Tamás Szabados*

Challenges of the Codification of the Law Applicable to Legal Persons from the Perspective of Recodifying Hungarian Private International Law

I Introduction

The decision to recodify Hungarian private international law was taken by the Hungarian Government in 2015.[1] The changed social and economic circumstances since the time of its adoption require the revision of Decree-Law 13 of 1979 on private international law (Decree-Law) which currently includes the rules on conflict of laws, jurisdiction and certain other aspects of international civil procedure applied by Hungarian courts.[2] The creation of a new private international law act necessitates rethinking, among other issues, the conflict of laws rules determining the law applicable to legal persons. Codifying the law applicable to legal persons is undoubtedly a challenge for the Members States of the European Union (EU) in the light of the recent developments in EU law and the autonomous private international law of the Member States.

In most nations' private international law, the determination of the law applicable to legal persons takes place in the private international law act or the civil code which includes conflict of laws rules.[3] Although there are bilateral international treaties touching upon the issue of determining the law applicable to legal persons,[4] there is no broader multilateral international

---

* Tamás Szabados (LL.M., Ph.D.) is senior lecturer at Eötvös Loránd University (ELTE), Budapest, Faculty of Law, Department of Private International Law and European Economic Law (e-mail: szabados@ajk.elte.hu). This paper is the written version of the author's lecture delivered at the conference 'Recent Trends in European Private Law and Private International Law (4th Greek-Hungarian Symposium)' held at the Eötvös Loránd University on 9 October 2015.

[1] *A Kormány 1337/2015. (V. 27.) Korm. határozata az új nemzetközi magánjogi szabályozás kodifikációjáról és a Nemzetközi Magánjogi Kodifikációs Bizottság felállításáról* [Government Decision 1337/2015. (V. 27.) on the codification of a new private international law regulation and the creation of the Private International Law Codification Committee].

[2] *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* (Decree-Law 13 of 1979 on private international law). See Lajos Vékás, 'Egy nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 6 Jogtudományi Közlöny 295-299.

[3] An exception is German law, where the law governing legal persons has been determined by judicial practice.

[4] For one of the most well-known examples, see: *Freundschafts-, Handels- und Schiffahrtsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika vom 29. Oktober 1954.*

convention that has entered into force in this field,[5] nor does the EU provide comprehensive provisions on the law governing legal persons.

In 2014, the European Commission (Commission) announced an open call for tender for preparing a study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter.[6] The tender is important as it may indicate that the Commission intends to consider the issue of the determination of the law applicable to companies. Nevertheless, at the moment, in the absence of an EU-level regulation, the Member States enjoy considerable room to manoeuvre in shaping the law applicable to legal persons.

The aim of this contribution is to identify the challenges faced by the Hungarian legislator in the course of recodifying private international law concerning the law applicable to legal persons. This paper intends to outline the developments in EU law and some national conflict of laws codifications in terms of the law governing legal persons in order to draw some lessons for the new Hungarian private international law act. However, the paper does not deal with the question of jurisdiction and international civil procedure concerning legal persons.

In recent years, much attention has been devoted to determining the law applicable to companies in the event of transferring the company seat and to the related judgments of the Court of Justice of the European Union (CJEU). Nevertheless, the determination of the law applicable to legal persons should be put in a broader context. The analysis must also cover questions such as the scope of the applicable law or the necessity for adopting special connecting factors.

II The Hungarian Legislation in Force and its Antecedents

As is well known, in private international law, the law governing legal persons is traditionally determined along two connecting factors: the place of incorporation and the real seat of the legal person.

Before the Second World War, Hungarian private international law followed the real seat principle. In the absence of an express provision, this could be deduced from the judiciary practice of the supreme court, known as the Curia, and certain acts[7] as well as bilateral international treaties.[8]

The law governing the legal person was the law of the state of the seat. In Hungarian private international law, the seat was determined in accordance with section 25 of Act I of 1911 on the

[5] *Hague Convention* of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions; *European Convention on the Establishment of Companies Strasbourg*, 20.01.1966; *Convention on the mutual recognition of companies and bodies corporate Bull.* Suppl. No. 2-1969 pp. 7-14.

[6] European Commission, Directorate-General Justice, Open call for tender JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter. Contract notice in 2014/S 149-267126 of 06/08/2014. Brussels, 06/08/2014 JUST/A/4/MB/ARES(2014)2599553.

[7] See for example *1875. évi XXXVII. törvénycikk, kereskedelmi törvény* (Act XXXVII of 1875 on the Commercial Code) s 217 (3).

[8] István Szászy, *Nemzetközi magánjog* (Sylvester Irodalmi és Nyomdai Intézet 1938, Budapest) 227-228.

Code of Civil Procedure (Code of Civil Procedure of 1911) which identified the seat with the place of management that is 'the centre of administration of the legal person, where the activity, legal life of the legal person is concentrated, from where the legal person carries out business.'[9] The governing law was deemed to be applied to the legal personality, the organisation of the legal person, the relations between the members and between the members and the legal person, the representation of the legal person, the rules on the preparation of the balance sheet and the dissolution of the legal person.[10]

Subsequent to the Second World War, but before the adoption of the Decree-Law, the representatives of the legal literature took different views regarding this issue. In 1948, István Szászy drew up a Bill on private international law which was finally not adopted. According to section 7 of the Bill on Private International Law:[11]

> If pursuant to this Act the domestic law or the law of the domicile of a person must be applied, an association of persons or assets with legal personality is governed by the law, in whose territory the seat of the association of persons or assets is located.
>
> This law also governs the issue whether the association of persons or assets is to be considered as a legal person.
>
> The seat is the place of the management.

Section 7 of the Bill was found among the General Provisions where, in addition to other issues belonging to the general part of private international law, the domestic law (which is identical to the personal law according to the current terminology) and the law of the domicile were determined. However, the Special Provisions of the Bill did not refer to the law applicable to legal persons, but the rules governing natural persons should have been duly applied, for example regarding legal capacity (section 39 of the Bill). The justification of the Bill refers to the fact that the rules contained in section 7 reflect the real seat principle and that the Bill relies on section 25 of the Code of Civil Procedure of 1911 concerning the determination of the seat.[12]

In the view of Miklós Világhy, the personal law must be determined based on the seat of the legal person. The seat is determined by the court taking into account all the circumstances of the case, including the main establishment, the place of management, the seat indicated in the statute and the place of formation and incorporation, so that it must coincide with the geographical location to which the activity of the legal person is most strongly linked.[13] According to Világhy, the personal law so determined covers the existence and scope of the legal personality, the personality rights, the organisation of the legal person, the relations between the members and the termination and the winding up of the legal person.[14]

---

[9] Ibid 228.

[10] Ibid 231.

[11] István Szászy, *Magyar nemzetközi magánjog. Törvénytervezet és Indokolás* (Egyetemi Nyomda 1948, Budapest).

[12] Ibid 55.

[13] Miklós Világhy, *Bevezetés a nemzetközi magánjogba* (Tankönyvkiadó 1974, Budapest) 100.

[14] Ibid 100.

Ferenc Mádl, Hungary's future President and an academic specialising in private international law, stood firmly in favour of the incorporation doctrine, as most of the bilateral international treaties entered into after the Second World War followed this principle.[15] He proposed accordingly that a future Hungarian codification should follow the incorporation principle.[16]

The definite change took place, however, by the adoption of the Decree-Law which broke with the real seat theory and applies the incorporation theory as the main rule.

Section 18 of the Hungarian Decree-Law determines the law applicable to legal persons under the title 'Legal persons', pursuant to which:[17]

(1) The legal capacity, economic quality, personal rights of a legal person and the legal relations between the members thereof shall be adjudged according to its personal law.
(2) The personal law of a legal person is the law of that state in whose territory the legal person was incorporated.
(3) If a legal person is incorporated according to the laws of more than one state, or no incorporation is required according to the law applicable at the place of the seat indicated in the statute, its personal law shall be the law applicable at the place of the seat indicated in the statute.
(4) If a legal person has no seat according to its statute, or has several seats and is not incorporated in accordance with the law of any of those states, its personal law shall be the law of that state in whose territory its central management is located.
(5) *[Repealed]*

Accordingly, the main connecting factor is the place of incorporation; the place of the seat indicated in the statute and the place of the central management are only subsidiary connecting factors. The application of the subsidiary connecting factors is seldom necessary, since most often the place of incorporation can be ascertained.

The Decree-Law thus made it clear that Hungarian private international law follows the incorporation theory. Terminologically, however, no complete break was made with the earlier legal literature and István Szászy's Bill.[18] Thus, one of the subsidiary connecting factors of the Decree-Law is the place of central management *('központi ügyvezetés helye'),* which reflects the rule of the Code of Civil Procedure of 1911 and which was identified previously as the seat. According to the jurisdictional rule laid down in section 30 [currently section 30 subsection (1)] of Act II of 1952 (Code on Civil Procedure of 1952), in the event of doubt, the seat is the place of administration *('ügyintézés helye').* The acts on the company registration procedure adopted after the change of the political system provided similarly: they contained an identical provision, according to which the seat of a firm is the place of central administration *('központi*

15 Ferenc Mádl, *Külkereskedelmi monopólium. Nemzetközi magánjog* (Közgazdasági és Jogi Könyvkiadó 1966, Budapest) 98-104.
16 Ibid 109.
17 Translation by the author.
18 I owe thanks to Professor László Burián who called my attention some years ago to the terminological difference between the connecting factors applied in conflict of laws and the notions used in substantive law.

ügyintézés helye').[19] However, neither the Code on Civil Procedure of 1952, nor the companies acts nor the laws on company registration procedure nor Act V of 2013 on the Civil Code (Civil Code) contain(ed) and apply at the present the notion of the place of central management *('központi ügyvezetés').*[20]

The regulations on legal persons have remained largely untouched since 1979. The single change was the repeal of subsection 5 of section 18 of the Decree-Law by Act CXXXII of 1997 on the branches and agencies in Hungary of undertakings seated abroad.[21] The repealed subsection 5 provided that 'the personal law of the separately registered branch or establishment of the legal person is the law of that state in whose territory the branch or the establishment was registered'.

Additionally, we can find bilateral agreements which may concern the law applicable to legal persons. Thus, Decree-Law 11 of 1981 on the promulgation of the convention on the mutual legal assistance in civil matters concluded by the People's Republic of Hungary and the Republic of Italy, signed in Budapest on 26 May 1977, ensures the access to courts in the same way as for natural persons for those legal persons which were formed in the territory of one of the Contracting Parties and whose seat is in the territory of this Contracting Party.[22] We find a similar provision in the agreement on mutual legal assistance in civil and commercial matters concluded between the Republic of Hungary and the Arab Republic of Egypt signed in Cairo on 26 March 1996, as promulgated by Act CII of 1999.[23] These international agreements require the coincidence of the place of formation and the seat of the legal person. However, the text of the agreements does not determine which seat is concerned, the formal statutory seat or the real seat, although, taking the substantive and procedural company law provisions in force at the time of their adoption into account, presumably it concerns the latter. Nevertheless, the above rule has been laid down only in relation to the right of access to courts and the legal protection of legal persons.

---

19 *1989. évi 23. törvényerejű rendelet a bírósági cégnyilvántartásról és a cégek törvényességi felügyeletéről* (Decree-Law 23 of 1989 on company court registration and legal supervision of companies) s 6; *1997. évi CXLV. törvény a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról* (Act CXLV of 1997 on company registration, public company information and court registration proceedings) s 16 (1); *2006. évi V. törvény a cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról* (Act V of 2006 on public company information, company court registration and winding-up) s 7 (1) (Company Registration Act).

20 *1988. évi VI. törvény a gazdasági társaságokról* (Act VI of 1988 on companies); *1997. évi CXLIV. törvény a gazdasági társaságokról* (Act CXLIV of 1997 on companies) (Companies Act of 1997); *2006. évi IV. törvény a gazdasági társaságokról* (Act IV of 2006 on companies) (Companies Act of 2006); *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code).

21 *1997. évi CXXXII. törvény a külföldi székhelyű vállalkozások magyarországi fióktelepeiről és kereskedelmi képviseleteiről* (Act CXXXII of 1997 on the branches and agencies in Hungary of undertakings seated abroad).

22 *1981. évi 11. törvényerejű rendelet a Magyar Népköztársaság és az Olasz Köztársaság között Budapesten, az 1977. évi május hó 26. napján aláírt, a kölcsönös polgári jogsegélyről szóló egyezmény kihirdetéséről* (Decree-Law 11 of 1981 on the promulgation of the *Convention on the mutual legal assistance in civil matters concluded by the People's Republic of Hungary and the Republic of Italy* signed in Budapest on 26 May 1977) art 1 (3).

23 *1999. évi CII. törvény a Magyar Köztársaság és az Egyiptomi Arab Köztársaság között a polgári és kereskedelmi jogsegélyről szóló, Kairóban, 1996. március 26. napján aláírt Egyezmény kihirdetéséről* (Act CII of 1999 on the promulgation of the *Convention on mutual legal assistance in civil and commercial matters concluded between the Republic of Hungary and the Arab Republic of Egypt signed in Cairo on 26 March 1996*) art 1 (3).

Concerning the application of section 18 of the Decree-Law, we do not find too many court decisions. Furthermore, most of these decisions are limited to establishing that the law of the place of incorporation is applicable to the legal person in a certain question.[24]

III Challenges of the Codification of the Law Governing Legal Persons

National legislators face several challenges in codifying the law governing legal persons. I will enumerate below some briefly, perhaps the most significant challenges: ascertaining the impact of EU law on the law applicable to legal persons; the selection of the connecting factor; the determination of the scope of the applicable law; the treatment of legal persons other than companies; the cross-border mobility of companies; and the need to create special conflict of laws rules. In the codification process, regard must be paid to the development of EU private international law and to the solutions adopted in other private international law acts, as well as to the changes which occurred since the creation of the Decree-Law.

1 The Relationship between EU Law and the Laws of the Member States from the Perspective of the Law Applicable to Legal Persons and the Determination of the Connecting Factor[25]

There is no explicit provision on the determination of the law applicable to legal persons in EU law. The question of conformity of national conflict of laws rules with EU law arose primarily in relation to the freedom of establishment ensured by the Treaty on the Functioning of the European Union (TFEU).[26] In the legal literature, the question was posed whether Articles 49 and 54 of the TFEU and the related case law of the ECJ have a conflict of laws content and whether the application of one or the other connecting factor (either the incorporation doctrine or the real seat principle) follows from them. First and foremost, the question whether the real seat doctrine is in conformity with EU law emerged.

The view, according to which Articles 49 and 54 have a conflict of laws content, takes as a departure the *Centros*,[27] the *Überseering*[28] and the *Inspire Art*[29] cases. In these judgments,

[24] See *Legfelsőbb Bíróság* (Supreme Court) BH 2001. 537; *Fővárosi Bíróság* (Municipal Court of Budapest) 15.P.25457/2002/109; *Legfelsőbb Bíróság* (Supreme Court) Gf.I.30.059/5; *Fővárosi Ítélőtábla* (Budapest-Capital Regional Court of Appeal) 5.Pf.21.267/2006/12.

[25] In the course of writing this subchapter, I largely relied on my previous works: Tamás Szabados, *The Transfer of the Company Seat within the European Union – The Impact of the Freedom of Establishment on National Laws* (Eötvös Kiadó 2012, Budapest) and Tamás Szabados, 'The Transfer of the Company Seat: The Freedom of Establishment and National Laws' (2013) 2 Acta Universitatis Sapientiae Legal Studies 153-168.

[26] Consolidated version of the *Treaty on the Functioning of the European Union* [2012] OJ C 326/47 arts 49-55.

[27] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[28] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

[29] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

the ECJ – subject to some narrow exceptions – excluded the application of the restricting provisions of the host Member State to companies incorporated in another Member State, but which intended to transfer their real seat to or establish a branch in the host Member State. In the *Überseering* judgment, the Court reached the conclusion that 'where a company formed in accordance with the law of a Member State (A) in which it has its registered office exercises its freedom of establishment in another Member State (B), Articles 43 EC and 48 EC *[the current Articles 49 and 54 TFEU – added by the author]* require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (A).'[30] From the *Centros* and *Inspire Art* judgments, the conclusion may be drawn that the law of the state of incorporation must be applied to a branch established by a company incorporated in another Member State and that the host Member State may not impose additional requirements on the branch.[31]

According to the view which may be considered as dominant, Articles 49 and 54 do not have either explicit or implied conflict of laws content.[32] Neither the TFEU, nor the judgments of the ECJ determine explicitly which connecting factor should be applied by the Member States.[33] Member States are free to choose and apply one or the other connecting factor, but their application cannot result in the restriction of the freedom of establishment. The ECJ does not examine connecting factors in themselves, but together with substantive law rules. Consequently, Member States are free to apply either the incorporation doctrine or the real seat principle, but in their interaction with substantive rules they may not restrict or render less attractive the exercise of the freedom of establishment.

In Daily Mail, the ECJ pointed out that the Treaty establishing the European Economic Community[34] takes into account the differences in national legislations, including the differences between the connecting factors.[35] In the *Cartesio* judgment, the Court found that '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

30 *Überseering,* para 95.

31 *Centros,* para 30; Inspire Art, para 101.

32 Thomas Rauscher, *Internationales Privatrecht* (CF Müller Verlag 1999, Heidelberg) 136; Horst Eidenmüller and Gebhard M. Rehm, 'Niederlassungsfreiheit versus Schutz des inländischen Rechtsverkehrs: Konturen des Europäischen Internationalen Gesellschaftsrecht' (2004) 2 ZGR 159-188, 164-166; Andreas Spahlinger, Gerhard Wegen, *Internationales Gesellschaftsrecht in der Praxis* (C.H. Beck Verlag 2005, München) 45; Ulrich Forsthoff, *Niederlassungsfreiheit für Gesellschaften: europarechtliche Grenzen der für die Erstreckung deutschen Mitbestimmungsrechts* (Nomos Verlagsgesellschaft 2006, Baden-Baden) 25-26; 53-59; Lutz Michalski, Ilja Funke, '§ 4a GmbHG' in Lutz Michalski (ed), *GmbHG Kommentar* (2nd edn, C.H. Beck Verlag 2010, München) 692-693.

33 Nadja Kubat Erk, 'The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine' (2010) 21 EBLR 413-450, 424; Péter Metzinger, Zoltán Nemessányi, András Osztovits, *Freedom of Establishment for Companies in the European Union* (Complex Kiadó 2009, Budapest) 37.

34 *Treaty Establishing the European Economic Community* (Rome, 25 March 1957).

35 Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, paras 20-21.

maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.'[36] From this, the conclusion may be drawn that the home Member State may freely choose between the incorporation doctrine and the real seat principle.[37]

Moreover, the scope of application of the freedom of establishment is limited. From the *Centros*, *Überseering* and *Inspire Art* judgments, it follows indeed that the law of the state of incorporation (with some exceptions) must be taken into account. However, these decisions concerned only a specific situation, namely the relationship between the company and the host Member State. The judgments of the ECJ may be interpreted in this context that the host Member State has to treat immigrating companies in accordance with the law of the state of their place of incorporation, but they give the Member State freedom on how to achieve this result. The judgments do not concern the relationship between the home Member State and the company, as well as companies established in third countries. In both cases, the real seat principle may continue to be applied.[38] Moreover, it is important to note that freedom of establishment is to be applied to companies within the meaning of Article 54 (2) of the TFEU. Accordingly, '[c]ompanies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.' This implies that the freedom of establishment provisions do not apply to non-profit legal persons, therefore the application of the real seat principle may be accepted concerning them.[39]

As a consequence, neither of the two connecting factors is contrary to the freedom of establishment, although, in the relationship between the company and the host Member State, the real seat principle has been largely supplanted by the incorporation doctrine. However, even in this context, it may happen that the rules of the host Member State are more favourable than the provisions of the state of the place of incorporation. In such a case, the rules of the host Member State may be applied, since they do not restrict the freedom of establishment. This means that the law of the state of incorporation gives only a standard, against which the law of the host Member State is to be measured, but there is no obligation to apply exclusively the law of the home Member State, even in the relationship between the company and the host Member State.[40]

---

[36] Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* [2008] ECR I-9641, para 110.

[37] Peter Kindler, 'Ende der Diskussion über die so genannte Wegzugsfreiheit' (2009) 4 NZG 130-132, 131.

[38] Stefan Leible and Jochen Hoffmann, '„*Überseering*" und das (vermeintliche) Ende der Sitztheorie' (2002) 48 RIW 925-936, 930.

[39] Dieter Leuering, 'Von Scheinauslandsgesellschaften hin zu „Gesellschaften mit Migrationshintergrund"' [2008] Zeitschrift für Rechtspolitik 73-77, 74-75.

[40] Gerald Spindler, Olaf Berner, 'Der Gläubigerschutz im Gesellschaftsrecht nach Inspire Art' (2004) 50 RIW 7-16, 10.

As we have seen, the primary and secondary EU legal sources do not contain any provision concerning the determination of the law applicable to legal persons, although the case law of the ECJ undoubtedly touches upon the determination of the law applicable to companies. In its Stockholm Programme, the Commission urged – without any further precision – developing common rules determining the law applicable to company matters.[41] In the majority opinion of the Reflection Group on the Future of EU Company Law set up by the Commission, ensuring the transfer of seat of companies does not require the unification of the conflict of laws provisions of the Member States, but the Reflection Group called for a comprehensive and comparative analysis of the advantages and flaws of the real seat theory.[42] However, other members of the Reflection Group found EU-level regulation of the law applicable to companies to be necessary as cross-border operations may affect the law governing companies.[43] Even so, no EU legislative act has been so far adopted, neither on the transfer of seat nor more generally on the determination of the law applicable to legal persons. The single exception is Regulation No 1346/2000/EC on insolvency proceedings (EU Insolvency Regulation). According to the EU Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened *(lex fori concursus).*[44]

2 Selection of the Connecting Factor

The second challenge is the selection of the appropriate connecting factor in the light of above conclusions. The trend in recent codifications points undoubtedly towards a wider acceptance of the incorporation doctrine, even though, based on EU law, Member States are not obliged to apply this principle generally. The majority of the more recent European private international law codifications provide for the incorporation doctrine; the real seat appears at most as a subsidiary connecting factor. This is the case with the Dutch Civil Code[45] and the Czech,[46] Bulgarian[47] and Estonian Private International Law Acts.[48]

Even some Member States, which previously followed the real seat doctrine, turned towards the incorporation doctrine, at least under certain circumstances. In Austria, after the *Centros* judgment, the Austrian Supreme Court, the OGH, declared that in spite of the express provision of the Austrian Private International Law Act laying down the real seat principle, the application

[41] Commission, 'Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen' COM (2009) 262 final, 14.
[42] Report of the Reflection Group on the Future of EU Company Law (Brussels, 5 April 2011), 23-24.
[43] Report of the Reflection Group on the Future of EU Company Law 23.
[44] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 which will be repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19.
[45] Dutch Civil Code art 10:118.
[46] Czech Private International Law Act art 30 (1).
[47] Bulgarian Private International Law Act art 56 (1).
[48] Estonian Private International Law Act art 14.

of the real seat principle is contrary to the freedom of establishment, at least as far as secondary establishment is concerned, and the incorporation theory is to be applied.[49] In Germany, the amendment of the AktG[50] and the GmbHG[51] by the so-called MoMiG enabled AGs and GmbHs to transfer their real seat abroad.[52] This was previously not allowed due to the application of the real seat doctrine in a strict form. Opposite examples may also be found. Thus, the Belgian Private International Law Act of 2004[53] and the Polish Private International Law Act from 2011[54] still preserved the real seat principle. Nevertheless, even these codes lay down that if the law applicable referred to the law according to which the legal person was established, that law is to be applied.[55]

It is worth referring to the work produced by various expert groups. These principally examined the issue of the transfer of seat, but they also addressed the determination of the law governing companies in their proposals. The theses of *Arbeitskreis Europäisches Unternehmensrecht,* concerning a European directive on the transfer of seat, propose in essence that Member State should be free to opt for the incorporation or the real seat doctrine. This means that the transfer of seat must be neutral in terms of conflict of laws.[56] However, the transfer of seat cannot imply the termination of the company in the Member of origin, which follows the real seat theory, and the reestablishment of the company in the host Member State. The German Council on Private International Law *(Deutscher Rat für Internationales Privatrecht)* drew up two proposals: a proposal for an EU regulation and another proposal on the amendment of the EGBGB regarding autonomous German private international law. The law applicable is determined uniformly by the two proposals. Companies are governed by the law of the state in which they were registered.[57] If the company was not or has not yet been registered, the law of that state according to which it was organised is to be applied.[58] If the applicable law cannot be ascertained even in this way then the conflict of laws rules on the law of obligations are to be applied. If a company purports to operate under a different law, a third party acting in good faith can rely on such law.

49 OGH 6Ob123/99b, 15.07.1999.

50 *Aktiengesetz vom 6. September 1965* (BGBl. I S. 1089).

51 *GmbH-Gesetz (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) Gesetz vom 20.04.1892* (RGBl. I S. 477).

52 *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen vom 23. Oktober 2008* (BGBl. I S. 2026).

53 Belgian Private International Law Act art 110.

54 Polish Private International Law Act art 17 (1).

55 Belgian Private International Law Act art 110; Polish Private International Law Act art 17 (2).

56 Arbeitskreis Europäisches Unternehmensrecht: Thesen zum Erlass einer europäischen Sitzverlegungsrichtlinie (2011) 3 NZG 98-99, These 4.

57 *Vorschlag für eine Regelung auf europäischer Ebene art 2 (1); Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10 (2); Hans Jürgen Sonnenberger, Frank Bauer (ed), *Vorschlag der Spezialkommission für die Neugestaltung des Internationalen Gesellschaftsrechts auf europäischer/deutscher Ebene* (Mohr Siebeck 2007, Tübingen).

58 *Vorschlag für eine Regelung auf europäischer Ebene* art 2 (2); V*orschlag für eine autonome deutsche Regelung im EGBGB* art 10 (3).

One of the peculiarities of the Hungarian private international law is that it refers to the 'personal law' of both natural and legal persons, a concept unknown to most private international law codes. Most private international law codes do not use this notion, but determine directly the law governing legal persons with the help of the incorporation doctrine or the real seat theory. In Hungarian private international law, the concept of personal law was used in the literature[59] and István Szászy's Bill applied the concept of 'domestic law' which had a meaning identical to personal law.[60] Moreover, there are some other private international law acts, such as the Austrian code which uses the similar concept of 'personal statute' *(Personalstatut)*.[61] If the new Hungarian code will continue to apply the concept of personal law for natural persons, then it is worth retaining it for legal persons, too.

In Hungarian private international law, the personal law of legal persons has been so far determined through the incorporation doctrine. There is no reason to deviate from this in the future private international law act in the light of the development of EU law and the recent national private international law codifications.

Instead, the question is the selection of the subsidiary connecting factors. In most situations, the governing law may be determined based on the place of registration, irrespective of the location of the actual seat of the legal person. However, there may be instances where no registration took place or the legal person has not yet been registered ('pre-company'). Subsidiary connecting factors are necessary if the place of registration cannot be ascertained.

In determining the connecting factors, it is worth considering two solutions. The first is the determination of the applicable law through connecting factors which correspond to the concepts of Hungarian substantive law. The place of registration could be retained as the main connecting factor. The subsidiary connecting factors in force now could be rephrased to a certain extent in order to ensure consistency with the substantive provisions, in particular with the new Hungarian Civil Code and company registration rules. Thus, it could be considered to replace the seat indicated in the statute *('alapszabályban megjelölt székhely')* with the statutory seat *('létesítő okirat szerinti székhely')*. The place of the central management *('központi ügyvezetés helye')*, which appears as a subsidiary connecting factor, seems to be terminologically inconsistent with the substantive provisions of the Hungarian Civil Code on legal persons and companies and the Company Registration Act, as they do not contain this notion. The place of central management could be replaced by the notion of the place of central administration ('*központi ügyintézés helye*'). It must be noted that the Civil Code refers to the place of central administration concerning companies (and not other legal persons) only, but it is questionable whether there is a more appropriate notion.

The second option is the application of more abstract connecting factors, following the Swiss Private International Law Act or the Proposal of the German Council for Private International Law. Pursuant to the Swiss Private International Law Act, companies are governed

[59] Szászy (n 8) 226-227; Mádl (n 15) 98; Villághy (n 13) 98.
[60] Szászy (n 11) 5, 7. §.
[61] Austrian Act on Private International Law art 10.

by the law of the state, in accordance with the rules under which they were organised if the disclosure and registration requirements of that state had been duly complied with or if they were organised according to the law of that state in the absence of such requirements.[62] If these prerequisites are not complied with by the company then the law of the state where the company is effectively managed is to be applied.[63] As we have seen, according to the Proposal of the German Council for Private International Law, the law of the place of registration governs the legal person. In the absence of registration, the law of that state, according to which the legal person has been organised, is to be applied. This law may be identified relatively easily and can be established in almost all cases. Hence, the application of the abovementioned more abstract connecting factors may facilitate legal practice.

3 Scope of the Applicable Law

The next issue is the determination of the scope of the applicable law. The scope of the law governing legal persons may be determined in various ways in private international law. There are private international laws which do not address this question at all and only limit themselves to determining the governing law.[64] Other private international laws give a longer or shorter list embedded in the text of the private international law act or in a separate list. A further difference between the lists is that some of them are exemplificative in nature and they refer to this, for example, by the words 'in particular'.[65]

The various lists contain, among others, the following issues:

- the legal nature of the legal person;[66]
- legal capacity;[67]
- the competence to perform juridical acts and to act in court;[68]
- the creation of the legal person;[69]

[62] Swiss Private International Law Act art 154 (1).

[63] Swiss Private International Law Act art 154 (2).

[64] Croatian Private International Law Act art 17.

[65] Estonian Private International Law Act art 15; Dutch Civil Code art 10:119; Polish Private International Law Act art 17 (3); Swiss Private International Law Act art 155; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1).

[66] Belgian Private International Law Act art 111 (1) 1); Bulgarian Private International Law Act art 58 1); Estonian Private International Law Act art 15 1); Polish Private International Law Act art 17 (3) 2); Swiss Private International Law Act art 155 a); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).

[67] Belgian Private International Law Act art 111 (1) 4); Dutch Civil Code art 10:119 a); Polish Private International Law Act art 17 (3) 4); Swiss Private International Law Act art 155 c); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).

[68] Dutch Civil Code art 10:119 a); Swiss Private International Law Act art 155 c); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 1).

[69] Belgian Private International Law Act art 111 (1)3); Bulgarian Private International Law Act art 58 1); Estonian Private International Law Act art 15 2); Polish Private International Law Act art 17 (3) 1); Swiss Private International Law Act art 155 b); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a. (1) 2); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2).

- the form of the legal person;[70]
- the name of the legal person;[71]
- the internal relations of the legal person;[72]
- the organisation and organs of the legal person;[73]
- provisions on the capital of the company;[74]
- the legal relations between the members and the legal person;[75]
- the acquisition and termination of membership and the rights and obligations related to them;[76]
- legal relations between the members of the legal person;[77]
- the representation of the legal person;[78]
- the rights and obligations linked to the shares held by the members;[79]
- the liability of the members for the obligations of the legal persons and of the persons entitled to act on behalf of the legal person;[80]
- the liability for the debts of the legal person;[81]
- liability of the directors, the members of the supervisory board and other officers towards the entity;[82]

---

70 Bulgarian Private International Law Act art 58 1).

71 Belgian Private International Law Act art 111 (1) 2); Bulgarian Private International Law Act art 58 2); Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 4); Polish Private International Law Act art 17 (3) 3); Swiss Private International Law Act art 155 d); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 3); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 3).

72 Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 6); Dutch Civil Code art 10:119 b); Swiss Private International Law Act art 155 f).

73 Belgian Private International Law Act Belga art 111 (1) 5); Bulgarian Private International Law Act art 58 4); Estonian Private International Law Act art 15 5); Polish Private International Law Act art 17 (3) 5); Swiss Private International Law Act art 155 e); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 4); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 4).

74 *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 4); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 4).

75 Belgian Private International Law Act art 111 (1) 6); Czech Private International Law Act art 30 (1); Swiss Private International Law Act art 155 f).

76 Belgian Private International Law Act art 111 (1) 7); Bulgarian Private International Law Act art 58 6); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 6); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 6).

77 Belgian Private International Law Act art 111 (1) 6); Czech Private International Law Act art 30 (1).

78 Bulgarian Private International Law Act art 58 5); Estonian Private International Law Act art 15 8); Polish Private International Law Act art 17 (3) 6); Swiss Private International Law Act art 155 i); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 5); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 5).

79 Belgian Private International Law Act art 111 (1) 8).

80 Bulgarian Private International Law Act art 58 7); Czech Private International Law Act art 30 (1); Polish Private International Law Act art 17 (3) 8); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 7); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 7).

81 Belgian Private International Law Act art 111 (1) 10); Estonian Private International Law Act art 15 7); Swiss Private International Law Act art 155 h).

82 Dutch Civil Code art 10:119 d).

- the question of who is liable on the basis of a certain capacity for acts binding the cooperation in addition to the cooperation;[83]
- the legal consequences of the violation of the laws and the statute;[84]
- the liability for the breach of obligations based on company law;[85]
- compliance with accounting duties, including the preparation and examination of annual reports, compliance with disclosure obligations, sanctions for any breach thereof and the related liability;[86]
- merger;[87]
- demerger;[88]
- transformation;[89] and
- termination.[90]

The present Hungarian regulation is tight-lipped as to the scope of the applicable law and refers only to the legal capacity, economic quality and personal rights of the legal person and the legal relations between the members thereof. In my view, it would be advisable to broaden the questions covered by the applicable law and make a list of them. This would facilitate, for practical purposes, distinguishing the questions falling under the scope of application of the personal law of legal persons from other areas of conflict of laws. It should also be indicated that the list is non-exhaustive, as issues may arise which are not contained in the list. In drawing up the list, the solutions existing in other private international law acts could be taken into consideration. In Hungarian court practice, several cases arose which concerned the representation of the legal person, hence legal and organisational representation could be mentioned in the list in order to delimit them from the rules on representation based on power of attorney.

83 Dutch Civil Code art 10:119 e).
84 Belgian Private International Law Act art 111 (1) 9); Bulgarian Private International Law Act art 58 8); Polish Private International Law Act art 17 (3) 9).
85 Swiss Private International Law Act art 155 g); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 8); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 8).
86 *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 9); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 9).
87 Polish Private International Law Act art 17 (3) 1).
88 Polish Private International Law Act art 17 (3) 1).
89 Bulgarian Private International Law Act art 58 9); Polish Private International Law Act art 17 (3) 1); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 2).
90 Belgian Private International Law Act art 111 (1) 3); Bulgarian Private International Law Act art 58 9); Czech Private International Law Act art 30 (1); Estonian Private International Law Act art 15 2); Dutch Civil Code art 10:119 f); Polish Private International Law Act art 17 (3) 1); Swiss Private International Law Act art 155 b); *Vorschlag für eine Regelung auf europäischer Ebene* art 3 (1) 2); *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10a (1) 2).

4 Legal Persons Other than Companies

Legal persons other than companies, such as foundations or associations, are usually treated in the same way as companies. Most of the private international law codes contain rules for legal persons that do not distinguish between companies and other legal persons, while others refer to a specific and broad company (Swiss Private International Law Act)[91] or cooperation (Dutch Code Civil)[92] concept, including legal persons other than companies. In my view, there is no need for adopting special conflict of laws rules for legal persons other than companies. Nevertheless, in addition to the place of incorporation, more abstract connecting factors, such as the place of organisation (as applied in the Swiss Private International Law Act and in the Proposal of the *Deutscher Rat für Internationales Privatrecht*), seem to be more appropriate to adequately cover all kinds of legal persons.

5 Cross-Border Mobility of Legal Persons

From the jurisprudence of the CJEU (*Cartesio* and VALE[93] judgments), it follows that Member States are obliged to ensure the possibility of cross-border conversion for companies, within the meaning of EU law. Cross-border conversion implies that 'a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable' and '…the company is converted into a form of company which is governed by the law of the Member State to which it has moved.'[94] For the other cases of the transfer of seat, in the relation between a company and the host Member State, the CJEU held that if a company transfers its real seat to another Member State, the host Member State has to recognise the legal capacity and standing of the company in accordance with the law of the Member State of incorporation.[95] In the relationship between the home Member State and the company, from the *Cartesio* judgment, it follows that the transfer of seat may be impeded by the Member State of origin if the company wishes to retain the law of that state as its governing law.[96] As discussed above, the provisions of the TFEU and the related case law do not determine the applicable connecting factor. The application of one or the other connecting factor does not determine in itself the possibility of cross-border conversion or other forms of the transfer of seat. The international conversion and other forms of the transfer of seat depend upon the interplay of substantive and conflict of laws provisions.

Some private international law acts or civil codes containing conflict of laws rules, such as the Dutch, Czech, Belgian and Polish private international law provide for the international conversion or other forms of the transfer of seat. Sometimes, private international law acts only

[91] Swiss Private International Law Act art 150 (1).
[92] Dutch Civil Code art 10:117 a).
[93] Case C-378/10 *VALE Építési Kft.* (ECLI:EU:C:2012:440).
[94] *Cartesio*, para 111.
[95] *Überseering*, para 95; Consolidated version of the *Treaty establishing the European Community* [1992] OJ C 224/1.
[96] *Cartesio*, para 110.

require compliance with the provisions of the Member States concerned.[97] More detailed provisions may be found in the Swiss Private International Law Act.[98] Certain private international law acts and the Proposal of the German Council for Private International Law also regulate cross-border mergers[99] and demergers.[100]

In my opinion, there are two ways in front of the Hungarian legislator regarding the international mobility of legal persons. First, the issue of the transfer of seat could be simply dropped from the new law, in the expectation of a future EU legislative act regulating cross-border conversion (transfer of seat). Provisions on cross-border conversion (transfer of seat) could be inserted in the Private International Law Act, later taking the rules of such a future EU legislative act into consideration. However, at the moment it is not visible that such an EU legislative act would be adopted in the near future in the form of the Fourteenth Company Law Directive or as a regulation. The other way is to create rules on cross-border conversion or the other examples of the transfer of seat in the new Hungarian private international law act without waiting for EU legislation. The necessity of this is supported by the cases referred from Hungary to the ECJ and the Hungarian judiciary practice on the transfer of seat.[101] The regulation should be in conformity with the freedom of establishment provisions and the related case law of the ECJ. National legislation has to comply with the provisions on the freedom of establishment and the related judgments of the CJEU.

Some remarks must be made in this respect. The possibility of international conversion and other forms of the transfer of seat does not depend exclusively on conflict of laws rules, but much more on substantive law norms. Consequently, the creation of substantive law rules, which are almost entirely absent at the moment, in Hungarian law would also be necessary.[102] In my view, the regulation of international conversion and the other forms of the transfer of seat primarily requires substantive law regulation. If the new Hungarian private international law act regulated cross-border conversion or any other form of the transfer of seat, the absence of substantive law provisions would lead to uncertainty for business actors.

The same holds for cross-border demergers. Regarding the eventual regulation of cross-border mergers, it must be noted that there is secondary legislation regulating this issue, namely Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, which was implemented in Hungary by Act CXL of 2007.[103]

[97] Czech Private International Law Act art 30 (3); Bulgarian Private International Law Act art 59.

[98] Swiss Private International Law Act arts 161-163.

[99] Swiss Private International Law Act arts 163a-163c; Belgian Private International Law Act art 113; Polish Private International Law Act art 19 (2). *Vorschlag für eine Regelung auf europäischer Ebene* art 5; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10b.

[100] Swiss Private International Law Act arts 163a-163d; *Vorschlag für eine Regelung auf europäischer Ebene* art 6; *Vorschlag für eine autonome deutsche Regelung im EGBGB* art 10c.

[101] See the *Cartesio* and the VALE cases; from the Hungarian judiciary practice see ÍH 2011. 168 *Fővárosi Ítélőtábla* (Budapest-Capital Regional Court of Appeal) 10. Cgf. 44.879/2009/2.

[102] Section 7/B of the Act on company registration procedure refers only to the transfer of the principal place of the activity of the firm.

[103] *2007. évi CXL. törvény a tőkeegyesítő társaságok határokon átnyúló egyesüléséről* (Act CXL of 2007 on the cross-border merger of limited liability companies).

It is important in any case that the future Hungarian private international law act should contain conflict of laws rules, while substantive law provisions should be contained in the relevant pieces of substantive legislation. The separation of the conflict of laws and substantive law aspects of the regulation might be quite difficult at the level of codification.

6 Special Conflict of Laws Rules

The creation of special conflict of law rules for certain specific questions depends partly upon the scope of the applicable law. The broader the scope of the applicable law, the fewer special rules are necessary. Some private international law acts, such as the Swiss[104] and Belgian[105] acts, contain provisions on the insolvency of legal persons. The potential regulation of insolvency matters in a new Hungarian private international law code should cover issues not regulated by the EU Insolvency Regulation.

Special conflict of laws rules may be found in the Dutch Civil Code, for example, on the liability of directors and supervisory board directors of insolvent cooperations.[106] The Swiss Private International Law Act provides for several special connecting factors, among others, on claims related to the public issue of shares[107] or to the violation of the name of the company.[108]

Some private international law acts contain provisions on entities without legal personality. Either the rules applicable to legal persons govern them as well, such as in Polish[109] or Estonian[110] law, or special rules apply to entities without legal personality, such as in Bulgarian law.[111] Nevertheless, the application of any of these solutions usually leads to the same outcome: the law governing legal persons also applies to entities without legal personality.

IV Conclusions

The regulation of the law governing legal persons raises several questions, such as the applicable connecting factor, the scope of the applicable law, the cross-border mobility of legal persons and the necessity of special connecting factors. The Hungarian legislator also faces the same issues in the process of the recodification of Hungarian private international law. The Hungarian legislator also has to take the development of EU law and the recent private international law codifications into account.

[104] Swiss Private International Law Act arts 166-171.
[105] Belgian Private International Act art 119.
[106] Dutch Civil Code art 10:121 (1).
[107] Swiss Private International Law Act art 156.
[108] Swiss Private International Law Act art 157.
[109] Polish Private International Law Act art 21.
[110] Estonian Private International Law Act art 17.
[111] Bulgarian Private International Law Act art 57.

There is no reason to deviate from the incorporation doctrine enshrined in the Decree-Law on private international law in force at the moment. However, the subsidiary connecting factors should be rephrased in order to ensure greater consistency between conflict of laws norms and substantive law provisions. It seems also necessary to broaden the questions falling under the scope of the applicable law. I suggested enumerating those questions in a list. It should be indicated that the list is non-exhaustive, as there might arise problems in the legal practice which do not appear in the list, but they should still be covered by the law governing legal persons. In my view, at the moment it is not advisable to create rules for the cross-border mobility of legal persons in the new Hungarian private international law act. First, the cross-border mobility of legal persons depends on the interplay of the substantive and conflict of laws rules. As substantive law rules are now missing in Hungarian law on the cross-border conversion and the other forms of the transfer of seat, the creation of conflict of laws rules may cause legal uncertainty. Second, a private international law act should determine only the conflict of laws rules regarding cross-border mobility. However, concerning the cross-border mobility of legal persons, separating substantive and conflict of laws rules could be highly difficult. Instead of conflict of laws provisions, the creation of substantive law rules could be considered by the legislator on the cross-border conversion.

In summary, the rules on legal persons in Hungarian private international law do not require comprehensive redrafting; the present norms only require fine-tuning in order to ensure greater regulatory consistency and certainty for the practice.