article does not make any conceptual distinction between foreign or domestic shell companies, the fact remains that from the standpoint of any particular jurisdiction, foreign shell companies are functionally more problematic. Because of the geographical dispersion of their shareholders, management bodies, assets and counterparties, they are more likely to fall into the cracks between national regulatory regimes. Cross-border civil or criminal judicial action remains excessively time-consuming and resource-intensive for both private plaintiffs and governments. The main focus of the article will therefore be on the treatment of foreign shell companies in cross-border situations. In terms of legal systems, the article draws mostly on United Kingdom (UK), United States (US), French, German and European Union (EU) law. It does not conduct a detailed analysis of the relevant segments in all these systems (which would be an impossible task) but adopts a selective approach to emphasize certain points. It can of course be argued, contra the position in this article, that existing private legal toolkits—for example corporate veil piercing—already do the job to address risks posed by shell companies in discrete cases as between private parties, and that for the rest problems must be addressed by public law regulation. The general position that will be defended in this article, in contrast, is in favor of extending to private law a critical public law style, fact-centric, substance-

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over-form approach to shell companies *ex ante*, contra the alternative of default deference to incorporation law. There should be no compunction in applying significant amounts of private “forum law” to foreign shell companies even before disputes arise. From the standpoint of conflicts of law theory, this would mean rehabilitating the real seat theory or adopting a form of international choice-of-law “eclecticism” similar to that propounded by US conflicts scholars in the past.<sup>23</sup> While it is accepted that this may lead to increased uncertainty in border line cases, there are powerful counter-arguments: the current system carries significant costs (or negative externalities, to use the language of law and economics), which include facilitation of tax evasion, money laundering and ordinary fraud; nothing prohibits private ordering from taking greater account of the public interest; and greater structuring simplicity in international corporate and transactional practice could after all be viewed not as the mark of insufficient imagination or deftness on the part of legal advisers, but as a virtuous objective worthy of being pursued.

## II. When is a Company a “Shell”? The Paradox of the Public/Private Divide

Corporate law, ironically, is usually silent as to the very concept of a “shell company.”<sup>24</sup> That is because a shell company, for company law, is not constitutively different from any other company. For a definition of the “shell” element, it is necessary to look outside of corporate law to other disciplines that are usually public-law centric. There, the expressions become multiple: “mailbox” companies,<sup>25</sup> “letter-box” companies,<sup>26</sup> “front” companies,<sup>27</sup> “brass-plate” companies,<sup>28</sup> “sham” companies,<sup>29</sup> “shelf” or

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23. James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40.3 MO. L. REV. 407, 407–11 (1975); Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROBS. 10, 10–11 (1977).

24. This is reflected, for example, by the absence of the expression “shell company” in the indexes of most corporate law textbooks.

25. Concept Paper, European Commission, *Investment in TTIP and Beyond—The Path for Reform*, at 2 (May 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf).

26. Case C-341/04, Eurofood IFSC, 2006 E.C.R. I-3813, 35; Case C-196/04, Cadbury Schweppes & Cadbury Schweppes Overseas, 2006 E.C.R. I-7995, 68 (“Thus, a fictitious presence, such as that of a ‘letter box’ or ‘brass plate’ company, cannot be described as a place of business for the purposes of Article 1(1) of the Thirteenth Directive); Case C-73/06, Pflanzler Luxembourg, 2007 E.C.R. I-5655; PASCHALIS PASCHALIDES, FREEDOM OF ESTABLISHMENT AND PRIVATE INTERNATIONAL LAW FOR CORPORATIONS 95–124 (2012) (Paschalide’s definition is “companies that do not retain any connection with their State of incorporation, other than a mere letter-box” adding that “this is the core meaning of the term . . .”).

27. Cadbury Schweppes and Cadbury Schweppes Overseas, 2006 E.C.R. I-7995.

28. Pflanzler Luxembourg, 2007 ECR I-5655.

29. Jeffrey Zients, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, THE WHITE HOUSE BLOG (Feb. 26, 2016, 3:00 PM), <https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions>.



**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

334 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

“conduit” companies.<sup>30</sup> Less derogatory expressions used to designate these structures are “holding companies” and “special purpose entities.”<sup>31</sup> During the corporate veil piercing process (more on this later), the terms used in various legal systems involve concepts such as “alter ego,”<sup>32</sup> “façade,” “cloak,” “sham”<sup>33</sup> or “straw-man.”<sup>34</sup> These concepts are not particular to corporate law: rather, they are terms of general contract or agency law.

In dealing with shell companies, the public/private legal divide remains very relevant. The regulatory disciplines belonging by and large to the realm of public law tend to adopt a purposive and fact-based substance-over-form approach to entity characterization. In contrast, the private law disciplines (including contract or tort law, and corporate law itself), while varying between countries, are much more protective of corporate personality: the underlying policy in these disciplines is to uphold party autonomy and the expectations of private parties perceived to be legitimate. These two continents have slowly diverged in past decades: private law disciplines are generally accepting of shell companies, while public law disciplines are much more skeptical. The clearer it is that a public interest is at stake, the more shell companies are disregarded to focus on the activities of parents or controlling persons instead.

Unsurprisingly, the strongest expression of substance-over-form skepticism about shell companies is found in the field of taxation. Virtually all modern tax systems use techniques characterizing shell companies as

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30. The “conduit” expression is generally used in the context of taxation. See, e.g., OECD, Double Taxation Convention and the Use of Conduit Companies R(6)-2, which defines conduit companies as legal entities created solely for the purpose of obtaining tax treaty benefits which would not otherwise be available. [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/r-6-double-taxation-conventions-and-the-use-of-conduit-companies\\_9789264239081-99-en#page1](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/r-6-double-taxation-conventions-and-the-use-of-conduit-companies_9789264239081-99-en#page1).

31. The designation of special purpose entity (“SPE”) is favored by international bodies. See OECD., BENCHMARK DEFINITION OF FOREIGN INVESTMENT 11 (2008); OECD., IMPLEMENTING THE LATEST INTERNATIONAL STANDARDS FOR COMPILING FOREIGN DIRECT INVESTMENT STATISTICS: HOW MULTINATIONAL ENTERPRISES CHANNEL INVESTMENTS THROUGH MULTIPLE COUNTRIES 1 (2015); see *Structured Investment Vehicle (SIV)*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/siv-structured-investment-vehicle/> (last visited Feb. 3, 2019); see also U.N. Conference on Trade and Development, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, at 3, 86, U.N. Doc UNCTAD/WIR/2014 (Box I.1 on treatment of “transit FDI”). It is also the terminology used in the structured finance industry, together with “special purpose vehicle” (“SPV”) or “structured investment vehicle” (“SIV”).

32. In the United States, the “alter ego” doctrine refers to the use of the law of agency to lift limited liability (with basic reasoning set out in the seminal case *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966)); see STEPHEN M. BRAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 87-97 (2016).

33. The three expressions are used in *Adams v. Cape Industries PLC*, the English case that is widely considered to have narrowed the ability to lift corporate veils. See *Adams v. Cape Industries PLC* [1990] Ch 433 (Jan. 2, 1990).

34. MATHIAS SIEMS & DAVID CABRELLI, COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH 166 (Mathias Siems et al. eds., 2nd ed. 2018) (Japanese doctrine, cited by Hisaei Ito and Hiroyuki Watanabe).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 335

“controlled foreign corporations” (CFCs) when they are established in low-tax jurisdictions: these doctrines allow the separate legal personality of the corporation to be disregarded and its income to be taxed directly in the hands of the shareholders or controlling persons.<sup>35</sup> The seminal EU case, *Cadbury Schweppes*, was about the low-tax Irish subsidiary of a UK parent.<sup>36</sup> In *Cadbury Schweppes*, the ECJ permitted CFC regimes to exist within the EU whenever, regardless of tax motives, the fact of incorporation did not reflect “genuine economic” reality, which would in turn be based on “objective factors . . . ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment.”<sup>37</sup> In other words it was accepted that for purposes of taxation, the separate legal personality of “letterbox” or “front” companies without substance in the form of premises, staff or equipment in their place of incorporation could be entirely ignored.

Before the *Cadbury Schweppes* decision, the ECJ had dealt with shell companies for the determination of the proper insolvency law under the EU Insolvency Regulation (this was the *Eurofood* case).<sup>38</sup> In *Eurofood* the ECJ held that a shell company (called a “letterbox” company by the Court) is a company that does not carry out any business in its territory of registration, and for which there are “objective” and “third part[y]” - ascertainable factors establishing that the company’s “actual situation [is] different” from that which is deemed to be reflected by its apparent location at its registered office.<sup>39</sup> The registered office creates a presumption, but that presumption is rebuttable by way of a public law style substance-over-form analysis.<sup>40</sup> Even if insolvency law is not generally considered to be a public law discipline, the “center of main interests” (COMI) connecting factor used in the EU involves a substance-over-form analysis according only limited deference to the choice of the place of registration by the shareholders, the goal being to protect the collective interest of creditors. In this discipline too, party autonomy in corporate structuring by the founding shareholders must cede the way to economic reality in the interest of creditor protection. The same pragmatism *vis-à-vis* formal incorporation exists in US bankruptcy law: for Chapter 11 to apply to a foreign incorporated entity it is enough for the entity to have a “place of business” in the US, which does not need to be its principal place of business, nor does the entity need to own property in

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35. OECD, *Designing Effective Foreign Controlled Company Rules – Action 3, Final Report 2015*; at <http://www.oecd.org/tax/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm> (last visited Mar. 11, 2019).

36. *Cadbury Schweppes and Cadbury Schweppes Overseas*, 2006 E.C.R. I-7995.

37. *Id.* at I-8051–52. To be complete on this subject, some tax critics have considered that the ECJ’s threshold in *Cadbury Schweppes*, in particular its reference to “wholly artificial” arrangements, was too narrow and that pre-*Cadbury* CFC regimes in many EU countries were more appropriately protective of legitimate revenue concerns.

38. See *Eurofood IFSC*, 2006 E.C.R. I-3813 (required interpreting the expression “center of main interests,” which is the “COMI” connecting factor used by the regulation).

39. *Id.* at I-3879.

40. *Id.*

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

336 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

the US.<sup>41</sup> Competition with foreign proceedings will then be resolved taking into account comity and *forum non conveniens* factors such as the location of the evidence and key witnesses: in the case of a shell company, this will often be elsewhere than in the formal place of incorporation.<sup>42</sup>

Shell companies are also addressed in securities laws: there, the objective will generally be to restrict access to open securities markets. Under US securities law, a shell company is a “company [. . .] with no or nominal operations; and either no or nominal assets, assets consisting of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.”<sup>43</sup> Such companies are excluded from the resale exemption under Rule 144 (there are two exceptions however, one for “asset-backed issuers,” i.e. SPVs in the structured finance industry, and the other for shell companies that are affiliates of larger groups undertaking a restructuring).<sup>44</sup> The purpose of this rule is to protect the ordinary investing public: companies that are devoid of physical operations and employees are restricted from simplified private placement rules and can only sell their securities if they have undergone full registration with the Securities and Exchange Commission (SEC).<sup>45</sup>

Yet another discipline dealing with the position of shell companies is investment arbitration.<sup>46</sup> The task of investment tribunals is to interpret what constitutes a “foreign investor” that can properly claim treaty benefits.<sup>47</sup> Unfortunately, decision-making by investment tribunals on this question has erred towards excessive formalism in past decades and many tribunals have unreservedly accorded treaty benefits to shell companies.<sup>48</sup> There were decisions that went the other way, however. To cite but one example, in *Pac Rim v El Salvador*, the International Centre for Settlement of Investment Disputes (ICSID) tribunal sought to distinguish between shell

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41. 11 U.S.C. § 109(a) (2016).

42. See, e.g., *In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.*, 680 B.R. 64, 97 (Bankr. S.D.N.Y. 2018) (for a recent example of a *forum non conveniens* determination by the Bankruptcy Court of the SDNY in favor of Anguilla over the United States. The debtors, two Anguillan banks, were not true shells, however, and the creditors filing in the United States had done so after principal proceedings had begun in Anguilla).

43. 17 C.F.R. § 240.12b-2 (1934).

44. 17 C.F.R. § 230.144 (1933).

45. Investor Publications, *Rule 144: Selling Restricted and Control Securities*, U.S. SEC. & EXCH. COMM'N. (Jan. 16, 2013), <https://www.sec.gov/reportspubs/investor-publications/investorpubs/rule144htm.html>.

46. Investment arbitration, of course, is not universally accepted to belong to the realm of public law. See, e.g., Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L. L. 45, 64 (2013).

47. This is a short-cut summary of the task. In most investment treaties this means understanding the definition of a “resident” company in the contracting state. Under the ICSID convention, the test is whether a company is a “national” of the contracting state. The task also involved interpreting and applying denial-of-benefits clauses when they exist.

48. Mark Feldman, *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, 27 ICSID REV. 281, 281 (2012); Delphine Nougayrède, *Yukos, Investment Round-Tripping, and the Evolving Public/Private Paradigms* 26 AM. REV. INT'L ARB. 337, 363 (2015).

companies and “traditional holding companies”: the latter “usually have a board of directors, board minutes, a continuous physical presence and a bank account,” whereas shell companies “normally” have “no geographic location for [their] nominal, passive, limited and insubstantial activities.”<sup>49</sup> The company under examination was a Nevada-registered LLC that had just been redomiciled there from the Cayman Islands.<sup>50</sup> The tribunal found that it should fall into the second category, that of shell companies: not having any employees, bank account, office or any clear governance structure, it could not claim treaty benefits.<sup>51</sup> Because arbitral tribunals were inconsistent in the past on this fundamental question, the express exclusion of shell companies from the benefit of future investment treaties is now an articulated priority for most governments.<sup>52</sup> One might have imagined, of course, that investment tribunals would have realized the sensitive policy dimension of these determinations much earlier. Investment arbitration involves states as defendants: it seems entirely appropriate that the treatment of shell companies in this field be colored by a public-law approach akin to that followed in taxation or insolvency law, and that deference to shareholders’ *ex ante* selection of place of incorporation be set aside in the absence of actual substance.

A final example is that of intergovernmental standard-setting bodies. For the FATF—which produces global standards in anti-money laundering law—“shell companies” are defined as “companies that are incorporated [in a certain territory but] have no significant operations or related assets” in that territory.<sup>53</sup> The FATF views these structures as highly exposed to money laundering and has long recommended that their ultimate beneficial owners be identified.<sup>54</sup> The OECD, for its part, issues standards in international statistics production and taxation.<sup>55</sup> As regards statistics production, the OECD defines a shell company as a company “that is formally registered, incorporated or otherwise legally organized in an economy but which does not conduct any operations in that economy other

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49. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections ¶¶ 4.72, 4.75 (June 1, 2012).

50. *Id.* ¶¶ 5.43–5.44.

51. *Id.* ¶¶ 4.69–4.75.

52. See European Commission, *Concept Paper: Investment in TTIP and Beyond*, *supra* note 25, at 2 (for the European Union) (writing regarding the TTIP that “‘mailbox’ companies will not be able to bring cases to arbitration. Only companies with real business operations in the territory of one of the Parties will be covered by the investment protection provisions.”); see Jeffrey Zients, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, THE WHITE HOUSE BLOG (Feb. 26, 2016, 3:00 PM), <https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers> (for the United States) (writing in defense of the Transpacific Partnership agreement that “TPP will prevent sham corporations from accessing the investment protections provided by the agreement.”).

53. GUIDANCE ON TRANSPARENCY AND BENEFICIAL OWNERSHIP, *supra* note 3, at 6 n. 15.

54. *Id.*

55. BENCHMARK DEFINITION OF FOREIGN INVESTMENT, *supra* note 31, at 2.

than in a pass-through capacity.”<sup>56</sup> Their recommendation is that amounts transiting through such entities be excluded from national data on cross-border investment flows, in favor of ultimate source and destination countries, and that countries hosting “special purpose entities” (SPEs) (in other words incorporation hubs) maintain separate sets of data for those structures.<sup>57</sup> In the field of international taxation, the OECD’s recommendation in recent years is that likewise, tax treaties be interpreted in a manner reinforcing the substance-over-form bent of interpretation, to ensure that beneficial ownership of income flows prevail over formal legal entitlement as a result of private ordering.<sup>58</sup>

To summarize, the common approach to shell companies that is revealed in all these fields is to ignore the manifestations of legal personality in order to protect important third party interests: the public purse, ordinary creditors, the investing public and defendant host states (and also, incidentally, to try to present more meaningful statistics on international economic flows). When there are no physical assets, offices, or employees, common sense commands that economic substance prevail over legal formality.<sup>59</sup> This is a cascade of policy-oriented disciplines going to great effort to remove the artificial consequences of shell company proliferation. And yet, the private laws used to create these very structures in the first place seem oblivious to these efforts and retain their natural deference to form and formality. We now turn to this private law approach.

### **III. Shell Companies in Private Law: Form over Substance and International Competition**

Private law doctrines that determine when corporate personality can be defeated do of course exist. They come in varying forms in the different national traditions: “piercing” or “lifting” the corporate veil in the Anglo-American tradition, *durchgriffshaftung* in the German tradition, “abuse of law,” fraud (*fraude à la loi*), simulation and fictitiousness (*fictivité*) in the French tradition, to name a few. On the whole, these doctrines operate *ex post*, i.e. once a dispute has arisen. At that point they require the assessment of indicia such as degree of respect of corporate formalities, role and conduct of the corporate organs, presence or absence of physical premises, employees or assets, commingling of funds or assets, level of capitalization and, most

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56. *Id.* at 101.

57. *Id.* at 102.

58. Tax treaty interpretation to prevent abuse is one of the planks of the OECD initiative against Base Erosion and Profit Shifting (“BEPS”). See *Action 6 Treaty Abuse*, OECD., <http://www.oecd.org/tax/beps/beps-actions.htm> (last visited Feb. 3, 2019).

59. A similar approach to shell companies has now been adopted in international accounting standards. Under IFRS the consolidation of special purpose entities used to be governed by SIC-12. It was then replaced by IFRS 10 (2012) which uses a more synthetic approach. *IFRS 10 Consolidated Financial Statements*, INT’L FIN. REPORTING STANDARDS, <https://www.ifrs.org/issued-standards/list-of-standards/ifrs-10-consolidated-financial-statements/> (last visited Feb. 3, 2019); BENCHMARK DEFINITION OF FOREIGN INVESTMENT, *supra* note 31, at 101.

importantly in some jurisdictions, use of the company for the commission of fraud or injustice.<sup>60</sup> The general point made here is that these thresholds for defeating corporate personality (and attendant limited liability) are often high, and the process is likely to entail significant legal costs for plaintiffs. The threshold is particularly high in the English tradition, as was illustrated again in a recent case also indicative of the extent of international shell company use by Russian businesses.<sup>61</sup> If thresholds are high in purely domestic contexts, things are more complicated still when dealing with foreign companies, because of private international law's evolution towards automatic recognition of foreign legal personality and its deference to the foreign law of incorporation. In contrast, a century ago, treaties were often necessary to ensure full recognition of foreign companies.<sup>62</sup> The paragraphs that follow propose a narrative of the historical evolution that led to where we are now.

A. FOREIGN COMPANIES IN THE INTERNATIONAL ORDER: THE INCORPORATION THEORY VERSUS THE “REAL SEAT” THEORY

The treatment of foreign companies in a national system depends first and foremost on the policy that underlies the domestic company law of that system: when a state confers legal personhood to a company, does it content itself with completion of certain registration formalities only, or does it also require that the company being formed have a genuine economic connection with its territory? As is well known there are two competing approaches to this question, which are underpinned by different “theories of the corporation” (more on this later) and expressed in domestic rules of both corporate law and private international law. The first approach is the “incorporation theory,” according to which legal personality is conferred on the basis of registration formalities regardless of economic connection with the state of incorporation. This is the philosophy that has historically prevailed in the UK, in its former colonies, and in the United States (where it gave rise to the internal affairs doctrine). The other theory is that of the

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60. For a detailed comparative analysis of veil piercing doctrine, see KAREN VANDEKERCKHOVE, *PIERCING THE CORPORATE VEIL* (WOLTERS KLUWER, 2007); see also MARCO VENTORUZZO ET AL., *COMPARATIVE CORPORATE LAW* 151 (West Academic, 2015). In some countries, separate veil piercing doctrines have been developed in the context of insolvency law (for example ‘*action en comblement de passif*’ in French law, or ‘substantive consolidation’ in US federal law). See *French Bankruptcy Law Amendments*, SULLIVAN & CROMWELL LLP (Apr. 17, 2012), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_French\\_Bankruptcy\\_Law\\_Amendments\\_4-17-12.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_French_Bankruptcy_Law_Amendments_4-17-12.pdf).

61. The facts of the case involved a number of corporate structures under the control of a single Russian individual, including in jurisdictions such as Cyprus or the Marshall Islands. *VTB Capital Plc v. Nutritek International Corp and Others* [2013] UKSC 5 (Eng.).

62. W.F. Hamilton, *Recognition of Foreign Companies*, 8 J. COMP. LEG. & INT’L L. 129, 131 (“As between different countries the matter is often dealt with by treaties providing for reciprocal recognition of the companies respectively formed in the treaty-making states.”).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

340 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

“real seat,” applied in Germany, France, Belgium and other countries of Continental Europe. In these countries, corporate law institutions were primarily expected to organize and support local economic activity which was conducted from that territory, i.e. for businesses which had a real seat of management in the territory. These two competing theories use different “connecting factors” to determine the law that governs corporate existence and governance: either the place of incorporation, or the place of the real seat. At this point in time, admittedly, many comparative studies consider that the two paradigmatic categories have become blurred.<sup>63</sup> France, for example, is sometimes described as a “hybrid” system, owing to the fact that the registered office creates a presumption (however rebuttable). Yet significant practical differences remain. In the French system, to this day the registered office of a company cannot be a mere mailbox.<sup>64</sup> It must correspond to minimum physical reality and space available for use by company staff.<sup>65</sup> This is very different from the situation in incorporation theory jurisdictions where companies can be pre-incorporated by registered agents in the dozens and then sold off-the-shelf at nominal price.

Although they primarily address the existence of domestic companies, these two competing theories of private international law naturally color the manner in which foreign companies are approached. Incorporation theory jurisdictions recognize foreign companies regardless of location of their actual seat of management or center of activities, because this is of no interest in their own law vis-à-vis domestic companies. In England, Dicey’s *The Conflict of Laws* writes that “the existence . . . of a foreign corporation duly created . . . under the law of a foreign country is recognized in England.”<sup>66</sup> English law will not seek to verify the underlying principles of the foreign corporate law and does not care whether the foreign company has any genuine economic activity in its territory of incorporation (as this is not relevant for its own companies). In the U.S., the Second Restatement of the Conflict of Laws likewise states that “incorporation by one state will be

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63. CARSTEN GERNER-BEUERLE ET AL., *STUDY ON DIRECTORS’ DUTIES AND LIABILITY XV LSE ENTERPRISE*, at 226 (2013).

64. CODE DE COMMERCE [C. COM.] art. L122-3 (Fr.).

65. Domiciliation services were first allowed in 1984/1985 and then expanded by a decree of 30 December 2008. A copy of the domiciliation agreement must be filed with the registrar of companies upon registration. FRANCE COMPANY LAWS AND REGULATIONS HANDBOOK - VOLUME 1 STRATEGIC INFORMATION AND BASIC LAWS 161 (Int’l Bus. Publications, USA eds., 2015). On the French government’s anti-money laundering supervisory role on domiciliation services specifically, see Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, *La domiciliation d’entreprise : une gestion à risques*, <https://www.economie.gouv.fr/dgccrf/domiciliation-dentreprise-gestion-a-risques> (last visited Feb. 3, 2019). On the French requirement for substance, Agnès Bounous, *Siège Sociale*, *Jurisclasseur Sociétés* Fasc. 28-30 (2014), with court references therein.

66. ALBERT V. DICEY ET AL., *THE CONFLICT OF LAWS* 1339 (Lawrence Collins et al. eds., 14th ed. 2006); *see also* Foreign Corporations Act 1991, c. 44, §1, (Eng.).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 341

recognized by others.”<sup>67</sup> The main advantage of the doctrine, it is said, is its simplicity and predictability.

The real seat doctrine, for its part, applies a more critical lens to foreign companies. The first country to codify it was Belgium, by a law of May 18, 1873,<sup>68</sup> and the doctrine was later imported in France by the courts specifically as an anti-abuse mechanism to combat the incorporation elsewhere, at the time primarily in the UK, of companies conducting their main activity in France.<sup>69</sup> In Germany, the real seat theory (*Sitztheorie*) was first articulated (though apparently not codified) in 1884<sup>70</sup> and was applied consistently throughout the 20th century by the courts, until the recent EU developments that will be addressed below. Under the *Sitztheorie*, a business having its seat in Germany was required to incorporate in Germany and conversely, if the seat was foreign, German corporate law was unavailable.<sup>71</sup> The theory led to denial of the legal existence of companies incorporated abroad if it transpired that in fact, their real seat of activities was in Germany.<sup>72</sup>

In these real seat countries, unconditional recognition of foreign companies regardless of location of seat required express executive or legislative intervention to that effect, either in domestic law or by treaty. In France, recognition of foreign joint-stock companies was dependent on a French executive decree per country under a 1857 law; such decrees were adopted for all countries with which there were significant trade ties: Italy in 1860, Luxembourg in 1861 or the Netherlands in 1863, for example.<sup>73</sup> For

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67. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §297 (Am. Law Inst., 1971). The activities of foreign corporations, including access to state courts, may however be subject to so called “qualification statutes.” The US peculiarity, of course, is that “foreign corporations” include both non-US corporations (alien corporations) and US corporations registered in another state.

68. ALINE KÜHNE, *DIE ANERKENNUNG I GESELLSCHAFTEN IM FRANZÖSISCHEN UND DEUTSCHEN RECHTSKREIS* 260 (Duncker & Humblot Berlin, 1st ed. 2014).

69. See, e.g., Cour de Cassation [Cass] [supreme court for judicial matters] Civ. December 22, 1896 (1897) 24 Journal du Droit International 364 (Fr.), which ruled that a limited liability company created in England by a French founder was a nullity because it had only a nominal and fictitious seat in England, had not centralized its administration there, did not appear there to third parties, only had a secretary without any authority whose role was to copy the balance sheets and minutes all produced in Paris where the directors resided and met, and because its operations took place in France only. See also PASCHALIDES, *supra* note 26, at 112.

70. KÜHNE, *supra* note 68, at 332.

71. Werner F. Ebke, *The “Real Seat” Doctrine in the Conflict of Corporate Laws*, 36 INT’L L. 1015, 1021–1022 (2002).

72. Regarding a Gibraltar company, see for example the case cited by Roger Drury, in his prescient article on this topic in 1998, i.e. before the ECJ Centros case. See Roger Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the Delaware Syndrome*, 57 CAMBRIDGE L. REV. 165, 178 (1998).

73. YVON LOUSSOUARN ET AL., *Sociétés Etrangères en France*, Jurisclasseur Sociétés Fasc. 194–10 & International Fasc. 570–30 (2013), ¶¶ 15, 28. The recognition of foreign limited liability companies was easier. This is perhaps because the French equivalent of limited liability companies, *sociétés de personnes*, places institutional emphasis on the identity of individual members and are therefore akin to partnerships or contracts in the common law tradition rather



**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

342 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

US companies, French unconditional recognition was obtained by way of treaty in 1959.<sup>74</sup> Companies registered in British overseas territories were recognized in France on the basis of treaties with the UK;<sup>75</sup> and for jurisdictions that did not have a decree or treaty, French courts applied most favored nation clauses.<sup>76</sup> Treaty-based recognition was practiced in other real seat jurisdictions as well, for example Germany<sup>77</sup> or Italy.<sup>78</sup> In these systems, unconditional recognition of foreign legal persons was not a given and required political intervention.<sup>79</sup>

Admittedly, the real seat theory has never been without its flaws. Critics point to the lack of uniformity of what exactly constitutes a “real” seat. Depending on the countries this might be either the head office from which senior management directs day-to-day activities, or the place where the board of directors meet, or perhaps the place where shareholders meet.<sup>80</sup> It was, deep down, an ambitious theory. An early US admirer was Elvin Latty, who was a critic of the US internal affairs doctrine.<sup>81</sup> His main concern was with US “pseudo-foreign corporations,” by which he meant corporations registered in one state but conducting their activities in another.<sup>82</sup> For his critique of the US internal affairs system he found inspiration in the

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than companies or corporations. For France, see WILLIAM BURGE, BURGE’S COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY: AND IN THEIR CONFLICT WITH EACH OTHER AND WITH THE LAW OF ENGLAND, VOLUME 2 223 (Sweet & Maxwell Ltd., 1908); for Luxembourg or the Netherlands, see H. CLEVELAND B. 1859 COXE, MANUAL OF FRENCH LAW AND COMMERCIAL INFORMATION 64 (Nabu Press, 2010).

74. LOUSSOUARN ET AL., *supra* note 73, ¶ 63.

75. Pierre Mayer, *Commentary*, 71 REVUE CRITIQUE DE DROIT INT’L PRIVÉ 81 (1982) (Fr.); see Drury, *supra* note 72.

76. George Karailah, *Condition des Etrangers*, 80 REVUE CRITIQUE DE DROIT INT’L PRIVÉ 667 (1991) and the jugements discussed therein.

77. See Treaty of Friendship Commerce and Navigation, U.S.-Ger., Oct. 29, 1954, 7 U.S.T. 1839; PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE 364-79 (Jurgen Basedow & Knut B. Kessler eds., 2014).

78. See Treaty of Friendship Commerce and Navigation, U.S.- It., art. II, Feb. 2, 1948, 63 Stat. 2255.

79. The wider argument can indeed be made that the inherently political dimension of much of private international law has been forgotten. Earlier conceptions of the field were more aware of that dimension. In 1949, French author J. P. Niboyet wrote that

the determination of rights that foreigners [including foreign companies] may enjoy in France, or that are denied them, is dominated . . . by the policies of the state in its foreign relations [politique internationale], and the facts of the problem are extremely variable. There are first diplomatic facts, which are facts of international politics. The problem is also dominated by elements of economic policy. There may be reasons of high politics to grant or deny certain rights to foreigners. There are also elements of essentially social policy. Finally, there are demographic elements pertaining to the problem of immigration.

J.P. NIBOYET, COURS DE DROIT INTERNATIONAL PRIVE FRANÇAIS 60-61 (Recueil Sirey ed., J.P. Niboyet trans., 2d ed. 1949) (Fr.).

80. See Gerner-Beuerle *infra* note 137.

81. See Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137, 172-73 (1955).

82. *Id.*

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continental European approach: “at least in one important respect Continental doctrine is more penetrating than ours: it invariably looks beyond the mere shell of formal incorporation to the core of business reality.”<sup>83</sup> Contemporary critics of shareholder primacy in today’s US corporate law are also supportive of the real seat theory, because they view it as inherently conducive to multi-stakeholder governance: “the real seat doctrine is how Germany can continue to enforce its [worker] codetermination model, and it is how Japan can enforce its own standards on Japanese companies.”<sup>84</sup>

#### B. THE DECLINE OF THE REAL SEAT THEORY IN EUROPE

Despite the support that it enjoys in certain circles, the real seat theory is now in decline in its historical birthplace of continental Europe.<sup>85</sup> For decades the co-existence within the EU of two competing traditions meant that no common directive or regulation could be adopted to address the private international law of companies. The six founding members did sign the Convention on Mutual Recognition in 1968, which endorsed the real seat doctrine,<sup>86</sup> but the Netherlands later changed its tack and refused to ratify it.<sup>87</sup> Subsequent evolution then progressively favored and consolidated the incorporation theory bit by bit. The 1968 Brussels Convention on Jurisdictional Matters and the 1980 Rome Convention on Contractual Obligations set down the rule that for European companies, questions regarding the “constitution, nullity or dissolution” of companies would be

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83. *Id.* at 171–72.

84. DAVID YOSIFON, *CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT* 191 (Cambridge Univ. Press, 2018).

85. See GERNER-BEUERLE ET AL., *supra* note 63, at 225.

86. Convention of the Mutual Recognition of Companies and Bodies Corporate, art. 3–4, Feb. 29, 1968, 2 Bull. Eur. Communities Supp. 1969; see BERNARD AUDIT & LOUIS D’AVOUT, *DROIT INTERNATIONAL PRIVÉ* ¶ 123 (Paris, Economica, 7th ed. 2013). This was the Brussels Convention of February 26, 1968 signed between Belgium, Germany, France, Italy, Luxembourg and the Netherlands. According to Article 3:

any Contracting State may declare that it will not apply the present Convention to any companies or bodies corporate specified in Articles 1 and 2 which have their real registered seat outside the territories to which the present Convention applies, if such companies or bodies corporate have no genuine link with the economy of one of the said territories.

*Id.* at art. 3. It was followed by Article 4: “Any Contracting State may also declare that it will apply any of its own legislation which it deems essential, to the companies or bodies corporate specified in Articles 1 and 2 having their real registered offices on its territory,” even if established under the law of another Contracting State. *Id.* at art. 4. A number of other treaties were negotiated for the recognition of foreign companies, but never entered into force either. For example, a Hague Convention of 1st June 1956, a Council of Europe Convention of 1966 on the establishment of companies and a 1996 Convention on the recognition of legal personality of NGOs.

87. Drury, *supra* note 72.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

344 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

the exclusive province of the law and national courts of the “seat.”<sup>88</sup> The definition of the “seat” was referred back to domestic law, but in effect there could be only one relevant national system as a matter of principle (and not two or more).<sup>89</sup> For non-European companies not affected by EU treaties or conventions, deference to the law of incorporation came about through other mechanisms. To take the French example again, the mechanism was, rather bizarrely, the European Convention on Human Rights.<sup>90</sup> At a certain point in time, the French courts began to find that denial of personality to foreign companies was a breach of their fundamental rights under that Convention, more precisely of the rights to a fair trial and to protection of property;<sup>91</sup> this is how the legal personality of a Liechtenstein *anstalt* was recognized in France for the first time,<sup>92</sup> or that of companies registered in Qatar or Abu Dhabi.<sup>93</sup> This line of judicial decisions ultimately led to the 2007 repeal of the 1857 law requiring an executive decree.<sup>94</sup> When that occurred, French commentators rued the absence of debate on the principles that would henceforth underpin the recognition of foreign companies:<sup>95</sup> for some, the use of the ECHR for this purpose was rather like a strange “marriage of convenience between the law of human rights and the law of international commerce.”<sup>96</sup>

A further major change in the regime of foreign company treatment came with the case law of the European Court of Justice on one of the four pillars

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88. EC Convention on the Law Applicable to Contractual Obligations (Rome 1980), art. 1(e), June 19, 1980, O.J. L. 266; Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, art. 16.2, Sep. 27, 1968, 1998 O.J. (C 27) 1 [hereinafter Brussels Convention].

89. Brussels Convention, *supra* note 88, at art. 53.

90. European Convention on Human Rights, Dec. 10, 1948, 213 U.N.T.S 222.

91. Winfried H. van den Muijsenbergh & Sam Rezai, *Corporations and the European Convention on Human Rights*, 25 PAC. McGEORGE GLOBAL BUS. & DEV. L.J. 43 (2012).

92. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Crim., Nov. 12, 1990, 89-81851. Bull. crim. No. 337, p. 956 (Fr.); Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., June 25, 1991, 90-13849. Bull. civ. No. 207, p. 136 (Fr.); George Karaillah, *Condition des Etrangers*, 80 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 669, 672 (1991) (overturning lower court findings that the anstalt did not have standing to appear because the legal form had not been recognized by executive decree).

93. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Com., Dec. 5, 1989, 88-14840. (Fr.); Karaillah, *supra* note 92, at 672. In this case there was also a form of quasi-estoppel, the Abu Dhabi claimant company having (unsuccessfully) challenged the right of standing in court of the defendant Qatari company for lack of executive decree-based recognition, after having deployed the contrary argument in its own favor in prior proceedings in which it was the defendant.

94. Dominique Bureau, *Feu la loi du 20 mai 1857*, 97 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 161 (2008) (Fr.).

95. *Id.*

96. Bertrand de Lamy & Hugues Kenfack, *Droit de l'homme et droit du commerce international: la fin ou le moyen?*, LA SEMAINE JURIDIQUE EDITION GÉNÉRALE (7 Juillet 2004) n° 28 (note sous Cass Com 8 juillet 2003, Banque Internationale pour le commerce et l'industrie de la Guinée, 28 La Semaine Juridique Edition Générale 1285 (2004)); Georges Khairallah, *La personnalité morale en France d'une société anonyme étrangère*, 692 DALLOZ COLLECTION (2004).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 345

of the constitutive treaties, the principle of freedom of establishment, through a series of ad hoc judicial decisions starting in 1999.<sup>97</sup> The resulting construction is complex and has been much debated, but it gives a general roadmap. In summary, member states can continue to apply either one of the two theories (incorporation or real seat), but for their domestic companies only.<sup>98</sup> If a member state wishes to make its corporate law institutions available only to those companies that maintain a real seat in its territory, it is able to do so.<sup>99</sup> But, that same member state will be bound to recognize the legal personality of companies formed in an incorporation theory member state, regardless of where the seat of operations of such companies may lie.<sup>100</sup>

In summary therefore, while the real seat theory technically continues to exist within the EU, its influence is in decline. Most of the European member states that currently serve as incorporation hubs (the Netherlands, Cyprus, Malta, the UK) apply the incorporation theory.<sup>101</sup> The Netherlands, now the world's leading destination for foreign direct investment according to some sources,<sup>102</sup> deliberately opted for the

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97. Case C-212/97, *Centros Ltd. V. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-01459; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, 2002 E.C.R. I-09919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E. C. R. I-10155; Case C-210/06, *Cartesio Oktató és Szolgáltató Bt.*, 2008 OJ C 44, 21.2.2009.

98. *Id.*

99. *Cartesio*, *supra* note 97 (stating “a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that state if the company intends to reorganise itself in another Member State by moving its seat to the territory of that latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.”).

100. *Centros*, *supra* note 97, (finding that a U.K. registered limited liability company formed by Danish individuals with only activity in Denmark is entitled to register a branch in Denmark); *Überseering*, *supra* note 97 finding that Germany must recognize the legal standing of a U.K. company having moved its actual center of administration (i.e. real seat) to Germany (while under German law it was required to re-register as a German company). The court found that the German government's arguments in favor of the real seat doctrine (creditor protection through minimum charter requirements, protection of minority shareholders, employee protection through the co-determination model, and taxation imperatives) did not justify restricting what it viewed as the U.K. company's freedom of establishment, but it noted that it was “not inconceivable” that such “overriding requirements relating to the general interest” could, “in certain circumstances” justify restrictions.).

101. *GERNER-BEUERLE ET AL.*, *supra* note 63, at 225, 228–29 (Luxembourg, however, is an exception (more on this below)).

102. *Netherlands Inward Direct Investment from Top Five Counterpart Economies*, INT'L MONETARY FUND, <http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&sid=1482247616261> (last visited Feb. 3, 2019). According to the IMF, total incoming direct investment into the Netherlands was \$5.005 trillion in 2017. In point of comparison, the US came second, at \$4.025 trillion. Clearly most of this investment flowing to the Netherlands is into SPEs or holding companies for further dispatch elsewhere.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

346 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

incorporation theory back in 1959, and it was the country that blocked the failed 1968 Convention that could have consolidated the real seat theory.<sup>103</sup> Even in Belgium, the historical home of the real seat theory, a switch to the incorporation theory is now on the table, on the argument that it would be “closer to the needs of business.”<sup>104</sup>

C. THE PLANETARY SPREAD OF THE INCORPORATION THEORY

This general evolution in favor of the incorporation theory was not limited to the European Union. In Switzerland, the courts had historically hesitated between the two theories; the primacy of the incorporation theory was eventually settled there by legislative intervention in 1987.<sup>105</sup> The incorporation theory has of course long been received in British former colonies: the fourteen Overseas Territories (which include the Cayman Islands and the British Virgin Islands), the Crown Dependencies (the Channel Islands and Isle of Man), EU member states such as Ireland, Cyprus and Malta, and the Asian financial centers of Hong Kong, Singapore or Mauritius. Perhaps most meaningful of all, however, is the position at present of the large emerging-market economies. In these countries as elsewhere, the private international law of companies is embedded in national private law systems; but judging at least from three of the five BRICS (Brazil, Russia, India, China, and South Africa) countries, the incorporation theory has also become dominant there. As regards India, it is perhaps not surprising that its conflict of laws should follow the English model, but the cases of China and Russia are more intriguing. These are civil code systems with a history of communism; it might have been thought, therefore, that they would be less naturally deferential to what might after be viewed as an “Anglo-American” theory of corporate recognition. That is not the case, however, and both countries practice a form of recognition that is inspired by the incorporation theory.<sup>106</sup> One explanation that can be proposed for this paradox is that in these countries, the incorporation theory

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103. GERNER-BEUERLE ET AL., *supra* note 63, at 228.

104. Marc Van de Looverbosch, *Real Seat Theory vs Incorporation Theory: the Belgian Case for Reform*, CORP. FIN. LAB (Feb. 21, 2017), <https://corporatefinancelab.org/2017/02/21/real-seat-theory-vs-incorporation-theory-the-belgian-case-for-reform/>.

105. Code fédéral de droit international privé suisse [LDIP] [Swiss Federal Law on Private International Law] Dec. 18, 1987, RS 29, art. 154 (Switz.); see Bertrand Dutoit, *Droit International Privé Suisse, Commentaire de la Loi Fédérale du 18 Décembre 1987*, (Helbing Lichtenhahn 5th edition, 2016), commentary under Article 154 at 697-701. According to Dutoit, the court case first confirming the incorporation theory was a decision dated February 4, 1976, which confirmed the Swiss nationality of a company on the grounds that its statutory seat was in Geneva (regardless of where its shareholders were located). The decision went on to reserve the position when a seat was fictitious.

106. See *Grazhdanski Kodeks Rossiiskoi Federatsii* [GK RF] [Civil Code] art. 1202 (Russ.); Kwang H. SUK, *Some Observations on the Chinese Private International Law Act*, 18 No. 2 GERMAN J. CHINESE L. 105, 110–11 (2011). The Chinese rule is at Article 14 of the act. On a separate note, this article describes China as “post-communist” in reference to its economic model rather than its political governance.

finds its roots in state-centric positivist legal traditions that are naturally inclined towards the “concession theory” of companies, according to which corporate personality must necessarily derive from state fiat.<sup>107</sup> There may also be more contemporary political reasons, connected to the fact that use of foreign shell companies is frequent in these economies. Throughout the last two or three decades the Chinese and Russian governments built open economies integrated with the rest of the world, while at the same time retaining private law systems with significant weaknesses.<sup>108</sup> Domestic corporate laws, in particular, were long deemed unattractive by local business elites keen to use foreign alternatives instead,<sup>109</sup> and governing elites presumably preferred to shield these investor strategies from legislative or judicial disruption. The important point is that these formerly communist economies, whether because of legal tradition or contemporary preferences, now practice the formalistic incorporation theory approach to company recognition, rather than the complex, substance-over-form, fact-centric philosophy that underlies the real seat theory.

#### D. A GLOBAL MARKET FOR INCORPORATION SERVICES

The combined result of these singular evolutions is the appearance of a vibrant global market in incorporation services. In this market, “naked” shell company administration goes hand in hand with development, within each incorporation hub, of national areas of industry specialization. Within the EU, the Netherlands have for many decades been a center for holding companies within global multinational groups. Luxembourg has become a generalist incorporation center as well but with a parallel specialization in finance and investment funds. Ireland historically specialized in asset finance (for example in aircraft leasing) and then expanded to the technology sector. Malta was long a center for the shipping industry and is now also

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107. Regarding China, see TAO DU, *THE NEW CHINESE CONFLICT-OF-LAW RULES FOR LEGAL PERSONS: IS THE MIDDLE WAY SENSIBLE?* 341–342 (Jurgen Basedow & Knut B. Pissler eds., 2014); Regarding Russia, see Delphine Nougayrède, *Outsourcing Law in Post-Soviet Russia*, 3 J. EURASIAN L. 383 (2013).

108. This is admittedly a sweeping statement that requires unpacking for each individual segment of private law, a task beyond the scope of this article. On the subject of Chinese contract law for one example, the editors of a recent monograph write that the need to combine “private entrepreneurial spirit” with “socialist principles and government authority” led to general principles of interpretation in the Chinese civil code that seem “confusing and conflictive, with the potential of diminishing the certainty and predictability of contract law” (Larry A. DiMatteo and Chen Lei, *Chinese Contract Law: Civil and Common Law Perspectives*, Cambridge University Press 2017, at 14). For Chinese company law, see Shen Wei, *infra* note 109, and for use by Chinese investors of offshore financial centers, see Jason Sharman, *Chinese capital flows and offshore financial centers*, 25(3) *The Pacific Review* 317 (arguing that Chinese investors “avail themselves of efficient institutions in offshore centers that are absent locally”, at 317). For the weaknesses of Russian private law generally, see Nougayrède, *supra* note 107.

109. Shen Wei, *China’s Dilemma: How Can a Weak Company Law Regime Support a Strong Market for International Private Equity Investments? A Real ‘Piggybacking’ Case* 11(3) *BUS. L. INT’L* 195–224 (2010); Nougayrède, *supra* note 107.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

348 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

attempting to become a generalist center. The same is true for Cyprus, which for two decades was the platform of choice for investors from the former Soviet bloc.

These EU providers of incorporation services face global competition from many rivals, amongst which are British overseas territories such as the British Virgin Islands (a generalist center), the Cayman Islands (investment funds, listing vehicles and structured finance) and Bermuda (insurance companies), as well as Asian centers in Hong Kong and Singapore. Mauritius, for its part has sought to specialize as a gateway to India and Africa. The main users of many of these hubs are investors from emerging economies: between 2010 and 2016, 65% of investment flows into the BVI and Cayman Islands came from Hong Kong, mainland China, Russia and Brazil.<sup>110</sup> In all these hub jurisdictions, company law is a cornerstone of export-oriented strategies for domestic development and growth.<sup>111</sup> The global incorporation market has given rise to national professional classes of administrators and service providers whose clear interest is to promote and preserve the competitive success of their national law when compared to that of other hubs.<sup>112</sup> In Singapore, even the textbooks proclaim the aspiration that Singapore “become the place of incorporation of choice in Asia.”<sup>113</sup> While Delaware is often considered to be an important participant in this global market, its position is arguably different from other incorporation jurisdictions, because of the fact that it is part of the federal US system. Delaware developed early on as an incorporation hub for US businesses (replacing New Jersey, as is well known); the case can be made that its main

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110. U.N. Conference on Trade and Development, *supra* note 5, at 20.

111. For an account of these strategies, see, e.g., CHRISTOPHER R. BRUNER, *RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD* (1st ed. 2016), and see also the book review by William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081 (2018) (reviewing CHRISTOPHER M. BRUNER, *RE-IMAGINING OFFSHORE FINANCE: MARKET DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD* (2016)). Bruner adopts a sanguine position on these strategies and argues (as do others) that successful incorporation hubs should be viewed as useful laboratories of legal innovation. He writes that “[c]harged labels such as “tax haven” and “offshore financial center” tend to obscure both the value provided by such jurisdictions and the degree to which major economic powers engage in the very practices for which they criticize their smaller competitors.” (221). For a comparative review of other scholars’ views of the role of offshore jurisdictions in the global economy, see Delphine Nougayrède, *The Use of Offshore Companies in Emerging Market Economies: A Case Study*, 23 COLUM. J. OF EUR. L. 401 (2017).

112. On the contribution of corporate lawyers to the creation of the Cayman financial center, see Tony Freyer & Andrew P. Morris, *Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960*, 45 ARIZ. ST. L. J. 1297 (2013).

113. Regarding Singapore, commentators write that “[t]he legislative and regulatory philosophy [of Singapore law being] clearly one that is market-friendly and responsive,” Singapore will “perhaps [ . . . ] also become the place of incorporation of choice in Asia.” HANS TJO, PEARLY KOH & LEE PEY WOAN, *CORPORATE LAW* iv-vii (1st ed. 2015). See Vincent Ooi & Tan Cheng Han, *A Relationship of Reciprocal Influence: Singapore Company Law and the Economy* 3 (Nat’l Univ. of Sing., Working Paper No. 001, 2018), [https://law.nus.edu.sg/wps/pdfs/001\\_2018\\_Tan%20Cheng%20Han.pdf](https://law.nus.edu.sg/wps/pdfs/001_2018_Tan%20Cheng%20Han.pdf).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 349

objective was always to attract incorporations from elsewhere within the US, rather than from outside the US even when they are owned by foreigners, Delaware legal entities are at all times under the shadow of powerful federal US enforcement bodies, such as the IRS, OFAC, the US Department of Justice or the SEC. In contrast, no such shadow is cast by the enforcement agencies of non-US incorporation hubs, even within the EU where these bodies remain largely national. This is a circumstance that makes a practical difference for persons seeking to use Delaware primarily as a secrecy haven. What is important for the purpose of this article, more generally, is that for all of these incorporation hubs, the incorporation theory must remain the prevailing global paradigm. It is central to the very existence of the market for incorporation services and to the success of national development strategies that have latched onto it.

Within the continental European Union, there has been significant scholarly debate on this evolution of private international law. Perhaps unsurprisingly, the critics have often been French or German.<sup>114</sup> Most French commentators have seen in the Centros jurisprudence the seeds of a race to the bottom,<sup>115</sup> while attempts at EU-wide imposition of the incorporation theory by way of directive were bluntly opposed by a French parliamentary report on the argument that the rule would lead to forum shopping and third party legal insecurity.<sup>116</sup> One German scholar implicitly defended the real seat doctrine by highlighting its historical insertion into a wider political and economic system, and its role in establishing a “level playing field” with regard to protection of all stakeholders: “obviously, states that recognize a political, or even a constitutional, need to protect certain interests (such as the interests of minority shareholders, employees, creditors or other stakeholders, especially in the context of large publicly-held

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114. There have admittedly been a few US or UK defenders of corporate “bio-diversity” as well. See, e.g., Nicholas H.D. Foster & Jane Ball, *Imperialism and Accountability in Corporate Law: the Limitations of Incorporation Law as a Regulatory Mechanism*, in 2 GLOBAL GOVERNANCE AND THE SEARCH FOR JUSTICE: CORPORATIONS AND CORPORATE GOVERNANCE, (Sorcha McLeod & Roger Brownsword, eds., 2006) (“in a straight contest between common law and the more protective type of civilian law attitude, the common law has a distinct advantage. Add to this the predominance of United States (and, to a lesser extent, English/UK) ideas in legal globalisation, and the existence of micro-states eager to cash in on any opportunity to gain registration income, legal-organisational bio-diversity seems threatened, as does the long-term survival of a stricter corporate regulatory regime.”).

115. The “race to the bottom” risk is at least implicitly endorsed by Pierre Mayer and Vincent Heuzé (*Droit International Privé*, LGDJ 11th edition 2014, at 731) as well as by Dominique Bureau and Horatia Muir Watt (*Droit International Privé*, PUF 3rd edition 2014, at 466).

116. Christian Gaudin, Sénat, Rapport d’information fait au nom de la mission commune d’information sur la notion de centre de décision économique et les conséquences qui s’attachent, en ce domaine, à l’attractivité du territoire national - Tome I : rapport (2007) (Fr.); see at <https://www.senat.fr/rap/r06-347-1/r06-347-1105.html>. The report pointed out, however, that member states such as Germany and the Netherlands as well as many large French corporations seemed favorable to this type of reform. *Id.*



**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

350 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

corporations) will favor the real seat doctrine.”<sup>117</sup> Another German scholar worried that the ECJ’s case law would endanger the famed German worker co-determination model, which is built into its corporate law,<sup>118</sup> and noted regretfully that “[t]he ECJ could equally have adopted an approach that deferred to the Member State’s judgment of how best to regulate socio-economic affairs in their territories.”<sup>119</sup> There was even a pointed critique by an Austrian (and US) scholar as to whether the ECJ’s jurisprudence was even intentional: “Did the Court intend this result? It is unlikely, given its relatively limited understanding of business law policies.”<sup>120</sup> Even if not expressly articulated as such, this seems like a remarkable indictment of ECJ decision making in the field.

Despite all of these concerns, it does not seem that the Centros line of decisions has led to a European Delaware or Nevada, in the sense that EU businesses are not rushing to incorporate their companies in another member state rather than at home.<sup>121</sup> The main fallout has, instead, been a series of national corporate reforms to introduce more competitive domestic statutes and a general reduction in minimum charter capital requirements; this latter development has been welcomed by some commentators as a “change in culture for paternalistic Continental European models,”<sup>122</sup> but considered by others to reflect a race to the bottom.<sup>123</sup> A larger area of concern, however, should perhaps be elsewhere, i.e. in the decision of some of the smaller EU states to become incorporation platforms not for other EU investors, but for non-EU investors as an entry point into the entire EU. Instead of a “Delaware syndrome,” this might be referred to as the European “Trojan Horse syndrome.” Under EU rules now standing, all EU states must unconditionally recognize the legal personality of a Cyprus or Maltese

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117. Ebke, *supra* note 71, at 1028. Yet while Werner Ebke’s article is a ringing endorsement of the powerful internal logic of the real seat theory, he nevertheless seems anxious not to be seen as “promoting” or “defending” it. *Id.* at 1017.

118. JUSTIN BORG-BARTHET, *THE GOVERNING LAW OF COMPANIES IN EU LAW* 161 (2012).  
119. *Id.* 139-140.

120. Martin Gelter, *Centros, the Freedom of Establishment for Companies, and the Court’s Accidental Vision for Corporate Law* (February 13, 2015), in *EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE* 309, 337 (Fernanda Nicola & Bill Davies, eds., 2017).

121. Andrea Zorzi, *supra* note 20 at 256 (2017). The country perhaps best placed to win a race to become the preferred EU center for incorporation would have been the UK, but in recent years it did not seem interested to play this role, a series of reforms having reinforced the anti-abuse contents of its corporate law (for example the removal of corporate directorships, reinforcement of concept of shadow director and creation of a fully public register of beneficial owners). See BORG-BARTHET, *supra* note 118, at 83-84. The question may at any rate be moot following the UK’s decision to leave the EU.

122. Gelter, *supra* note 120, at 335.

123. GUNTHER H. ROTH & PETER KINDLER, *THE SPIRIT OF CORPORATE LAW – CORE PRINCIPLES OF CORPORATE LAW IN CONTINENTAL EUROPE*; at 20 (2013) (“a gradual convergence of private limited company laws on the initiative of Member States may be noted due to increased competitive pressures and this in the form of downward spiral (“race to the bottom”). For example this may be seen in the downward adjustment of corporate capital”).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 351

registered company when the company is validly formed under Cypriot or Maltese law (typically an easy standard), even if its shareholders are all non-Cypriot, non-Maltese or non-EU, if it has no substance in Cyprus or Malta other than a registered address and if its principal activity is conducted entirely outside of Cyprus or Malta.<sup>124</sup> Nor should these two countries be singled out: the same problem exists in other more established EU incorporation platforms as well, such as the Netherlands, Luxembourg or Ireland.

To be fair, it must be recognized that this is not only about corporate laws or the private international law of companies. The complete EU picture must also include the tax dimension. Even if the ECJ's doctrine on corporate recognition was really "accidental,"<sup>125</sup> the emergence of a market for EU incorporation services to non-EU investors really took off the way it did because of long-standing European failure to harmonize corporate income taxes and outbound withholding taxes on payments to non-EU investors. In the US, in contrast, federal taxation rules ensure significant commonality across the fifty states, and outbound withholding taxes are federal and therefore apply indistinctly. In the EU, there is no "federal" corporate income tax and each member state sets its own outbound withholding taxes: member states that wish to attract non-EU investors are free to remove such withholding taxes entirely.<sup>126</sup> Therefore, the demise of the real seat theory is only part of the overall European picture. Luxembourg is a real seat country (at least on paper). Yet, it has been very successful as an incorporation platform for non-EU investors, because of its

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124. For example, in France, CA Rennes 24 April 2002 concerning a Cypriot "single ship" company. The court listed the following circumstances as justifying that the company was not fictitious: it had been registered in Cyprus prior to the factual circumstances under dispute, its shareholders were designated physical persons, it had its own assets (a vessel under Cypriot flag), the vessel was managed by a specialized service company, it had entered into insurance and charterparty agreements and had prepared financial statements subject to audit by a reputable international firm. *But see* Cour de Cassation, Com. [Court of Cassation, Commercial Division] Jun. 22, 1999, Bulletin 1999 IV N° 136 p. 113 (concerning a Cypriot single ship company that was ruled to be fictitious: the reasons were that it was wholly owned by its shareholder (a Russian company) save for 0.01% owned by a Cypriot nominee (a legal secretary), which represented an insignificant amount of charter capital, the company had no "structure for its operations," its bareboat charter activity had no reality and the company was formed only to provide security to a lending bank. But the court also ruled that fictitiousness could not retroact). On this second case, see Alexis Constantin, *Conditions et effets de la fictivité d'une société*, commentary on Cass. Com. 22 June 1999, *Revue des sociétés* 824-841 (1999).

125. Gelter, *supra* note 120, at 309.

126. Moves against overly favorable corporate income tax rules (and rulings) in individual EU member states are now under way, on the basis not of taxation rules but of competition rules prohibiting state aid (the Apple case is a prominent example). Withholding taxes on dividends, royalties and interest paid to non-EU recipients, however, still seem quite immune to harmonization and continue to be decided by each member state individually (and bilaterally in tax treaties with non-EU countries), and this despite reported attempts by the EU commission to introduce minimum EU-wide standards (see for example Joe Kirwin, *EU pushes measures to tax outbound royalty*, BLOOMBERG (Oct. 6, 2016), <https://www.bna.com/eu-pushes-measures-n57982078129/>).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

352 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

favorable tax laws, network of tax treaties, and perhaps also because of its pragmatic approach to the actual physical presence required at the seat.<sup>127</sup> Compared with the US, this EU failure to formulate corporate recognition policies that would take proper account of the tax competition taking place between member states seems both short-sighted and naive.

E. THE EVOLUTION OF THEORIES OF THE CORPORATION

Yet another contributive factor to the success of shell companies as a global phenomenon is the rise of contractarian theories of the firm. A century ago, “theories of the corporation” were hotly debated by scholars.<sup>128</sup> The question was whether corporations were natural entities with corporeal substance pre-existing legal personality that should be recognized by the law (the “natural” or “real entity” theory),<sup>129</sup> or whether corporations were legal fictions to which personhood was conferred through a discretionary concession or grant by the state (the “concession”, “grant” or “fiction” theory).<sup>130</sup> At present, the question seems much less relevant. To paraphrase

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127. Per the OECD the total stock of global incoming FDI into Luxembourg in 2017 was 3.988 trillion USD (directional principle), out of which a full 3.809 trillion was transit FDI through SPEs. See *FDI Flows by Industry* OECD.STAT (06 Mar. 2019, 2:32 UTC), [https://stats.oecd.org/Index.aspx?DatasetCode=FDI\\_FLOW\\_INDUSTRY](https://stats.oecd.org/Index.aspx?DatasetCode=FDI_FLOW_INDUSTRY) (FDI positions, main aggregates BMD4, directional principle: inward). Another expression is FDI as a proportion of GDP: in 2015, Luxembourg’s share of the OECD total inward FDI stock (1.4%) dwarfed its share of GDP (0.1%). See Organization for Economic Cooperation and Development [OECD], *Luxembourg: Trade and Statistical Note*, at 2 (2017), <http://www.oecd.org/investment/LUXEMBOURG-trade-investment-statistical-country-note.pdf>. Luxembourg’s pragmatic approach to its own real seat requirement seems confirmed by the Polbud case regarding the (valid) transfer of a Polish company’s registered office to Luxembourg without transferring its real head office which remained in Poland (CJEU Case C-106/16, *Polbud Wykonawstwo sp. z o.o.*, Oct. 25, 2017, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-10/cp170112en.pdf>).

128. For recent summaries of the main theories and past debates, see Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMP. L. 573, (2000); Lawrence E. Mitchell, *The Relevance of Corporate Theory to Corporate and Economic Development: Comment on the Transplantation of the Legal Discourse on Corporate Personality Theories*, 63 WASH. & LEE 1489 (2006); Martin Petrin, *Reconceptualizing the Theory of the Firm – From Nature to Function*, 118 PENN ST. L. REV. 1 (2013); and Susan Mary Watson, *The Corporate Legal Person*, J. OF CORP. L. STUD. 1 (2018).

129. Watson, *supra* note 128, at 12. This was the theory of German scholar Otto van Gierke. As explained by Watson, van Gierke

argued that the real and social existence of a group makes it a legal person rather than the state. As such, the corporation was not created by the law, but pre-legal or extra-legal. Even though the law did not create the corporation, Gierke argued that it was bound to recognise its existence.

*Id.*

130. *Id.* at 2. The origins of this theory were found in medieval practice in Italy. It was considered to have died away when general incorporation statutes (which removed the state’s discretionary element) were adopted in the 19th century. Watson makes the convincing argument, however, that the concession theory is the most appropriate to explain the modern

the words of an English scholar, most would agree that “a favorite word in discussions of company law theory or legal personality is ‘metaphysical,’ which seems to be a euphemism for ‘useless waste of time.’”<sup>131</sup> If any corporate theory can be said to enjoy serious attention in academic scholarship today, it is the contractarian interpretation of the firm as a “nexus of contracts” (or “nexus *for* contracts”) which grew out of the law and economics movement. According to this view, the main function of corporate law is to facilitate economic activity through “entity shielding” and “asset partitioning”: the segregation of assets to serve as security for creditors of the company rather than those of the owners, together with procedural benefits in the form of single authority to sign contracts and obtain separate legal standing in court.<sup>132</sup> This is a theory chiefly concerned with attention to transaction costs and optimal, growth-enhancing allocation of resources, which views corporations as an expanded sort of contract exercising its effects vis-à-vis third parties. None of this requires paying attention to the human or physical dimension of a company’s existence. The fact that the corporation has legal personality is viewed merely as a “convenient heuristic formula for describing organizational forms which enjoy the benefit” of the three “foundational rules,” (i.e., entity shielding, single authority and standing in court).<sup>133</sup> The law and economics literature on corporations having been uninterested in legal personality as an institution,<sup>134</sup> it is not surprising that the same lack of interest would extend to questions governing its international recognition. A contractarian theory of the firm will naturally accord the same deference towards private corporate ordering that is accorded in the area of contract. Respect for party autonomy is indeed fundamental in contract, i.e. parties must be free to determine their contractual commitments and their legitimate expectations must be upheld. As critical scholars have written, these are absolute bedrocks of international economic order premised on the need for legal predictability and couched in terms that are both “technical and necessitarian.”<sup>135</sup> A corporate theory of the contractarian kind will be loath

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corporation. This would certainly seem consistent with the international rise of the incorporation theory in private international law.

131. Foster, *supra* note 128, at 588.

132. The seminal work is REINIER KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (3d ed. 2017).

133. John Armour, Henry Hansmann & Reiner Kraakman, *The Essential Elements of Corporate Law* 9-10 (Eur. Corp. Governance Inst., Working Paper No. 134, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1436551](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436551). The authors add that “although it is common in the legal literature to extend syllogistic deduction from the premise of legal personality to the existence of characteristics beyond the three foundational features [. . .], we see no functional rationale that compels this.”

134. DEREK FRENCH, STEPHEN W. MAYSON & CHRISTOPHER L. RYAN, *COMPANY LAW* 156 (31st ed. 2015); Watson, *supra* note 128, at 2.

135. Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT’L L. 209, 229 (2002). For another critique of party autonomy, see Horatia Muir Watt, *Party Autonomy in International*

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

354 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

to question, let alone defeat the choice of investors to form or own a shell company in one jurisdiction rather than another. At the other end of the spectrum is the traditional continental European system of corporate law. This system sought to internalize third party protection into the very body of corporate law and “attach[ed] importance to a high level of mandatory law in order to provide effective legal protection for *all* interests involved” (not just shareholders), therefore demanding “of their domestic enterprises that they subject themselves to national laws using a company form under domestic law.”<sup>136</sup> For decades this continental European corporate law system co-existed alongside contract laws themselves fully respectful of party autonomy. One fails to see why these two separate disciplines should necessarily be fused into one and why an institutional theory of the corporation cannot continue to co-exist alongside and separately from contract laws.

To this day, the influence of contractarian approaches to corporations continues to be visible in European private international law doctrine. Scholarly suggestions are that the incorporation theory should become the object of a new EU regulation (“Rome V”), with the twin goals of (yet) further reduction of transaction costs and further enhancement of legal certainty.<sup>137</sup> For the scholars formulating this proposal, the real seat connecting factor is simply too uncertain: “Member States differ in their definitions of the real seat, and past experience with a real-seat-type connecting factor used by the Insolvency Regulation (the center of main interests/COMI) has given rise to a considerable amount of litigation and, accordingly, a high degree of legal uncertainty.” Yet, at the same time, the authors acknowledge that “there is a strong policy desire on the part of the Member States to retain at least some control over foreign companies operating within their territory.”<sup>138</sup> Their technical proposal to reconcile these two objectives is a carve-out allowing “overriding mandatory provisions” to prevail over the law of incorporation.<sup>139</sup> “Overriding mandatory provisions” in the European system 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 organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable.”<sup>140</sup> On the face of it, this looks like an elegant solution respectful of national specificity. The difficulty, however, is that “overriding mandatory provisions” have not been very

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*Contracts: From the Makings of a Myth to the Requirements of Global Governance* 6 EUR. REV. OF CONT. L. 250 (2010).

136. ROTH & KINDLER, *supra* note 123, at 1023-27 (2013) (emphasis added).

137. Carsten Gerner-Beuerle, Federico M. Mucciarelli, Edmund-Philip Schuster & Mathias M. Siems, *STUDY ON THE LAW APPLICABLE TO COMPANIES*, EUROPEAN COMM’N, at 294 (2016).

138. *Id.* at 327.

139. *Id.* at 330.

140. Commission Regulation 593/2008 of June 17, 2008, On the Law Applicable to Contractual Obligations (Rome I), art. 9(1)–(2).

successful as an institution to date. They are difficult to identify, suffer from lack of consensus and may represent an impracticably high standard. There are very few precedents of these rules having been deployed in cross-border settings to defeat party autonomy.<sup>141</sup> Setting aside the question of “overriding mandatory provisions” however, the general point is that scholarly reasoning in the private international law of corporations now displays levels of natural deference towards party autonomy that are similar to those traditionally afforded to contracts. This reasoning does not place any methodological emphasis on the institutional dimension of corporations, or on how the interests of stakeholders other than shareholders or contractual creditors, not to mention the wider public, might also be protected.

#### **IV. The Dilution of Substantive Corporate Law Standards**

All these combined evolutions form the backdrop of the global success of the shell company as an institution. In parallel, the global market in incorporation services has contributed to the dilution of certain substantive standards originally thought to be embedded in the corporation seen as an institution. I propose to illustrate this through two examples only (without claiming to be exhaustive): first, the advent of strict confidentiality rules limiting access to corporate information, and second, the deconstruction of corporate administration and transformation of the office of director with attendant dilution of fiduciary duties. The paramount advantage achieved by legal systems from these techniques has been to keep the cost of corporate services to a minimum, which helps to buttress positions in the global market for incorporations.

##### **A. CORPORATE CONFIDENTIALITY**

As early as 1968, the first EU company law directive set forth the principle of public disclosure of the “personal data” of all companies.<sup>142</sup> The directive required the publication of the articles or charter of the company, names of directors or board members, powers of these officers to bind the company, and annual accounts of the company.<sup>143</sup> The reason underpinning these

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141. One of the difficulties is that the “overriding mandatory rules” that must be recognized by courts are those of the forum state, which in questions of corporate constitution and governance will be the state of incorporation. True protection would require recognizing the “overriding mandatory rules” of a third country, for which consideration by courts is both discretionary and infrequent (See Delphine Nougayrède, *TNK-BP, Party Autonomy and Third Country Mandatory Rules*, 35 NW. J. INT’L L. & BUS. AMBASSADOR 1A, 1 (2015)).

142. First Council Directive 68/151, 1968 O.J. Spec. Ed. 41, 41 (EC).

143. See *id.* (“on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.”). For smaller closely held companies the obligation to publish the annual balance sheet and profit and loss account was deferred until the Fourth Directive on annual accounts. See Fourth Council Directive 82/891, 1978 O.J. (L 221) 1, 1 (EC).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

356 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

disclosure obligations was the imperative of creditor protection.<sup>144</sup> These were the European standards of transparency as far back as 1968; the standards have expanded since then—the most recent expansion being mandatory beneficial owner identification in registers that are expected to become public.<sup>145</sup>

In contrast to these European standards, which are applied in all member states including the European incorporation hubs of the Netherlands, Luxembourg, Cyprus or Malta, the corporate disclosure standards of most non-EU incorporation hubs have long been minimal. In the traditional offshore jurisdictions, the principle of confidentiality was a cornerstone policy and continues to be forcefully defended to this day,<sup>146</sup> albeit with recent temperaments. In the BVI, for example, information available for public inspection is traditionally limited to the certificate of incorporation, the memorandum and articles (which are usually standard form documents), address of the registered office, amount of government fees paid, any notices of winding up or liquidation, and the register of charges.<sup>147</sup> The share

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144. See First Council Directive 68/151, 1968 O.J. Spec. Ed. 41, 41 (EC).

145. Disclosure obligations regarding financial information were set out in 1978 by the Fourth Company Directive of 1978. Fourth Council Directive, *supra* note 143. These obligations were then replaced in 2013 by Directive 2013/34/EU. See Directive 2013/04, of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 1 (EU). In 2015, the Fourth Money Laundering Directive required EU companies to look through successive tiers of shareholders to identify and record physical ultimate beneficial owners owning more than a certain threshold (25% or less depending on the country), but only a few countries decided that they would publicly disclose these beneficial owner registers. See Directive 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 1 (EU). A fifth anti-money laundering directive has just been adopted that requires public disclosure of all beneficial owner registers, See Directive 2018/843, of the European Parliament and of the Council of 30 May 2018 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2018 O.J. (L 141) 1. The speed of implementation by EU member states of these new measures is, admittedly, problematic. At the time of writing (September 2018) only 8 or so states seemed to be in full compliance, and they did not include major incorporation hubs such as the Netherlands, Cyprus or Malta.

146. ROSE-MARIE BELLE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW 3–4 (2014).

147. CHRISTOPHER BICKLEY, BERMUDA, BRITISH VIRGIN ISLANDS AND CAYMAN ISLANDS COMPANY LAW 55–56 (4th ed. 2013); Carey Olsen, *Continuing Requirements for British Virgin Island Companies*, OFFSHORE LAW SPECIALISTS (2017), [https://www.careyolsen.com/sites/default/files/CO\\_BVI\\_CORP\\_Continuing%20Requirements%20for%20BVI%20Companies%20KL\\_3%2017%20%282%29.pdf](https://www.careyolsen.com/sites/default/files/CO_BVI_CORP_Continuing%20Requirements%20for%20BVI%20Companies%20KL_3%2017%20%282%29.pdf).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 357

register disclosing the names of the shareholders and register of directors are available for inspection only if the company has elected to have them filed at the BVI registrar of companies; only a very small fraction of companies incorporated in the territory have chosen to do so, however.<sup>148</sup> In some cases BVI courts even prevent disclosure of the share register to minority shareholders.<sup>149</sup> The Cayman Islands offer still less public disclosure: it is limited to the registered name of the company, its date of incorporation, registration number, address of the registered office and the type of company.<sup>150</sup> Shareholder and director identity remain shielded from public scrutiny, as do any financial statements. This is very fundamentally different from the regime that has existed for five decades in the European Union.

Following international pressure, many offshore jurisdictions have now agreed to introduce beneficial owner registers, i.e. the names of shareholders, beneficial owners and directors will progressively be made available to local registrars and law enforcement agencies (and from there should become subject to international exchange in accordance with intergovernmental agreements).<sup>151</sup> These reforms do not affect the position of “horizontal” private law creditors or counterparties, however, who do not gain any additional rights of information in the process.<sup>152</sup> Minimal standards of disclosure are evidently advantageous for shell company administration, for they enable to keep the costs of maintaining the structures to a very low amount. The preservation of confidentiality is

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148. According to the OECD (2013), total existing incorporations in the territory were 850,000. During the period 2010-2012 only 2% of the circa 200,000 newly registered companies elected to have their register of members maintained at the BVI registrar. OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes, Peer Review Report Phase 2, Implementation of the Standard in Practice, Virgin Islands (British)*, ¶ 65 (2013).

149. BELLE ANTOINE, *supra* note 146, at ¶ 2.16 (“what is intriguing is that the court protected the confidentiality of the share register even to the extent of denying access to a shareholder engaged in litigation against the sole director and majority shareholder”); Harneys, *Shareholder Activism: Considerations for BVI Companies*, LEXOLOGY (Aug. 21, 2017), <https://www.lexology.com/library/detail.aspx?g=52f6de27-6da0-4e18-9378-ecfc571aa293>.

150. BICKLEY, *supra* note 147, at 78-79; see *Comparison of Laws in Bermuda, Cayman Islands and British Virgin Islands Relating to Offshore Companies*, CONYERS DILL & PEARMAN (2009), [https://www.conyersdill.com/publication-files/Pub\\_Multi\\_Comp\\_Laws\\_Bda\\_Cay\\_BVI.pdf](https://www.conyersdill.com/publication-files/Pub_Multi_Comp_Laws_Bda_Cay_BVI.pdf).

151. Such registers were introduced by both the BVI and Cayman Islands amongst others. Beneficial Ownership Secure Search System Act (2017) (BVI); Beneficial Ownership (Companies) Regulations, (2017) (Cayman Islands) (These statutes do not require that the information be made public, however). See *Maintaining Beneficial Ownership Register—Cayman Islands and British Virgin Islands*, ASIA LAW NETWORK (Sept. 16, 2018), <http://learn.asialawnetwork.com/2018/09/16/maintaining-beneficial-ownership-register-cayman-islands-and-british-virgin-islands-bvi/>.

152. There are exceptions. In Singapore, direct shareholders are now publicly accessible on the Bizfile system of the registrar of companies. If they are nominees (which may frequently be the case), they are not identified as such. *Setting Up a Private Limited Company in Singapore*, RIKVIN, <https://www.rikvin.com/incorporation/singapore-private-limited-company-registration/> (last visited Jan. 31, 2019). Singapore has also now enacted a register of beneficial owners (“controllers”), but it will not be public. *Companies (Amendment) Act 2017*, ACC. AND CORP. REGULATORY AUTHORITY, [https://www.acra.gov.sg/CA\\_2017/](https://www.acra.gov.sg/CA_2017/) (last visited Jan. 31, 2019).



**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

358 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

viewed by many jurisdictions as central to their competitive position, particularly vis-à-vis Asian centers, and they have actively resisted pressure to lift their standards.<sup>153</sup> But even if local disclosure standards were to be raised, there are serious questions as to the quality of information that might be elicited from the local agents. This is connected to the frequent deconstruction of corporate administration that has occurred in many of these jurisdictions, to which I will turn in the following section.

Before doing so, however, it is important to say a few words on the position of the United States in this debate on corporate disclosure. In terms of public access to information, US incorporation hubs such as Delaware or Nevada are aligned more with traditional regimes in jurisdictions like the Cayman Islands or BVI than with the European hubs. Delaware incorporation requires disclosure only of a local registered agent; not only is there is no public disclosure of directors or shareholders, but the mere idea of mandatory identification of ultimate beneficial owners (not to mention disclosure) has been successfully resisted for years.<sup>154</sup> The main explanation for this resistance is that state bodies that maintain corporate registers view beneficial owner identification not as a matter of state law but as a federal matter that should be the responsibility of agencies such as the US Treasury.<sup>155</sup> Following international pressure, piecemeal federal measures were progressively introduced in recent years, which require ultimate beneficial owner identification in certain tax filings, including for foreign owned entities that do not conduct any activity in the US,<sup>156</sup> and also for entities that purchase high end real estate in US counties viewed as prime destinations for money laundering.<sup>157</sup> But this piecemeal approach driven by

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153. A May 2018 vote by the UK Parliament requiring the overseas territories to make public their registers of beneficial owners (as is already in the case in the UK) elicited violent objections in most of these territories. See, e.g., Patrick Wintour, *British Overseas Territories in Talks to Keep Tax Haven Secrecy*, THE GUARDIAN (June 13, 2018), <https://www.theguardian.com/world/2018/jun/13/british-overseas-territories-in-talks-to-keep-tax-haven-secrecy>.

154. The most recent attempts at US federal legislation are TITTLE Act, S. 1454, 115th Cong. (2017) in the Senate, and the Corporate Transparency Act, S. 1717, 115th Cong. (2017) and Corporate Transparency Act, H.R. 3089, 115th Cong. (2017) in both Senate and House. S. 516, 115th Cong. (2017); S. 1717, 115th Cong. (2017); H. J. Res. 3089, 115th Cong. (2017). All previous attempts at federal or state legislation were unsuccessful.

155. See *State Incorporation – Collection of Company Ownership Info*, NATIONAL ASSOCIATION OF SECRETARIES OF STATE, <https://www.nass.org/initiatives/state-incorporation-collection-company-ownership-info> (last visited January 27, 2019) (discussing company ownership).

156. Treatment of Certain Domestic Entities Disregarded as Separate From Their Owners as Corporations for Purposes of Section 6038A, 81 Fed. Reg. 239, 89849 (Dec. 13, 2016) (to be codified at 26 C.F.R. pts. 1, 301).

157. FinCen Geographical Targeting Orders for the five boroughs of New York City, Miami-Dade County, Broward County, Palm Beach County, Los Angeles, San Diego, San Antonio, San Francisco, San Mateo and Santa Clara. These orders require title insurance companies to identify beneficial owners beyond a certain acquisition threshold. *U.S. Title Insurers Required to Identify High-End Cash Buyers in Six Major Metropolitan Areas*, FINANCIAL CRIMES ENFORCEMENT NETWORK (Jul. 27, 2016), <https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manchattan>.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 359

federal enforcement agencies falls short of general beneficial owner identification for all US registered companies and corporations, so in this field the US is still lagging behind best practices.<sup>158</sup> Regrettably, the ABA has played a central role in the resistance against corporate transparency, on the argument that the proposed measures would undermine client-attorney privilege and place an unnecessary burden on corporate formation by US small businesses.<sup>159</sup>

**B. THE DECONSTRUCTION OF CORPORATE ADMINISTRATION AND  
DILUTION OF FIDUCIARY LIABILITY**

One of the more harmful evolutions of substantive corporate law in many incorporation hubs, especially the traditional offshore ones, is the deconstruction of corporate administration among multiple service providers, “registered agents” and “nominee” shareholders or directors. Jurisdictions wishing to successfully market incorporation services to non-residents must try to host sufficient numbers of such service providers (which are sometimes locally regulated, though not always), but many of the functions can also be parceled out along what are global supply chains of interlocking corporate administration services.<sup>160</sup> The linchpin provider in the jurisdiction of incorporation is always the “registered agent,” but the role of these local participants can be quite minimal and limited to providing a legal address and keeping copies of a few documents.<sup>161</sup> The more value-added services, such as the provision of nominee directors or nominee shareholders, can be procured from other services providers in other countries instead (usually also incorporation hubs). The minimal role of registered agents lowers local incorporation costs, but it also leads to

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158. Another reproach often formulated against the US is that it is not a party to any of the multilateral or bilateral treaty arrangements for reciprocal exchange of account information spearheaded by the OECD since 2013 (i.e. it receives information from abroad but does not send any out). The critique is not entirely accurate as some of the FATCA intergovernmental treaties, in particular IGA Model 1, provide for reciprocal exchange. ERIKA LUNDER, CONG. RESEARCH SERV., R43444, REPORTING FOREIGN FINANCIAL ASSETS UNDER TITLES 26 AND 31: FATCA AND FBAR 12 (2014).

159. See Letter from Hilarie Bass, President, Am. Bar Ass’n, to Senate Comm. on Judiciary (Feb. 1, 2018) (and for a full exposition of the ABA’s views against “Gatekeeper Regulations on Lawyers” that the proposed legislation would according to them involve, visit [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_legal\\_profession/bank\\_secrecy\\_act/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/)). As an aside, the circumstance that all US entities are under the shadow of powerful federal enforcement agencies does not justify, in this author’s view, the US exempting itself from recognized international best standards.

160. For an extreme example of such practices by Kazakh businessman Mukhtar Ablyazov, see Delphine Nougayrède, *The Use of Offshore Companies in Emerging Market Economies: A Case Study*, 23(2) COLUM. J. EUR. L. 401, 409–15 (2017).

161. See, e.g., IMF, *British Virgin Islands: Financial Sector Assessment Program Update Documentation—Technical Note on Corporate and Trust Services Providers*, Country Report No. 10/326, at 5 (Oct. 2010), <https://www.imf.org/external/pubs/ft/scr/2010/cr10326.pdf> (regarding the BVI).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

360 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

minimization of local knowledge regarding the activities that are actually conducted by the company, allowing heads to remain in the sand and obstacles to be raised against verification of information and effective regulation by local regulators.

The directors, according to standard corporate theory, should be the key agents of internal control over the company. But, in many jurisdictions, directors' fiduciary duties are now significantly curtailed through the operation of indemnities. Wide director indemnification is of central importance to jurisdictions that practice incorporation services as an export, again with the paramount objective of keeping the costs down. Intriguingly, the corporate law of these jurisdictions is seldom transparent about the resulting dilution of actual director liability. Given prevailing standards of confidentiality, judgments in this area are hard to come by, which is why a recent Singaporean illustration is of special interest.<sup>162</sup> The case involved two nominee Singaporean directors who, despite having signed various loss-making transactions, were found not to have been in breach of their duty to exercise due care and skill.<sup>163</sup> Their defense rested on "Nominee Director Indemnity Agreements" under which their roles would be purely routine and administrative, and which ensured that they would not "act in any executive capacity or undertakes[sic] any commercial decisions or assume any commercial responsibility."<sup>164</sup> Yet when one examines a leading textbook on Singapore corporate law and its chapter on fiduciary duties, there is no mention of the position of "nominee" directors, nor of the effectiveness of contractual instruments that might entirely void fiduciary duties that, on the books at least, appear to be fairly standard in scope.<sup>165</sup> Director indemnification is not per se abnormal, of course, and it is allowed in a number of onshore countries: the real question, however, is one of degree. There must be a balance between the protection reasonable persons will require before accepting a position of responsibility, and the need to ensure that these individuals will act responsibly and seek sufficient knowledge about the activities of the company.<sup>166</sup> National legal systems accept different thresholds of exclusion from director indemnification, which may vary from simple negligence (i.e. directors remain "on the hook" for simple

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162. *Prima Bulkship Pte Ltd v Lim Say Wan*, [2016] SGHC 283, at 4 (Sing.).

163. *Id.* at 1-4.

164. *Id.* at 11-12.

165. HANS TJIO, PEARLY KOH & LEE PEY WOAN, *CORPORATE LAW* iv-vii (1st ed. 2015). This may change in the next edition following the *Prima* judgment.

166. On this theme in a US context, see ROBERT A. RAGAZZO AND DOUGLAS K. MOLL, *CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS* 544 (Thomson West, 2006) ("the fundamental issue that must be addressed by an indemnification statute is the establishment of policies consistent with these broad principles: to ensure that indemnification is permitted only when it will further sound corporate policies and to prohibit indemnification when it might protect or encourage wrongful or improper conduct.").

negligence) all the way to a much higher threshold of dishonesty or fraud.<sup>167</sup> The higher the exclusion threshold, the more directors are protected from liability. Offshore jurisdictions characteristically have high exclusion thresholds. Bermudan company law, for example, was specifically amended in 1996 to allow indemnification in all cases not reaching the high threshold of fraud or dishonesty (the previous threshold, of willful negligence, was much lower).<sup>168</sup> As a result, commentators were able to report in 2014 that “there have been no reported directors’ liability decisions from the Bermuda courts since 1996.”<sup>169</sup> In contrast, indemnification granted to directors in onshore jurisdictions is much narrower, and directors in companies registered in those jurisdictions therefore have greater incentive to exercise actual control or supervision over corporate activities.

Yet another characteristic often found in offshore jurisdictions, also central to shell company administration, is the institution of corporate directors (i.e. legal entities as directors as opposed to natural persons). The point of such structures is to insert additional layers of limited liability: fiduciary liability is borne by a company with limited assets itself, and in turn its shareholders also enjoy limited liability. The natural persons carrying out administration tasks do not bear any personal fiduciary duty of their own, because they work as employees of the corporate director, and their names need not appear on any of the corporate documentation. Continental jurisdictions such as France or Germany have never allowed this type of institution. In the UK, corporate directorships used to exist but were specifically disallowed in 2015;<sup>170</sup> the reason put forward was precisely to “deter opaque arrangements involving company directors and increase accountability where they are used to no good end.”<sup>171</sup> Other European countries that serve as incorporation hubs still retain the institution, however: this is true of the Netherlands, Luxembourg, Cyprus or Malta. The institution also continues to exist in many US states.

To summarize therefore, shell companies are often associated with various institutional characteristics in the corporate law that explain why they are so easy to manipulate: minimal publicly disclosed information, deconstructed corporate administration between numerous intermediaries none of which has full oversight over corporate activities, professional nominee directors or

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167. For a practitioner-oriented summary of director indemnification in different countries, see LINKLATERS, A CROSS-BORDER GUIDE FOR GROUP COMPANY DIRECTORS 98 (Jul. 2014), [www.linklaters.com/pdfs/mkt/brussels/Directors\\_Cross\\_Border\\_Guide.pdf](http://www.linklaters.com/pdfs/mkt/brussels/Directors_Cross_Border_Guide.pdf).

168. Companies Amendment Act 21, § 98(b) (1996) (Berm.).

169. John Riihiluoma, *Directors’ Liability in Bermuda: An Overview*, in OFFSHORE COMMERCIAL LAW IN BERMUDA, ¶¶ 8.1–8.2 (Ian R.C. Kawley ed., 2014). The author adds, however, that directors of Bermudan companies listed in foreign exchanges are under risk of being sued in those jurisdictions. *Id.* A more recent edition (2018) reports one decision on directors’ liability.

170. Small Business, Enterprise and Employment Act 2015, c. 26, § 87, sch. 3 (UK).

171. DEPARTMENT OF BUSINESS, INNOVATION & SKILLS, SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT: COMPANIES: TRANSPARENCY 4 (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417328/bis\\_15\\_266\\_SBEE\\_Act\\_companies-transparency-fact-sheet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417328/bis_15_266_SBEE_Act_companies-transparency-fact-sheet.pdf).

officers benefitting from significant indemnity protection, corporations as directors. Such characteristics allow evisceration of the supervisory function that traditional corporate theory would normally expect from the corporate organs and local regulators. Unsurprisingly, the fact that such structures would at the same time benefit from default international recognition seems to many like an affront to common sense.<sup>172</sup>

## V. What Can Be Done?

As was mentioned in the introduction, the dominant policy trend to control the abuse of shell companies internationally is to create new stores of information, in the form of domestic corporate registers of beneficial ownership and international exchange of account information. With some exceptions, however, this information will not become publicly accessible and will be reserved to regulators and law enforcement. In the private law sphere, as was explained in Section 2, contingent evolutions over recent decades have progressively led to unconditional international recognition of shell companies, as of all companies. This is a powerful evolution for which systemic reversal seems unlikely. The question therefore is what contribution private law safeguards might still be capable of offering in the effort to curb abuse. The most ambitious route might well be to simply align private international law recognition with the standards of international tax law: if a shell company is treated as a CFC in the country of its shareholders, then its legal personality would no longer be internationally recognized either. Short of this nuclear option, however, other piecemeal tools can perhaps be considered.

### A. EX ANTE CONTRACTUAL PROTECTIONS

For well-advised contractual counterparties (so-called “adjusting creditors” in the law and economics literature), the best available response at present is to avoid dealing with shell companies altogether. The next best response, failing that, is to contractually replicate the protections that the corporate institutional structure does not provide upfront. This means making ultimate controllers—beneficial owners or parents—parties to contracts, for example as guarantors, inserting provisions on the production and sharing of financial statements during the duration of the contract, asking to review and approve indemnification provisions applicable to directors, full representations on the identity of the ultimate controllers or beneficial owners (with an obligation to promptly notify of any change), and the taking of registrable security on whatever assets of the company may exist. Evidently, all this amounts to full externalization of risk management costs that are entirely passed on to counterparties (who also have to pay their own legal costs to perform due diligence and secure the necessary advice). Weaker or less sophisticated counterparties may be unable to achieve

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172. *See supra* note 13.

sufficient protection, and such modes of protection are by definition entirely unavailable to involuntary creditors such as tort victims or revenue authorities.

#### B. STATUTORY LIMITATION OF RIGHTS

Another possible avenue are statutory limitations of the types of rights that may be obtained by shell companies without human or physical substance and that do not present adequate levels of transparency. Despite globalization and rules on non-discrimination, it is still possible for legal systems to statutorily introduce such restrictions. In the European Union, for example, limitations of rights were proposed by members of the European Parliament in the run-up to the adoption of the 5th Anti-Money Laundering Directive.<sup>173</sup> Their proposal was that non-EU companies be obliged to submit their beneficial ownership for inclusion into EU registers whenever such companies sought to open a bank account, request a loan, acquire real estate, or enter into any commercial transaction in the EU that is dependent on a formality or validation act such as notarial certification.<sup>174</sup> Failure to comply with this transparency requirement would give rise to “adequate sanctions,” including “nullity of the contract.”<sup>175</sup> In the UK, the government has already announced legislation introducing a public register of beneficial owners of *foreign* legal entities that own British real estate;<sup>176</sup> this would seem to be the first instance of a national register collecting ownership information on foreign companies rather than domestic ones. One might also recall the qualification statutes that US states have long deployed to condition the ability of foreign corporations incorporated in other states to do business or appear in court.<sup>177</sup> Nor are such types of measures necessarily limited to Western jurisdictions.<sup>178</sup> The question, admittedly, is whether sufficient consensus can be found, within the EU for example, on the typology of companies subject to additional transparency obligations and concurrent limitations on rights (the objective of such

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173. EUR. PARL. DOC. (COM0208) (2016) at proposed new paragraph 10a.

174. *Id.*

175. *Id.*

176. DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, A REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES AND OTHER LEGAL ENTITIES: RESPONSE TO CALL FOR EVIDENCE 9 (Mar. 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/681844/ROEBO\\_Gov\\_Response\\_to\\_Call\\_for\\_Evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/681844/ROEBO_Gov_Response_to_Call_for_Evidence.pdf).

177. On the type of protections that have been deployed in the past by incorporation theory countries, see Drury, *supra* note 72, at 178.

178. In Russia, for example, the highest commercial court decided in 2013 on its own authority to restrict the procedural rights of a Dominican company owning real estate property on grounds of its failure to disclose its beneficial owners. *Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda Rossiyskoy Federatsii ot 26 marta 2013. No. 14828/12* [Resolution Presidium of the Supreme Arbitration Court Russian Federation March 26, 2013 No. 14828/12], *VYSSHIY ARBITRAZHNYI SUD ROSSIYSKOY FEDERATSII* [Higher Arbitration Court of the Russian Federation] 2013, p. 7–8.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

364 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2]

measures being to target shell companies but not all foreign corporations), or on the categories of activities that should be subject to control. Statutory limitations on real estate ownership rights and rights to open bank accounts by foreign shell companies, however, would probably appear to be fairly consensual.<sup>179</sup>

**C. SETTING ASIDE THE INCORPORATION LAW FOR CORPORATE  
VEIL PIERCING AND DIRECTOR LIABILITY**

Another proposition is to ensure protection available *ex post facto* by curtailing the empire of the incorporation law in two specific types of proceedings: corporate veil piercing cases (or national equivalents), and director liability. These proceedings may involve not only corporate law but other categories of law as well, which will often be tort law, contract law, insolvency law and sometimes even criminal law. Despite the direction taken by private international law,<sup>180</sup> when the question arises whether to pierce the veil of a foreign corporation or engage the liability of a director or controlling person, the rules of the jurisdiction of incorporation should not be determinative, and the forum law should prevail whenever the objective is to protect counterparties or creditors outside the jurisdiction of incorporation. This solution may seem unorthodox at first glance or likely to open Pandora's box unpredictability in cross-border situations, but it is arguably already compatible with accepted law in many jurisdictions, precisely because veil piercing will often involve categories like tort, contract or agency. Despite or perhaps because of the high threshold of veil piercing in the English system, a number of English scholars have already argued in favor of this type of versatility. Authors have defended the right to set aside incorporation law specifically on grounds of diversity of connecting factors,<sup>181</sup> or pointed out that English law must remain relevant whenever a foreign company is a "sham" or "pretend" company.<sup>182</sup> In this last case, even

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179. Following increased AML pressure, many international banks have been closing down accounts of offshore entities for several years already. See, e.g., Dimitri Sevastopulo, *British Virgin Islands Suffers Amid Push Against Anti-Money Laundering*, FINANCIAL TIMES (Sept. 16, 2014), <https://www.ft.com/content/3fbed922-3d51-11e4-871d-00144feabdc0>.

180. See Gelter, *supra* note 120, at 333-35 (highlighting one of the main outcomes of the Centros line of decisions: the ECJ has implicitly been nudging member states towards creditor protection in a non-paternalistic manner *ex post* rather than *ex ante*, through mechanisms like corporate veil piercing that are very fact intensive and individualized in approach).

181. Chee Ho Tham, *Piercing the Corporate Veil: Searching For Appropriate Choice Of Law Rules*, 22 LLOYD'S MAR. AND COM. L. Q. 42 (2007) ("without appreciating the varied nature of the veil piercing exercise, one might be tempted to look only at the *lex incorporationis* to answer the question, because veil piercing might well be characterized as an issue particularly related to the nature of the corporation and its relationship with its members. But this approach need not be applied indiscriminately. The *lex incorporationis*, though important, need not always be the proper law." The author concludes that "on the current state of English domestic law, it may well be that there is no room for a single choice of law rule to govern the issue of corporate veil piercing.").

182. Briggs, *supra* note 6, ¶ 10.28 (the difficulty, however, is that English characterization as a sham is often difficult to achieve in practice).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2019]

AFTER THE PANAMA PAPERS 365

“if it were shown that foreign law was applicable and for example absolutely declined to permit the personality of the corporation to be looked behind, as some jurisdictions may, the common law rules of private international law would be entitled to disapply the foreign law on ground of public policy.”<sup>183</sup> In the United States, while many states apply the internal affairs doctrine in corporate veil piercing cases, it is not a universal rule and some states proceed otherwise: “New York is a leading example of a state that does not apply the internal affairs doctrine to veil piercing. Instead, New York relies on a choice of law rule known as the “paramount interest” test, under which “the law of the jurisdiction having the greatest interest in the litigation will be applied . . . and the facts or contacts which obtain significance are those which relate to the purpose of the particular law in conflict.”<sup>184</sup>

In EU jurisdictions, disenfranchisement of the foreign incorporation law can presumably be achieved by unlimited application or expansion of national veil piercing doctrines to all types of non-EU companies even under the auspices of corporate law proceedings. When shell companies are registered in the EU, the question becomes that of the standards that would allow overcoming the test of the Centros jurisprudence in individual corporate law cases. This may end up requiring thresholds such as fraud or overriding mandatory rules, which are very high and risk locking the European system into incorporation law unilateralism.<sup>185</sup> The solution may therefore lie in wider cross-border use of insolvency or tort related creditor protection rules, e.g. falling under COMI or connecting factors other than place of incorporation. This could in fact be the direction taken in the CJEU’s 2015 Kornhaas decision, which allowed the application of German fiduciary liability rules to the British director of a UK LLC.<sup>186</sup> Seen from a certain angle, this all seems like a necessary flight away from corporate law towards other disciplines such as insolvency or tort, regarding matters which should be at the heart of corporate law. In other words, it is quite an indictment of corporate law for its failure to craft its own indigenous solutions to protect interests other than those of shareholders. Rejection of shareholder primacy is often expressed in critical corporate law scholarship on contemporary standards of corporate governance; as it turns out, the same exact reproach can also be formulated against the contemporary private international law of companies.

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183. *Id.* ¶ 10.27.

184. BAINBRIDGE & HENDERSON, *supra* note 32, at 135.

185. For a French defense of the active deployment of ‘fraud’ against the use of shell companies, see Sophie Schiller, *La fraude, nécessaire “deus ex machina” face à l’évolution du droit des sociétés*, 4 REVUE DES SOCIÉTÉS 211 (2014).

186. Case C-594/14, Kornhaas v. Dithmar, 2015 ECLI: EU 806 (Dec. 10, 2015). For a critique of the Kornhaas decision, see Wolf Georg Ringe, *Kornhaas and the Limits of Corporate Establishment*, OXFORD UNIVERSITY FACULTY OF LAW BLOG 2016 (May 25, 2016), <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment>. According to Ringe, the court appeared to be in a “state of mental blackout.”



D. INTRODUCING INTERNATIONAL “SOFT-LAW” BEST STANDARDS  
OF CORPORATE LAW

Veil piercing is highly specific to national traditions, and it is not realistic to imagine that entire sections of domestic private law involved in the exercise will soon be harmonized (although there may be convergence on some elements). If there is sufficient international consensus on the risks posed by foreign shell companies, it might be possible, however, to devise functional “best standards” of substantive corporate law, which could encourage gradual convergence during law reform and be used by national courts when considering cross-border veil piercing or director liability cases. This might be particularly useful in emerging market economies, which tend to be more exposed to the use of foreign shell companies but where courts may be less experienced in such matters. The standards would involve identifying the more harmful characteristics of shell companies involved in contentious proceedings, in particular the corporate anonymity, deconstruction of corporate organs and evisceration of fiduciary duties that have been described above. The task of compiling these best standards could be entrusted to international policy forming bodies like the FATF and OECD, which have already taken the lead in global soft law efforts against money laundering and tax evasion. Generally, the objectives of such standards should be to encourage corporate transparency, reverse the deconstruction of corporate administration, reduce the length of opaque supply chains of incorporation services, and preserve the active supervisory function of directors. Such standards, if implemented in jurisdictions of incorporation, would augment the volume of information on corporate activity that is actually known to local service providers, through the threat of real liability being imposed on them by creditors or domestic regulators. This may of course increase the cost of incorporation services as a national export, but it would also preserve the current model and allow these jurisdictions to continue this line of activity.

**VI. Conclusion**

This article is based on the premise that the proliferation of shell companies is a problematic feature of the international economic order. It has argued that contrary to public law disciplines, their private law treatment remains too deferential to legal form in the place of incorporation. There are a number of singular factors explaining this evolution over recent decades. Amongst these factors are the geographical spread of the English common law tradition, the decline of the real seat theory in Europe, the rise of contractarian theories of the firm and the emergence of post-communist economies naturally deferent to legal form. The enduring fragmentation of corporate law along national lines and increased deference to laws of incorporation have led to a competitive global market for incorporation services and, it is argued here, erosion of substantive standards of corporate law. In addition to regulatory measures that are currently being

implemented to curb some of the more harmful effects of the misuse of corporate personality, this article has argued that attention also needs to be paid to the private law dimension. Deference to the law of incorporation of shell companies should be reduced, further harmonization of private international law to entrench the incorporation theory in the European context should be resisted, and private law measures should be considered at a national level that would impose substantive conditions prior to foreign corporations reaping the full benefits of corporate personality and limited liability, particularly when the fiduciary obligation of the corporate organs has been reduced or eliminated. Statutory limitations of rights and corporate veil piercing would be primary arenas for such types of measures. In addition, one could imagine the development of soft law recommendations by international standard setting bodies to encourage an international race to the top rather than to the bottom.

As a penultimate comment, it is accepted that all this may look like a sweeping defense of national diversity and differences, leading to greater uncertainty in cross-border situations and higher transaction costs. The response to this objection is that the time when predictability and transaction cost reduction were paramount goals overriding everything else, including historical legacies of institutional “bio-diversity,” may now be over. Private law institutional “bio-diversity” can be viewed in a positive light. The continental European principles of corporate law that developed over time and were exemplified by the real seat theory had internal logic and political legitimacy. National private laws remain the bedrock on which most citizens and economic actors make decisions and structure transactions; as diversity and competition between national private laws evidently continue to exist, then it would be entirely natural that the same diversity should extend to private international law, and that national systems be afforded dedicated private law tools to deal with what might appear to them as foreign institutional anomalies. If points of international agreement are nevertheless possible, for example on the importance of preserving full fiduciary obligation on corporate organs, non-binding cooperative efforts in the form of soft law best standards of corporate law would help to give a general sense of direction for the benefit of all.

As a final comment, this article has also sought to show how an accumulation of singular private law processes in different jurisdictions led to an arguably unsatisfactory general outcome. Private international law was the main discipline contributing to this outcome, in its role as international conveyor belt transporting discrete national legal institutions across borders with perhaps insufficient attention being paid to the content of institutions, the values embedded into them or their compatibility with circumstances elsewhere. Yet within this discipline there may also be untapped tools to achieve coordinated diversity, which should accordingly warrant attention by scholars.

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