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**Globalizing Savigny?
The State in Savigny's Private International Law
and the Challenge from Europeanization and Globalization**

I. Introduction *

1) *Überseering and the “Obsolescence of Traditional Private International Law”*

On November 5, 2002, the European Court of Justice rendered its decision in *Überseering*.¹ *Überseering* was a company originally incorporated in the Netherlands, which had later transferred its effective seat of administration to Germany. Under German law, the effective seat determines the law applicable to a company. Thus, *Überseering* was now a German company that was not in compliance with German company law and thus lacked legal personality. Arguably, the company therefore had no locus standi to bring suit before German courts. The Court of Justice held that this violated the Treaty and that Germany was obliged to grant locus standi.²

This was the third time that the Court dealt with the legal personality of companies acting in a state different from that of their incorporation.³ In its *Daily Mail* decision in 1988,⁴ the Court had held that “unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.”⁵ Consequently, it allowed the United Kingdom to condition the newspaper’s change of its corporate seat to the Netherlands on the satisfaction of its tax liability in the U.K. In 1999, the Court rendered its *Centros* decision.⁶ Two Danish citizens, in order to avoid the high registration costs under Danish law, had established a private Limited Company in England, *Centros Ltd* (with only nominal minimum capital which was never paid) and set up a subsidiary in Copenhagen. They were only interested in the subsidiary. *Centros Ltd* itself never became active and had no connection to England and Wales other than the incorporation. Therefore, Denmark wanted to treat the subsidiary as a Danish company, and refused registration unless the fees for Danish companies had been paid. The European Court of Justice ordered the Danish authorities to register the subsidiary, arguing that *Centros Ltd* had been incorporated legally under U.K. law, and the EC Treaty gave companies a right to form branches in other member states. The earlier *Daily Mail* judgment was not mentioned.

* The text is essentially in the form in which it was submitted in the spring of 2003; only some newer references have been added.

1 Judgment of Nov 11, 2002, Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] E.C.R. I-9919.

2 Before the Court of Justice decided *Überseering*, the German Bundesgerichtshof held that foreign companies with an effective seat in Germany had locus standi: Bundesgerichtshof, July 1, 2002, 2002 Neue Juristische Wochenschrift (NJW) 3539 = 23 Praxis des Internationalen Privatrechts (IPRax) 62, note Kindler p. 41; cf. Stefan Leible & Jochen Hoffmann, Vom “Nullum” zur Personengesellschaft – Die Metamorphose der Scheinauslandsgesellschaft im deutschen Recht, 55 Der Betrieb (DB), 2203 (2002).

3 A fourth case is Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, [2003] E.C.R. I-10155.

4 Judgment of Sep 29, 1988, Case C-81/87, *The Queen v. Daily Mail and General Trust plc*, [1988] E.C.R. 5483.

5 *Id.*, at no. 19.

6 Judgment of March 9, 1999, Case C-212/97, *Centros Ltd. V. Ehvers- og Selskabsstyrelsen*, [1999] E.C.R. I-1459.

All three decisions seem to concern an old problem of private international law⁷ – whether the law applicable to a company should be the law of its effective seat (seat principle) or that of its incorporation (incorporation principle).⁸ Indeed, academics in private international law took each of the Court’s decisions as deciding this dispute one way or the other. *Daily Mail* was understood to mean that member states were essentially free to apply one principle or the other:⁹ The United Kingdom applied the incorporation principle, but other states were free to apply the seat principle. This interpretation received a blow by the *Centros* decision, which suddenly seemed to hold that European law required member states to accept the incorporation principle. After all, Denmark was forced to recognize Centros Ltd. as a U.K. company, even though its effective seat was in Denmark. The Court of Justice was heavily criticized because it had not mentioned the *Daily Mail* decision, and had not said directly which of the two private international law principles should now govern. An underlying criticism was that the Court should refrain from interfering with private international law altogether.¹⁰

Perhaps, however, there was no need for the Court of Justice to decide these questions at all, because they did not arise. Axel Flessner argues that both cases were not really private international law cases at all – the first involved international tax law, the second issues of registration.¹¹ This interpretation may look comforting to the discipline of private international law; it may look untouched. On second view, however, it is even more threatening. It means that the Court does not use private international law doctrines at all for questions that are, or were, essentially questions of private international law. If such fundamental issues like a corporation’s personality are now decided under seemingly autonomous principles of EU law, what room remains for private international law at all? Where, and how, is it still relevant?

Indeed, in *Überseering* the German Bundesgerichtshof as the referring court tried to set this straight.¹² The court did not restrain itself to asking whether it had to grant

7 Private International Law, or Conflict of Laws, deals with three kinds of question: First is the question of *jurisdiction*: Which state’s courts are competent to rule on a fact pattern? Second is the question of *choice of law*: Which state’s law is applicable to a fact pattern? Third is the question of *recognition and enforcement* of foreign judgments and other public acts: Under what circumstances can such acts passed by another state be recognized and enforced? All three questions are interrelated, but here the focus shall be only on the second, namely choice of law.

8 On variants of these principles and on the approaches of different legal systems in Europe see Daniel Zimmer, Ein internationales Gesellschaftsrecht für Europa, 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 298–317, 299–306 (2003).

9 Based on no. 23 of the decision, where the court explicitly acknowledges the differences between the legal systems of the member states.

10 For general criticism of the court’s approach to private international law see, e.g., Klaus Schurig, Unilateralistische Tendenzen im europäischen Gesellschaftskollisionsrecht, oder: Umgehung als Rechtsprinzip, in *Liber amicorum Gerhard Kegel*, 199–221 (Munich: Beck, 2002).

11 Axel Flessner, Schiffbruch der Interpreten und Statuten, 8 *Zeitschrift für Europäisches Privatrecht* (ZEuP) 1 (2000); see also Harald Halbhuber, Limited Company statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand (Baden-Baden: Nomos, 2001); Halbhuber, National doctrinal structures and European company law, 38 *Common Market Law Review* (CMLR) 1385–1419 (2001), with an analysis of German comments on *Daily Mail* and *Centros*; against Flessner, see Schurig (supra n. 10) 201 f.: at least registration is an issue of private international law.

12 Bundesgerichtshof, March 3, 2000, 53 DB 114 (2000); cf. Wulf-Henning Roth, Die Sitzverlegung vor dem EuGH, 21 *Zeitschrift für Wirtschaftsrecht* (ZIP) 1597 (2005).

Überseering locus standi, but also, more generally, whether European law requires “that a company’s legal capacity and capacity to be a party to legal proceedings [locus standi] is to be determined according to the law of the State where the company is incorporated”.¹³ The Court of Justice decided that this is indeed what European law requires¹⁴ and thereby came as close to determining the private international law question as conceivable.¹⁵ This decision could raise mixed feelings in the private international law community. On the one hand, it makes official that member states have lost the freedom to determine the private international law principles autonomously – a blow to a discipline that sees conflict of laws as a matter for the individual states. On the other hand, the court seems at least to acknowledge that it is dealing with private international law matters, and therefore at least decides within a familiar doctrinal framework.

Actually, things may not be as easy. Even after *Überseering*, Christian Joerges speaks of the “obsolescence of private international law”.¹⁶ Arguably, the seat principle would still be reconcilable with the decision; it would only be restricted by principles of European law.¹⁷ The problem is that the Court of Justice does not decide questions of private international law as such.¹⁸ Its doctrinal framework, with free movements on the one hand, and restrictions justified by certain particular concerns of the member states on the other, does not translate easily into a doctrine of private international law (although attempts have been made).¹⁹ Even if such a translation is possible, however, it remains necessarily a translation – the decision-making process itself is not one of private international law. That discipline must apparently remain in a secondary rank; it can, at best, re-conceptualize what is decided by other disciplines.

2) Classical Private International Law and Globalization

This development is surprising. Private International Law, one would imagine, should be better prepared for the challenges posed by Europeanization and globalization than most any other legal discipline. Laws with impacts beyond territorial borders, while new

13 *Überseering* (supra n. 1) no. 21.

14 *Überseering* (supra n. 1) no. 93, 95.

15 Harald Kallmeyer, Tragweite des Überseeringurteils des EuGH vom 05.11.2002 zur grenzüberschreitenden Sitzverlegung, 55 DB 2521–2522 (2002); Helmut Heiss, “Überseering”: Klarschiff im internationalen Gesellschaftsrecht?, 44 Zeitschrift für Rechtsvergleichung (ZfRV) 90–97, 93–97 (2003).

16 Christian Joerges, On the Legitimacy of Europeanising Europe’s Private Law, 10 (EUI Working Paper No. 2003/3).

17 Stefan Leible & Jochen Hoffmann, “Überseering” und das (vermeintliche) Ende der Sitztheorie, 48 Recht der Internationalen Wirtschaft (RIW) 925–936, 930 ff. (2002); Wulf-Henning Roth, Internationales Gesellschaftsrecht nach Überseering, 23 IPRax 117–127, 126 f. (2003).

18 Schurig (supra n. 11) 200.

19 See, e. g., Jürgen Basedow, Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis, 59 RabelsZ 1–55 (1995); Peter Mankowski, Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie, 100 Zeitschrift für Vergleichende Rechtswissenschaft (ZVgIRWiss) 137–181 (2001); Stefan Grundmann, Das Internationale Privatrecht der e-commerce-Richtlinie – was ist kategorial anders im Kollisionsrecht des Binnenmarkts und warum?, 67 RabelsZ 246–297 (2003); for an overview, see Ralf Michaels, EU Law as Private International Law? Reconceptualizing the Country-of-Origin Principle as Vested-Rights Theory, 2 Journal of Private International Law 147–194, 159–163 (2006) with further references.

for other legal disciplines, have almost by definition always constituted its main object of studies. After all, a “conflict of laws” (the discipline’s other name)²⁰ is only possible if more than one legal regulation is, on its face, applicable to a certain fact pattern.

Likewise, the discipline both knew of and dealt with the appearance of “the private” in the international sphere long before this became an issue of globalization discourse. This is evidenced in the discipline’s other name, Private International Law, coined already in the 19th century by Joseph Story.²¹ Story’s ideal of a largely apolitical common approach to private law questions, mirrored also in his concept of a far-reaching general common law transcending state borders, which he developed in the U.S. Supreme Court decision of *Swift v. Tyson*,²² still shapes thoughts in the field.

This may be the reason why private international law scholars have not, by and large, seen the need to adapt the field to the new paradigms of globalization.²³ In this respect, the field differs remarkably from others. For example, in the field of human rights, philosophical ideas of universal vs. local values, the interrelatedness of the state’s relation to its citizens on the one hand and to humanity as a whole on the other, now shape much of the legal discussion. Likewise, intellectual property law is now changing its outlook and structure, embracing supranational regulations like the TRIPS agreement, transnational concepts for transactions outside the scope of such supranational solutions,²⁴ and also solutions to insulate local structures of innovation and cultural production from the threat of hegemonic commercialization.

20 See infra n. 21.

21 Joseph Story, *Conflict of Laws* § 9, p. 13 (3rd ed., Boston: Little & Brown, and London: Maxwell & Son, 1846) (The first edition dates from 1834). For Story’s influence on Savigny (and thereby on European conflicts thinking) see Gerhard Kegel, *Wohnsitz und Belegenheit bei Story und Savigny*, 52 *RabelsZ* 431 (1988); see also Gerhard Kegel, *Story and Savigny*, 37 *Am. J. Comp. L.* 39–66 (1989). Ironically (or perhaps tellingly), while the name “private international law” was imported to Europe through Foelix and Schaeffner and became dominant (*Internationales Privatrecht*, *Diritto internazionale privato*, *droit international privé*, *derecho internacional privado*), in the common law world and most notably in the United States the name is still usually “conflict of laws”. See Zitelmann, *Der Name IPR*, in 27 *Zeitschrift für internationales Recht* 177–196 (1918).

22 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842). This decision was overruled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) (arguing, amongst others, that no law exists without some definite state authority behind it).

23 Some exceptions: Peter Behrens, *Die Bedeutung des Kollisionsrechts für die “Globalisierung” der Wirtschaft*, in: *Aufbruch nach Europa*, (J. Basedow et al. eds., Tübingen: Mohr Siebeck, 2001); Pedro de Miguel Asensio, *El Derecho internacional privado ante la globalización*, I *Anuario Español de Derecho Internacional Privado* 37–87 (2001); J.C. González, *Globalización y Derecho internacional privado* (Murcia, 2002). Admittedly, there is more readiness to accept Europeanization of the field. See, most recently, M. Wilderspin & X. Lewis, *Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres*, 91 *Revue critique de droit international privé* 1–37, 289–313 (2002). Here, a connection between Europeanization and globalization is not usually established, however, whereas many of the arguments in this paper should be relevant for globalization as well. See also Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?*, 69 *RabelsZ* 525–544 (2005).

24 See most recently the contributions to the Conference on “International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime”, Duke University School of Law, April 3–5, 2003, <http://www.law.duke.edu/trips/description.html>, now published as *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Keith E. Maskus & Jerome H. Reichman eds., Cambridge Univ. Press 2005).

Few such developments can be seen in the conflict of laws.²⁵ Sure, many monographs and articles in the field now invoke, in their introductions, either globalization explicitly, or some equally vague concepts like “a world growing ever closer together”, or a “growing number of international transactions and situations”. From this, their authors draw only the conclusion that conflict of laws is becoming more important, not that it must change its structure to account for these developments. Yet the reality looks different. Conflict of laws, as a discipline, seems to become less and less important. In the European Union, we see developments towards a Europeanization of conflict of laws.²⁶ Yet this development should not conceal the fact that a large part of conflict of laws has already become Europeanized: a substantive part of the case-law rendered by the Court of Justice in the area of the freedoms concerns cases that traditionally would have been conflict of laws cases. On a global level, various international regimes compete with national legal orders, and amongst each other.²⁷ Even in Europe, questions of both adjudicatory jurisdiction and applicable law are often determined rather through the interpretation of statutes and the determination of their (ominous) “extraterritorial applicability” than through classical conflict of laws methods.²⁸ “Classical” scholars of private international law have surprisingly little to say within these developments; instead, they often propose legal unification to overcome conflicts,²⁹ and to restrict conflict of laws, as a “second best”, to areas where such unification seems impossible.³⁰

The discipline’s faith in a universal law of mankind,³¹ as well as the tendency to try and avoid clashes of policy, are not accidental. Both are elements stemming from the birth of classical private international law, as developed in the 19th century by Savigny.³²

- 25 Klaus Günther & Shalini Randeria, *Recht, Kultur und Gesellschaft im Prozeß der Globalisierung*, 21 f. (Bad Homburg: Werner Reimers Stiftung, 2001).
- 26 See, most recently, Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2002: Zur Wiederkehr des Internationalen Privatrechts*, 22 IPRax 461–471 (2002); K. Boele-Woelki & R.H. van Ooik, *De ingrijpende communautarisering van het internationale privaatrecht, 2002 Sociaal-economische wetgeving (SEW) 394–407* (2002), *The Communitarization of Private International Law*, 4 Yearbook of Private International Law 1–36 (2002, published 2003).
- 27 On the conflict between such regimes see Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, 2003).
- 28 See Ralf Michaels & Hans-Georg Kamann, *Grundlagen eines allgemeinen gemeinschaftlichen Richtlinienkollisionsrechts – “Amerikanisierung” des Gemeinschafts-IPR?*, 12 *Europäisches Wirtschafts- und Sozialrecht (EWS)* 301–311, 311 (2001).
- 29 Ole Lando, *The Eternal Crisis*, in *Festschrift für Ulrich Drobnig*, 361–379 (Tübingen: Mohr, 1998); see also Friedrich K. Juenger, *The Problem with Private International Law*, in *Private Law in the International Arena – Liber amicorum Kurt Siehr*, 289–309 (Jürgen Basedow et al. eds., The Hague: Asser, 2000).
- 30 See my review of *I Yearbook of Private International Law* (Šarčević & Volken, eds., 1999), 48 *Netherlands International Law Review (Neth. Int’l L. Rev.)* 108–112, 112 (2001).
- 31 For tendencies of private international law towards universalization see Bernard Audit, *Le droit international privé en quête d’universalité – Cours général de droit international privé*, 305 *Recueil des cours de l’Académie de La Haye* 9–487 (2001, published 2003). The hope for legal unity still determines traditional comparative law, the sister discipline of private international law. See Ralf Michaels, *Im Westen nichts Neues?*, 66 *RebelsZ* 97–115, 101, 108 f. (1998) with further references.
- 32 Friedrich Carl von Savigny, 8 *System des heutigen Römischen Rechts* (1849), hereinafter VIII *System*. English quotations are from the translation by William Guthrie, published as “*A Treatise on the Conflict of Laws*” (Edinburgh, 1880).

Savigny's conception of conflict of laws, after a crisis in the 1960s and 1970s,³³ has returned to being the paradigm of conflict of laws thinking, at least in Europe.³⁴ Its neutrality with regard to different legal systems, its assumption of a private law relatively free of state intervention, seem ideal for a neo-liberal globalization. Furthermore, many deem the "classical" Savignyan system sufficiently flexible to account for new developments³⁵ and see no need for another conflicts revolution.

3) *The State as Lens*

This hope may be in vain for the following reason. If classical private international law rests on a state paradigm, and if the role of the state in globalization is no longer the same as it was in the 19th (and most of the 20th) century, then the field has lost much of its foundation. This can only become visible once we make the state the lens through which to analyze both classical private international law and modern developments. This seems justified, at least from the viewpoint of globalization. After all, the changing situation of the state is one important, perhaps the decisive, aspect of globalization.³⁶ Whether indeed it loses in importance, whether it gains, or whether it just undergoes a transmutation – almost everyone agrees that the state's position in the world is now different from its position in the 19th century. This should have an impact on private international law, if it is connected to the state.³⁷

This paper cannot show that (classical) private international law is inadequate for globalization. At best, it can show a much more limited claim to be true or at least probable: that the conception of private international law developed by Savigny in the 19th century does not hold out to the challenges of globalization. This is a much more modest argument, but I hope not an irrelevant one. After all, private international law, at least in continental Europe, is still based to a large degree on ideas of Savigny. Furthermore, while

33 Gerhard Kegel, *The 'Crisis' of Conflict of Laws*, 112 *Recueil des Cours* 91–268 (1964–II); see already Heinrich Kronstein, *Crisis of "Conflict of Laws"*, 37 *Geo. L. J.* 483 (1949).

34 Daniel Zimmer, *Savigny und das Internationale Privatrecht unserer Zeit*, in *Festschrift für Fritz Sturm zum siebzigsten Geburtstag*, 1709 (1999); see also Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 *Virginia Journal of International Law* 571–605 (1999); Paul Volken, *How Common are the General Principles of Private International Law? America and Europe Compared*, in 1 *Yearbook of Private International Law* 85–102 (1999); Tito Ballarino & Benedetta Ubertaini, *On Avello and Other Judgements: A New Point of Departure in the Conflict of Laws?*, 6 *Yearbook of Private International Law* 85, 124–129 (2004).

35 See, e.g., Jan Kropholler, *Internationales Privatrecht*, 15 (4th ed., 2001). An early response to the American conflicts revolution, arguing that evolution of the classical system provides similarly adequate result, is Bernard Audit, *A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles*, 27 *Am. J. Comp. L.* 589–613 (1979). For the most comprehensive adaptation of Savigny's theories, see Klaus Schurig, *Kollisionsnorm und Sachrecht* (1980).

36 Saskia Sassen, *Losing Control?* (1996).

37 This connection is seldom thematized. But see Eugen Ehrlich, *Internationales Privatrecht*, 126 *Deutsche Rundschau* 419–432, 425 (1906); Arthur T. von Mehren, *The Significance of the State for Choice of Law*, in *Festschrift für Konrad Zweigert zum 70. Geburtstag*, 287–306 (H. Bernstein et al., eds., 1981); see also Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* (8th ed., Munich: Beck), 7–22 (2000). See now Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *Wayne Law Review* 1209–1259 (2005).

there are several studies on Savigny's conception of private international law,³⁸ the role of the state in it has not yet been analyzed with regard to globalization.

One may argue that today's private international law looks very different from that of Savigny. This is certainly the case. My claim is only that certain essential elements still exist more or less in the way that they underlie Savigny's conception, and that these elements are connected to the State and become problematic in globalization. Further developments within the theory are then not decisive for the argument (although this can, of course, only be assumed here). Because the conception is established in the 19th century, it is there that we have to look for the paradigms that still, if secretly, shape the discipline.

Another possible criticism is that even in the 19th century Savigny is not the only important figure in private international law, that at least two other writers must be mentioned: Joseph Story and Pasquale Stanislao Mancini.³⁹ Again, the criticism would be valid. Yet it may be justified to focus only on Savigny, at least for now. Both for Story's and Mancini's conceptions, the role of the state is evident. Story bases his private international law on comity between states,⁴⁰ Mancini bases his on nationality and sovereignty,⁴¹ both see the discipline as part of international law. The role of the state in Savigny's conception is much less obvious. If it can be shown that even for Savigny the state is not only relevant but predominant, we can be relatively sure that the state permeates private international law thinking in the 19th century altogether. With these caveats, the analysis can begin.

II. The State in Savigny's Private Interational Law

The State has found various different forms in history,⁴² and these various forms have been relevant for conceptions of the conflict of laws in different times. The nation state is relatively recent and may be of fleeting importance.⁴³ When we look at Savigny's conception of the conflict of laws, we must be aware that he writes before the advent in Germany, and as an opponent of, the modern "nation state".

38 Most recently, Jean-Louis Halpérin, *Entre nationalisme juridique et communauté de droit*, 47–66 (Paris, 1999); Ulrike Seif, *Savigny und das Internationale Privatrecht des 19. Jahrhunderts*, 65 *RabelsZ* 492–512 (2001). Earlier studies include Max Gutzwiller, *Der Einfluß Savignys auf die Entwicklung des Internationalprivatrechts* (Fribourg 1923); Fritz Sturm, *Savigny und das internationale Privatrecht seiner Zeit*, 8 *Ius commune* 92–109 (1979); Sakurada, *Wirkungsbereich und Funktion des Kollisionsrechts – Einige Gedanken über Savignys IPR*, in: *Internationales Privatrecht, internationales Wirtschaftsrecht*, 127–144 (Holl & Klinken eds., 1985).

39 Max Gutzwiller, *Internationalprivatrecht: Die drei Großen des 19. Jahrhunderts*, in: *Festschrift für Frank Vischer zum 60. Geburtstag*, 131–140 (Peter Böckli et al. eds., Zurich: Schulthess, 1983).

40 Story (supra n. 21) §§ 33–38, pp. 43–49.

41 Pasquale Stanislao Mancini, *Della nazionalità come fondamento del diritto delle genti* (E. Jayme, ed., Torino: Giappichelli, 1994); Mancini, *De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles*, 1 *Journal du droit international privé* (Clunet) 221 (1874); see Halpérin (supra n. 38) 67–85.

42 See Martin van Creveld, *The Rise and Decline of the State* (1999).

43 Michael Stolleis, *Was kommt nach dem souveränen Nationalstaat? Und was kann die Rechtsgeschichte dazu sagen?*, in *European and International Regulation after the Nation State. Different Scopes and Multiple Levels* 17–30 (Adrienne Héritier, Michael Stolleis & Fritz W. Scharpf eds., 2004); Jost Delbrück, *Das Staatsbild im Zeitalter wirtschaftsrechtlicher Globalisierung* (2002).

Nevertheless it should be safe to start with the classical definition of the state rendered by the German tradition of “Allgemeine Staatslehre”, as developed by Georg Jellinek:⁴⁴ The state is the organisation of sedentary people which has original sovereign power.⁴⁵ Here, the state is defined by three elements: a territory, a population, and state power which I will here translate as (internal) sovereignty.⁴⁶ What remains to be shown is that both the state in general and all three of its elements can be found in, and influence, Savigny’s private international law.

1) *The Role of the State for Private Law*

Fleeting knowledge of Savigny and his theory of law as born from the people’s spirit (*Volksgeist*) might lead one to believe that for him law, at least private law, exists outside the state. Savigny would then be the perfect idol for a “global law without a state”, as is proposed for globalization.⁴⁷ It is well known that Savigny is an opponent of codification,⁴⁸ and that, although he approves of the primacy of legislation over customary and scientific law,⁴⁹ he does not think highly of state legislation in the area of private law in general. Yet it would be a fundamental misunderstanding to think that Savigny’s conception of (private) law was independent of the state.⁵⁰ Granted, Savigny argues that law emanates from the people, so neither state nor jurists seem necessary. Nevertheless, there are two important connections between state and private law in Savigny’s thinking.

The first one may appear obvious: the state enforces the law, through civil procedure and criminal law, including criminal procedure. Savigny calls this the “first and irrefutable task of the state, to make the idea of law govern in the visible world”.⁵¹ Yet these areas of the law are public law (*öffentliches Recht*) and thus distinct from private law. Savigny’s private law exists independent of its enforcement in the courts, and is therefore not, as it often is in the common law world, part of civil procedure.

- 44 Georg Jellinek, *Allgemeine Staatslehre* 394–434. (3th ed., Berlin: Springer, 1914); see most recently Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (2000).
- 45 “Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit sesshafter Menschen”. Jellinek (supra n. 44) p. 180 f.
- 46 *Staatsgebiet, Staatsvolk, Staatsgewalt*. See, e. g., Josef Isensee, *Staat und Verfassung*, in: I *Handbuch des Staatsrechts*, § 13, no. 28 ff. (Josef Isensee & Paul Kirchhof eds., Heidelberg: C. F. Müller 1987). Sovereignty is one important part of state power for Jellinek: Jellinek (supra n. 44), 435–489.
- 47 *Global Law Without a State* (Gunther Teubner ed., Aldershot et al., 1997).
- 48 See his classical work “Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (1814, reprint in Thibaut and Savigny – Ihre programmatischen Schriften, 95–192 (H. Hattenhauer, ed., 1973); English translation: *The vocation of our age for Legislation and Jurisprudence*, translated from the German of Frederick Charles von Savigny by Abraham Hayward, 2nd ed., London: Littlewood & Co., 1831); see also *Politik und neuere Legislationen – Materialien zum “Geist der Gesetzgebung”* (H. Akamatsu & J. Rückert, eds., 2000).
- 49 See Savigny, *I System des heutigen Römischen Rechts* (1840), § 13 (pp. 38–44) (hereafter I System).
- 50 As is apparently assumed by Christian Joerges, *Zum Funktionswandel des Kollisionsrechts*, 6 (1971); Seif (supra n. 38) 501: law as organic expression of the people, not part of the state order (“organische Lebensäußerung des Volkes und nicht Bestandteil der staatlichen Ordnung”); already Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*, 215 ff. (Frankfurt/M. & Berlin, 1965). For Savigny, this antagonism of people and state does not exist, because his conception of the state is different.
- 51 Savigny, I System § 9, pp. 25–27; Dieter Strauch, *Recht, Gesetz und Staat bei Friedrich Carl von Savigny*, 100 (2nd ed., Bonn 1963).

This connection between state and private law becomes relevant, however, in a more general sense, and this is the second connection. Savigny does not distinguish between state as government and as people, as Anglo-American theories would do. Quite to the contrary, he argues explicitly that every people appears as state.⁵² Consequently, a state of nature – where there is private law without a state – is inconceivable,⁵³ and “private legislation”⁵⁴ (or even private codification⁵⁵), in particular private contracts, do not become law⁵⁶ (unlike the famous Art. 1134 of the French Code Civil⁵⁷). Put simply, just as the people only attain reality through the state, the people’s (private) law becomes law only through the state as well.⁵⁸ Savigny’s political conservatism prevents him from embracing ideas of a quasi-spontaneous privately formed law.

Thus, private law is always state law. However, Savigny’s state is not a government separate from the people, with discretion to legislate as the ruler pleases. Instead, because Savigny sees the state as the organizing form of the people, consequently legislation emanates from, and therefore reflects, both customary and scientific law. What Savigny rejects is not the idea of private law as state law, but of private law based on a ruler’s discretion, on politics.⁵⁹ Politics can be left to public law – an area of the law that Savigny distinguishes sharply from private law. Public law is political (and therefore unscientific and comparably uninteresting from a scientific point of view),⁶⁰ private law is scientific and in this sense apolitical, pure.⁶¹

- 52 Savigny, I System § 9, p. 23: “Vielmehr wird jedes Volk, sobald es als solches erscheint, zugleich als Staat erscheinen, wie auch dieser gestaltet seyn möge.”, § 10, p. 29: “müssen wir wiederholt behaupten, daß der Staat ursprünglich und naturgemäß in einem Volk, durch das Volk, und für das Volk entsteht.” (emphases in original). See already Savigny, *Juristische Methodenlehre – nach der Ausarbeitung des Jakob Grimm*, 14 (Wesenberg, ed., 1951); cf. Strauch (supra n. 51) 20–22, 98.
- 53 Okko Behrends, *Geschichte, Politik und Jurisprudenz in F. C. v. Savignys System des heutigen römischen Rechts, in Römisches Recht in der europäischen Tradition – Symposium aus Anlaß des 75. Geburtstages von Franz Wieacker*, 257–321, 266 ff. (Behrends et al. eds., Ebelsbach: Gremer, 1985).
- 54 Ferdinand Kirchhof, *Private Rechtssetzung* (Berlin: Duncker & Humblot, 1987); *Global Law Without a State* (supra n. 47).
- 55 Catherine Kessedjian, *La codification privée*, in *E Pluribus Unum – Liber amicorum Georges A. L. Droz*, 135–149 (1996); Ralf Michaels, *Privatautonomie und Privatkodifikation*, 62 *RabelsZ* 580–626 (1998).
- 56 Savigny, I System § 6, p. 12. For the question of contract as a source of law in Roman law see Zoltán Végh, *Ex pacto ius – Studien zum Vertrag als Rechtsquelle bei den Rhetoren*, 110 *Zeitschrift für Rechtsgeschichte, Romanistische Abteilung (SavZ/Rom)*, 184–295 (1993). Savigny was also opposed to social contract theories of the state, see Savigny, I System § 10, p. 29.
- 57 “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faits.”
- 58 Savigny, I System § 9.
- 59 Savigny, *Vom Beruf* (supra n. 48) 16 (Thibaut und Savigny, 106); Savigny, *Über den Zweck dieser Zeitschrift [Zeitschrift für geschichtliche Rechtswissenschaft]*; in Thibaut und Savigny (supra n. 48) 261–268, 264.
- 60 See Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*, 397–399 (Ebelsbach: Verlag Rolf Gremer 1984); Olivier Beaud, *Savigny et le droit public. Plaidoyer pour une lecture politique de l’œuvre de Savigny*, in *Recht zwischen Natur und Geschichte*, 193–205 (*Ius Commune Sonderheft* 100, Kervégan & Mohnhaupt eds., 1997). For connections between the historical school and public law, see Michael Stolleis, *Die historische Schule und das öffentliche Recht*, in *Die Bedeutung der Wörter – Studien zur europäischen Rechtsgeschichte, Festschrift für Sten Gagnér*, 495–508 (Stolleis ed., 1991). See also Claudio Cesa, *Sulle idee politiche della scuola storica*, 16 *Annali della Scuola Normale Superiore di Pisa: Classe di Lettere e Filosofia*, 83–106 (1986).
- 61 See Joachim Rückert, *The Unrecognized Legacy: Savigny’s Influence on German Jurisprudence after 1900*, 37 *Am. J. Comp. L.* 121–137, 136 (1989); Rückert, *Savignys Konzeption von Jurisprudenz und*

Thus we find that the state plays a central role for Savigny's conception of all law, including private law. This central role is quintessential for the development of classical private international law as well. By transcending the distinction between people and state,⁶² Savigny makes it possible to think of private law as the emanation of the people's spirit, and still conceptualize private international law as a system of conflicts between state laws. On the one hand, the state enforces laws (domestic or foreign) with its institutions, namely the judge. On the other side of the equation, the sovereign state also defines, and limits, the "law" to be chosen by choice of law, the applicable law. The classical choice-of-law process always directs the state judge to apply state law.⁶³ Thus, the state is present both as enforcer, and as creator of enforceable law, as subject and object of the choice-of-law process.

2) *Sovereignty*

Thus, the state is indeed central to Savigny's private international law. How do Jellinek's three elements⁶⁴ fare? The first element of interest is sovereignty. Sovereignty is, of course, quintessential for theories of private international law as part of international law. Thus, before Savigny, Joseph Story devotes passages of his treatise to comity as a way to overcome concerns of sovereignty. After Savigny, Mancini sees sovereignty as one building block of private international law. Yet both consider private international law as international law, so the importance of sovereignty is not surprising. How does sovereignty figure in Savigny's concept of private international law? Is not sovereignty reserved to questions of public law (and politics)?

Generally, the question appears in private international law as perhaps its primordial problem: Why should a judge ever apply foreign law? Why should he, if his own law and foreign law provide different rules for the situation at hand, prefer the foreign law to his own? From a practical point of view, there may be several reasons – predictability and uniformity of results, party expectations, all these are considerations favoring such application. Also, if a legislator directs the judge to apply foreign law, positive law solves the question.⁶⁵ Yet legislation is rare at Savigny's time (and still incomplete today). Moreover, this positivistic recourse to the legislature does not answer the prior philosophical/ political problem involved in submitting to foreign law, both as a question outside legislation, and as a question for the legislator.

At least three ideas have been conceived to justify such a submission.⁶⁶ First, one might want to circumvent the problem by arguing that the judge does not really apply foreign law

Recht, ihre Folgen und ihre Bedeutung bis heute, 61 *Tijdschrift voor rechtsgeschiedenis* 65–95, 82 f. (1993).

62 For this aspect see particularly Rückert (supra n. 60) 312–328.

63 Gerhard Kegel & Klaus Schurig (supra n. 37) 16; Rest. (2d) Conflict of Laws § 1 (1971); Michaels (supra n. 37) 1228–1231.

64 Supra n. 44.

65 Savigny, VIII System 26, 130.

66 The third solution is the fiction that the judge applies a new ad hoc rule of his own law, modeled after that of the foreign legal system. This solution, disregarded by Savigny, has been favored both in the United States as "local law theory", and in Italy as "incorporation theory". For the U.S. see Guinness

at all (and therefore does not submit to the foreign sovereign). This solution materializes in the 19th century theory of vested rights (“wohlerworbene Rechte”,⁶⁷ “droits acquis”⁶⁸). As Dicey, one of its most important later propagators, writes: “[T]he courts, e. g. of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws.”⁶⁹ The theory gains even more popularity in the United States, where it enters into the Restatement through its propagator Beale⁷⁰ – before being debunked by legal realism.⁷¹ In Europe, this debunking has already taken place when Savigny writes his 1849 treatise on private international law. In 1841/42, Carl Georg von Wächter has rejected the theory on two grounds. First it is circular: the judge cannot determine whether a right has been acquired under a foreign law without applying that foreign law; yet whether that law is applicable is exactly what the process should establish. Second, the argument is inconclusive: only the state that has granted a right can be held obliged to enforce it; that state cannot impose an obligation on other states to enforce rights “vested” under its law.⁷² Savigny approves.⁷³

The second theory to avoid a clash between sovereigns is the theory of comitas (Voet, Huber), comity (Dicey, Story), or courtoisie (Foelix, Vareilles-Sommieres)⁷⁴. Under this theory, sovereigns enforce each other’s laws on the basis of courtesy. This is less than an obligation (thus there is no submission), but more than mere discretion,⁷⁵ a very vague concept somewhere between law and politics / international relations. The problem with the concept is, of course, that it only explains why, in certain situations, sovereigns may

v. Miller, 291 Fed. 769 (S.D.N.Y. 1923), aff’d, 299 Fed. 538 (2d Cir. 1924), aff’d sub nom. Hicks v. Guinness, 269 U.S. 71 (1925) per J. Hand; Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 29 (Cambridge, Mass.: Harvard Univ. Press 1942); cf. David F. Cavers, *The Two “Local Law” Theories*, 63 Harv. L. Rev. 822–832 (1950), reprinted in Cavers, *The Choice-of-Law Process*, 45–55 (1985). For Italy see Bernardini, *Produzione di norme giuridiche mediante rinvio* (Milan, 1966).

- 67 Horst Müller, *Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht* (Hamburg, 1935); Max Keller & Kurt Siehr, *Allgemeine Lehren des internationalen Privatrechts* (Zurich: Schulthess, 1986), 418–426; for criticism see Jan Kropholler, *Internationales Privatrecht*, § 21.1, pp. 141–144 (4th ed., 2001).
- 68 Antoine Pillet, *La théorie générale des droits acquis*, 8 *Recueil des Cours* 485–538 (1925–III).
- 69 Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, 11 (2nd ed. 1908).
- 70 Restatement, *Conflict of Laws* (1934); Joseph Beale, *Treatise on the Conflict of Laws* (1935); see also *Soater v. Mexican National Railroad Co.*, 194 U.S. 120, 126 (1904) per J. Holmes.
- 71 For an attempted revival, see Perry Dane, *Vested Rights, “Vestedness”, and Choice of Law*, 96 *Yale L. J.* 1191–1275 (1987) with further references.
- 72 Carl Georg von Wächter, *Ueber die Collision der Privatrechtsgesetze verschiedener Staaten* (Fortsetzung), 25 *Archiv für die civilistische Praxis (AcP)* 1–9 (1842). On Wächter, see Kurt H. Nadelmann, *Wächter’s Essay on the Collision of Private Laws of Different States*, 13 *Am. J. Comp. L.* 414–428 (1964); Nikolaus Sandmann, *Grundlagen und Einfluss der internationalprivatrechtlichen Lehre Carl Georg von Wächters (1797–1880)* (Diss. Münster, 1979); see also Paul Volken, *Wenn Wächter mit Story*, in *Private Law in the International Arena* (supra n. 29) 815–828.
- 73 Savigny, *I System* § 361, p. 132.
- 74 For actual relevance see Lawrence Collins, *Comity in Modern Private International Law*, in: *Reform and Development of Private International Law – Essays in Honour of Sir Peter North* 89–110 (James Fawcett ed., Oxford: Oxford Univ. Press, 2002).
- 75 But see Alan Watson, *Joseph Story and the Comity of Errors* (Athens and London: Univ. of Georgia Press, 1992) (arguing that Huber had stated a duty to apply foreign law, and that Story, in invoking a degree of discretion, had misunderstood him).

agree to enforce foreign laws, but does not give any guidelines or principles when this is, or should be, done.

Savigny accepts this concept of comity⁷⁶ but changes it dramatically. On the one hand, he establishes comity as a duty to apply foreign laws.⁷⁷ On the other hand, he denies that any submission of one sovereign to the other is necessary. Indeed, he does not see choice of law as a problem of sovereignty at all.⁷⁸ The reason must be seen in his conception of private law. Differences between the private laws of states are a fact of the European state of things in the 19th century. Yet they are not, in Savigny's mind, based on clashes of politics⁷⁹ or sovereigns, but on an imperfect state of development, and they can be overcome over time. Thus, the conflict of laws is no real conflict for Savigny, because the ground for differences was not different political opinions. By privatizing conflict of laws, Savigny avoids the possibility of a clash.⁸⁰

The reason for the lack of a clash is only partly the apolitical character of private law. Another important factor is Savigny's conviction that all Christian nations (and these are the only ones he is interested in) ultimately share the same underlying values in their private laws.⁸¹ Thus, even if private law is not value-free, a conflict of laws between Christian nations is still not a conflict between different values, because Christianity serves as an overarching framework within which conflicts take place.

This "privatization" of choice of law can also be seen in Savigny's method. Instead of determining the territorial scope of statutes, Savigny seeks for the "seat" of a "legal relation" in order to determine the law applicable to it. This has famously been called a "Copernican Revolution" ("kopernikanische Wende").⁸² Logically, the difference is one of starting point only, not of result: Whether one determines the scope of a statute and then finds which relations fit under it, or whether one starts with the relation and determines the applicable statute, should make no difference in outcome. Savigny was well aware of this himself.⁸³ Yet there is a difference. Partly it is (merely) psychological.⁸⁴ By starting with the legal relation, Savigny is able to assert an argumentative primacy of this relation over the applicable law. It is not the lawmaker who decides what situations he wants to cover, it is the situation which determines the appropriate lawmaker. Starting with the statute and its scope of application has a political, public overtone; starting with the legal relation emphasizes the private, apolitical character of the choice-of-law process. Actually,

76 Savigny, VIII System § 348, p. 28: "freundliche Zulassung".

77 Ibid.

78 Savigny, VIII System § 348, p. 25; see also Seif (supra n. 38) 509.

79 Paul Neuhaus, Savigny und die Rechtsfindung aus der Natur der Sache, 15 *RabelsZ* 364, 376 (1949/50).

80 Savigny's depoliticization of choice of law has been emphasized frequently; see only critically J. E. J. Th. Deelen, *De blinddoek van von Savigny* (Amsterdam, 1966); Hans Ulrich Jessurun d'Oliveira, *De ruine van een paradigma: de konfliktregel* (Deventer, 1976); Joerges (supra n. 50), 9 f.

81 Savigny, VIII System § 346, p. 17. Story had already distinguished Christian from heathen laws: Story (supra n. 21) § 25, p. 36.

82 Neuhaus (supra n. 79) 366 (1949/50).

83 Savigny, I System § 344, pp. 1–3; cf. Schurig (supra n. 35) 115 f.

84 Kegel & Schurig (supra n. 37) 165 f., with a slightly different emphasis.

however, the difference is not only psychological.⁸⁵ By looking at the (potential) scope of application of a statute, it is possible that more than one statute claims applicability – a true conflict in the jargon of governmental interest analysis.⁸⁶ If we start with the legal relation, such a true conflict is impossible: a legal relation has only one seat, and this seat determines the applicable law. Conflicts are made impossible.

Consequently, this apolitical conception of choice of law is appropriate only for private law in a narrow sense. Savigny himself proposes a different treatment for “laws, whose peculiar nature does not admit of so free an application of the community of law obtaining between different states”.⁸⁷ He distinguishes two kinds of such laws: first “laws of a strictly positive, imperative nature”, and second, “legal institutions of a foreign state, of which the existence is not at all recognized in ours, and which, therefore, have no claim to the protection of our courts”.⁸⁸ In modern terminology, these are internationally mandatory rules and the public policy exception. Here, sovereignty does play a role: the legislator’s will is decisive.⁸⁹ Savigny acknowledges a political choice-of-law system with the possibility of clashing sovereignties, and it may be due to the relative brevity of his article devoted to the question that this aspect has become only an exception, an afterthought to classical choice of law.⁹⁰

In one sense, therefore, it Savigny’s concept of private international law may seem less closely linked to state sovereignty – and thus more apt for globalization – than that of other authors. If private law is essentially value-neutral (at least vis-à-vis other Christian states), then there seems to be no need to restrict private international law to state laws, linked with a sovereign. It seems possible to apply non-state laws, chosen according to non-state criteria, as well. Yet such a concept would no longer be in accordance with Savigny’s concept because of his emphasis on a necessary connection between law and state. As a matter of fact, this necessary connection makes the state particularly important for his approach. Others may distinguish between sovereign-related private laws, where conflicts must be solved by comity or some other means, and other private laws, where the state can be left behind. For Savigny, this second category of laws simply does not exist.

3) Territory

The second element of the state – territory – has perhaps become even more important than the first. Savigny is not, of course, the first to introduce territory into private international law. Almost since the birth of the discipline, there has been a growing tension between the older principle of personality and the younger one of territoriality. In the middle

85 See also Paul Heinrich Neuhaus, *Abschied von Savigny?*, 46 *RebelsZ* 1–25, 8 f. (1982).

86 See Eugene F. Scoles, Peter Hay et al., *Conflict of Laws* § 2.9, pp. 25–38 (3rd ed., St. Paul, West, 2000).

87 Savigny, *VIII System* § 349, p. 32.

88 *Id.* at § 349, p. 33.

89 *Id.* at § 349, p. 34 f.

90 In a sense, both the governmental interest analysis in the United States and the “political school” of choice of law in Germany only reverse the rule-exception relation: for them, the political aspect becomes the rule, the apolitical one the exception.

ages, the applicable law was that of the individual's clan, a personal criterion. Territoriality arises, as the factor to determine the applicable law, with the rise of the territorial state. As such, however, it is closely connected to questions of sovereignty – because sovereignty is territorial, so is the scope of jurisdiction, the reach of the sovereign's will.

In the light of this close connection between sovereignty (over territory) and territoriality, it is interesting to note that Savigny, while otherwise rather opposed to sovereignty as basis for private international law, not only maintains, but even enhances the territorial aspect. For him, the conflict of laws is not a conflict of sovereigns over territories, but still a conflict of territorial laws.⁹¹ His relevant criterion to determine the applicable law is the “seat” (“Sitz”),⁹² the “home” (“Heimath”)⁹³ of a legal relation. This is evidently a territorial quality of this relation, making it necessary to place it in a physical, territorial location.

The seat may not be a purely territorial concept,⁹⁴ at least not in a purely factual sense. Savigny is eager to distinguish his approach not only from the theory of vested rights with its territorial idea that rights “vest” in a territory before their bearer travels.⁹⁵ He also criticizes an earlier German author, Wilhelm Peter Schaeffner, although Schaeffner also emphasizes the legal relations as the starting point, trying to determine “where it came into existence”.⁹⁶ The difference is not easy to spot.⁹⁷ In all likelihood, Savigny is critical of Schaeffner's apparent emphasis on a merely factual geographical determination. Apparently, Savigny's conception of “seat” (just as that of *Besitz*, possession),⁹⁸ is not merely factual, but a combination of factual (geographical) and ideal/legal elements.

Nevertheless, as a consequence of the emphasis of the “seat”, Savigny's choice-of-law rules for particular legal relations are entirely territorial in nature. He sees four relevant elements:⁹⁹ domicile, place of a thing, place of an act, place of the court. All four elements are territorial in nature. Consequently, it is not surprising that Savigny's particular choice-of-law rules are territorial as well. Personal status is determined by domicile (§§ 362–365), the same is true for the law of succession (§§ 379–380) and matrimonial questions; here, the husband's domicile is decisive (§ 379–380). The law of things is determined by the location of the things (for movable and immovable property alike) (§§ 366–368). The law of contract depends on a territorial connection as well: the place of performance (§ 370). Discarded is another possible territorial connection, the place of execution; it remains relevant for formal requirements of juridical acts (§ 381).

91 Savigny, VIII System § 346, p. 18, defines the relevant question as: “What *territorial law* is applicable in any given case?” (emphasis in original).

92 VIII System § 360, p. 108; see already § 348, p. 28.

93 Id. at § 360, p. 108, § 361, p. 120.

94 Max Gutzwiller, *Der Einfluß Savignys auf die Entwicklung des Internationalprivatrechts* (1923); Leo Raape & Fritz Sturm, *I Internationales Privatrecht* 410 (Munich: Vahlen, 1977).

95 *Supra*, p. 131.

96 Wilhelm Peter Schaeffner, *Entwicklung des internationalen Privatrechts*, 40 (1841). On Schaeffner see Stefan Wagner, *Wilhelm Peter Schaeffner*, 17 *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 73–76 (1997).

97 Kegel (*supra* n. 21) 61 is “taken aback” by Savigny's criticism of Schaeffner.

98 Savignv, *Das Recht des Besitzes. Eine civilistische Abhandlung* 22 (Gießen: Heyer 1803).

99 Savigny, VIII System, § 361, p. 120 f.

Most of these results are not new compared to those of older theories.¹⁰⁰ Savigny emphasizes territory over personality more than others before him, but he remains within the old territoriality / personality dichotomy. Nevertheless, the change he brings about in the starting point of the analysis – the legal relation – places these traditional results on a whole new basis. Under the old statute theory, the territoriality principle has been a direct function of the territorial boundaries of sovereignty. The sovereign power extended only to the state's boundaries; hence the state's laws have a territorially limited scope of application. Savigny's conception of legal relations, because it does not rely on the basis of such power, could, in theory, allow for non-territorial factors to determine the applicable law as well – provided that law could be thought as non-territorial. Yet ultimately it appears that Savigny uses territorial factors because law is still territorial for him. The law's territoriality comes not from the sovereign's limited power but from the territoriality of the people as the source of private law.¹⁰¹ This territoriality of law is nowhere really justified (at least not in Vol. VIII of the System) but rather assumed; yet that only makes it more relevant for Savigny's private international law.

4) *Citizenship*

Territoriality does not become the predominant principle for the conflict of laws without an argument. In fact, Savigny devotes a lengthy passage to the distinction between *origo* and *domicilium*, or origin (a personal concept) and domicile (a territorial concept).¹⁰² The relative length of this passage may seem surprising.¹⁰³ One possible explanation is rather trivial: the American Joseph Story, in his work on the conflict of laws that will be so influential on Savigny,¹⁰⁴ starts with the definition of domicile.¹⁰⁵ Yet there is also a political background to Savigny's need to explain, at length, his preference of territoriality over citizenship. The personality principle was originally, in pre-modern times, a tribal concept;¹⁰⁶ as such, it is outdated for Savigny's time and easy to discard. Yet the personality principle has been reinvented, so to speak, as the principle of nationality, together with the birth of the nation state. Art. 3 (3) of the new French Code Civil provides: "The laws relating to the condition and privileges of persons govern Frenchmen, although residing in a foreign country."¹⁰⁷ Here, the connecting factor is a personal one, namely

100 Seif (supra n. 38), 496–499.

101 Savigny, VIII System, § 346, p. 16 f.

102 Savigny, VIII System, §§ 350–359, pp. 39–106. On the principle of domicile for Savigny, see Gerhard Kegel, *Wohnsitz und Belegenheit bei Story und Savigny*, 52 *RabelsZ* 431–465, 437–442 (1988).

103 Halpérin (supra n. 38), 58 thinks that the passage "paraît anachronique, voire inutile, au lecteur moderne".

104 Kegel (supra n. 21).

105 Story (supra n. 21), ch. 3, pp. 50 ff.

106 Savigny himself wrote about the medieval principle; see his *Geschichte des römischen Rechts im Mittelalter*, 115 ff. (2nd ed., 1834). See, more recently, Simeon L. Guterman, *The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas*, 21 *U. of Miami L. Rev.* 259–348 (1966/67); Guterman, *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* (Peter Lang, 1990); Keller & Siehr (supra n. 67) §§ 2–3, pp. 11–20 (1986).

107 See Halpérin (supra n. 38) 25 f.

nationality. Savigny thinks the principle itself mostly irrelevant in practice¹⁰⁸ – an evaluation which is hardly true even in his time. More importantly, the underlying idea of nationality must be anathema to his political thinking, just as the nation state was, and potentially dangerous. Savigny does see the attractiveness of nationality. He considers the possibility of limiting domicile to conflicts of laws within a state, and adopting nationality for conflicts between different states, but rejects nationality as a connecting factor here as well.¹⁰⁹ It is only Mancini in Italy, somewhat later, who introduces the principle of nationality as one of the three determining factors for private international law¹¹⁰ (the other two being party autonomy¹¹¹ and sovereign state interests) and makes it so popular that the German legislator, who is otherwise thought to have followed Savigny in many respects,¹¹² adopts nationality over domicile as the connecting factor for personal issues.¹¹³

The connection between a principle of nationality and the (nation) state is easier to see than that between Savigny's concept of domicile and the state. Nevertheless, such a connection exists. Savigny's rejection of nationality as connecting factor reflects a rejection of the nation state, not of the state as such. A valuable insight comes from Savigny's conception of the citizen.¹¹⁴ This conception is less political than a concept of nationality. In fact, in his treatise on private international law, he admits that domicile (as the determining factor) is more accidental, and more open to manipulation by the individual, than other criteria.¹¹⁵ Nevertheless, citizenship is what defines the individ-

108 Savigny, VIII System § 359, p. 98 f.

109 Savigny, VIII System § 359, pp. 98–101. Savigny discusses the French code civil and the Prussian General Land Law and omits the Austrian General Civil Code, which, in its Art. 4, provided applicability of the Code on Austrian nationals. On private international law in the three natural law codifications, see Halpérin (supra n. 38) 22–27.

110 Della nazionalità come fondamento del diritto delle genti di Pasquale Stanislao Mancini (Erik Jayme, ed., Torino 1994); Ferdinando Treggiari, *Nationales Recht und Recht der Nationalität – Mancini*, in *Nation und Staat im Internationalen Privatrecht*, 145–164 (Jayme & Mansel eds., Heidelberg: C.F. Müller 1990).

111 Yuko Nishitani, *Mancini und die Parteiautonomie im internationalen Privatrecht* (Tübingen: Mohr, 2000); Nishitani, *Mancini e l'autonomia della volontà nel diritto internazionale privato*, 28 *Rivista di diritto internazionale privato e processuale* 23–44 (2001).

112 This may actually be a post facto reinterpretation, no doubt facilitated because a large part of the travaux préparatoires were not published until 1973: *Die geheimen Materialien zur Kodifikation des deutschen IPR 1881–1896* (Hartwig & Korkisch eds., 1973); see also *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Allgemeiner Teil*, Verfasser Albert Gebhard, 129–308 (Werner Schubert ed., 1981); Michael Behn, *Die Entstehungsgeschichte der einseitigen Kollisionsnormen des EGBGB ...*, 19–194 (Frankfurt/M.: Haag & Herchen, 1980). On the legislator's approach to choice of law, see Oskar Hartwig, *Der Gesetzgeber des EGBGB zwischen den Fronten heutiger Kollisionsrechts-Theorien*, 42 *RabelsZ* 431–455, 433 (1978) (arguing that Savigny was comparatively unimportant).

113 Heinz-Peter Mansel, *L'adoption du principe de la nationalité par le EGBGB du 18 août 1896*, in *Liber Memorialis François Laurent*, 869–879 (Brussels 1989); Mansel, *Mancini, v. Savigny und die Kodifikation des deutschen internationalen Privatrechts von 1896*, in *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19. Jahrhunderts*, 245–295 (Reiner Schulze ed., Berlin: Duncker & Humblot, 1990); Erik Jayme, *Pasquale Stanislao Mancini e lo sviluppo del diritto internazionale privato tedesco*, 3 *Scienza e politica* 31 ff. (1990).

114 Hans-Christof Kraus, *Begriff und Verständnis des "Bürgers" bei Savigny*, 110 *SavZ/Rom* 552–601 (1993); id. 587 f. on the passages in VIII System.

115 Savigny, VIII System § 346, p. 17.

ual's membership with the people. Since, in turn, the people has its reality in the state, citizenship, mediated through the people, connects the individual with the law of a particular state. Savigny says so explicitly.¹¹⁶ Thus, citizenship (as a factor of the state) does play a role for Savigny's private international law, and it is connected to the state.

With regard to private international law, Savigny's concept of citizenship collapses into a territorial concept, namely domicile. Savigny considers nationality less relevant for two reasons, and both are interesting from a view of globalization. The first indeed sounds strikingly modern and global: the increasing commerce between the peoples makes differences between nationalities less harsh and less relevant.¹¹⁷ Yet there is a second, somewhat more startling reason: "The influence of Christianity . . . as a common bond of spiritual life embracing the most diverse nations, has thrown their characteristic differences more and more into the background."¹¹⁸ This means that Savigny's system of private international law is really made only for Christian nations, and excludes non-Christians, especially Jews.¹¹⁹ Savigny's relation to the Jews has been the object of several studies¹²⁰ and is not of interest here as such. What is relevant is the somewhat paradoxical result that Savigny's concept of domicile makes different treatment of Jews within the applicable territorial law possible. A nationality principle in the sense of the modern nation states would, normally, emancipate the Jews and thereby treat them like other nationals – as happened in France in 1791.¹²¹ A different interpersonal private international law could treat the Jews as a different nation and apply their own laws to them. While Savigny does apparently consider such a treatment of the Christian church as independent from the state,¹²² the Jews do not benefit from such treatment. Under Savigny's territorial approach, if Prussian law is applicable, this includes the special discriminatory provisions for Jews.¹²³ His private international law remains a conflict between state laws, with no place for non-state law. Before private international law, personal alliance is to a state only.

116 Savigny, VIII System § 346, p. 14.

117 Savigny, VIII System § 346, p. 17. Cf. Jürgen Basedow, *The Effects of Globalization on Private International Law*, in *Legal Aspects of Globalization*, 1–10, 8 f. (Basedow & Kono eds., The Hague: Kluwer, 2000).

118 Savigny, VIII System § 346, p. 17.

119 Savigny's most pronounced (and most-cited) statement about the Jew as stranger is in Savigny, *Stimmen für und wider neue Gesetzbücher*, 3 *Zeitschrift für geschichtliche Rechtswissenschaft* 1–52, reprinted in Thibaut und Savigny (supra n. 49) 231–254, 241: "Vollends die Juden sind und bleiben uns ihrem innern Wesen nach Fremdlinge".

120 On the question of Savigny's purported antisemitism see, most recently, Thomas Henne & Carsten Kretschmann, *Der christlich fundierte Antijudaismus Savignys und seine Umsetzung in der Rechtspraxis*, 119 *Zeitschrift für Rechtsgeschichte – germanistische Abteilung (SavZ/Ger)* 250–315 (2002).

121 See more generally Patrick Weil, *Qu'est-ce qu'un Français? Histoire de la nationalité française depuis la Révolution* (Paris: Grasset, 2002).

122 Savigny sometimes considers the Catholic Church as a State; see Savigny, *II Geschichte des Römischen Rechts im Mittelalter*, 261 f. (Heidelberg 1816). In his *System of Contemporary Roman Law*, the church is said to exist besides the state: Savigny, *I System* § 9, pp. 27 f.

123 Savigny, VIII System § 349, p. 36: a Prussian law prohibiting Jews to acquire land applies also to foreign Jews. The quote does not express a particularly anti-Semitic tendency; see also Henne & Kretschmann (supra n. 120) 310 f. *Contra* (perhaps): Sturm (supra n. 38) 102.

III. Savigny's System in Globalization

Summing up the previous section, the state is visible in Savigny's concept of private international law in various ways. The state is relevant insofar as all private law is state law, and the state has the task to enforce private law. Sovereignty is largely irrelevant: the conflict of laws is not a real conflict, because the differences between private laws do not reflect clashes of politics; private international law is, in this sense, purely private and apolitical. Territory is of primary importance, because private international law answers differences between territorial laws; consequently the method of private international law is to determine the territorial "seat" of a legal relation, and to apply the (territorial) law in force at that place. Finally, citizenship is determined, for private international law purposes, through a territorial factor (domicile).

We can safely say that these four principles are still, by and large, valid in private international law. However, all of them are somewhat problematic in globalization. One reason may well be that the underlying conception of the state is no longer adequate. Jellinek's definition of the state as "organization of sedentary people which has original sovereign power"¹²⁴ turns out to be inadequate in all of its three elements.

First, people are no longer sedentary. We witness an enormous increase of mobility, partly due to easier modes of transportation, partly through public encouragement ("free movement of persons"¹²⁵). The state population becomes more hybrid. Second, and for somewhat similar reasons, the state territory loses importance – not because it is harder to define, but because, in times of transportation and internet, it becomes less relevant. Finally, sovereignty becomes relative, not only with regard to other sovereign states, but – more importantly – with regard to other powerful actors, especially supranational organizations, but also private actors like NGOs and multinational corporations.

These changes effect private international law as well. Some aspects shall just be mentioned. For example, not all law is state law anymore. We see a rise both of supranational law – the European Union being the prime example – and of non-national law, private norm creation.¹²⁶ Choice-of-law rules could, theoretically, point to all kinds of rules, including non-state rules,¹²⁷ but mostly they do not.¹²⁸ At the same time, not all decision makers are state institutions. For example, arbitrators face choice-of-law questions as well.¹²⁹ Nevertheless, the sovereign state, both as deciding institution (the judge) and as provider of applicable rules, still shapes the discipline's character.

124 Supra n. 45.

125 Art. 61–69 EC.

126 For a criticism from a globalization perspective of Savigny's position on this point (supra n. 56), see Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 *Law and Society Review* 763, 768 (1997).

127 Michaels (supra n. 55); Michaels (supra n. 63).

128 Kegel & Schurig (supra n. 37), 16–22, see also 109–111 (against application of *lex mercatoria*).

129 Thus, choice-of-law rules for (not sovereign) arbitrators are often shaped after judge-focused rules; see Dennis Solomon, *Das vom Schiedsgericht in der Sache anzuwendende Recht nach dem Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts*, 43 *RIW* 981–990 (1997).

Furthermore, Savigny's dream of a convergence of laws under the bond of Christianity has not come true – not only because non-Christian nations have become more numerous and important, but also because Christian nations do not, of course, agree on relevant issues. This leads to clashes because Savigny's conception of an apolitical private law has proved to be an illusion in the 20th century. In fact, Savigny's apolitical character of private international law is the one element that came under severe criticism early on. Now we seem to be watching a tendency back from a politicized private international law. However, this is not a step back to the situation Savigny faced. Savigny's legal system contained clearly delimited public and private law spheres within the sovereign state. This state was strong in the public sphere, and (deliberately) weak in the private sphere. The political school of private international law urged the state to be strong in the private sphere as well. This step, radical as it looked, really only meant replacing one state element (territoriality) with another (state interests, sovereignty). In other words, the private international law process still took place within, and from, the state paradigm. The situation in globalization is different: the state is weak again in the private sphere (and beyond), partly from deliberation, partly from the pressure of globalization. The privatization of international relations, the competition of legal orders – all these are factors that disable the state and make its restrictions in the realm of private law more a function of necessity.

Also, determining a territorial seat becomes difficult in globalization, because territoriality has lost much of its meaning.¹³⁰ This is due not only to the fact that the state's power almost regularly extends “extraterritorially” – the Iraq war as a quasi-policing project is only the latest, and most obvious, example. Even irrespective of the state, territory is difficult to grasp: in the “global village”, borders lose significance, distances become irrelevant, markets transcend national boundaries, virtual spaces (like the internet) come into existence. Private international law can deal with this development in the sense that it will always be possible to determine certain territorial connections, but it may become questionable whether those connections actually make sense anymore.

Finally, the personal element is still in dispute. Whether nationality or domicile should govern questions of the person is still an open question.¹³¹ Yet the question may be too narrow, because it is still connected to state determinants. In a post-national age, peoples' identities may have to be determined by more than just their nationality or their domicile, and a more adequate private international law might want to take these additional factors into account.

130 For an analysis of territorial jurisdiction under globalization see Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in: *Globalisation and Jurisdiction* 105–130 (Piet-Jan Slot & Mielle Bulterman eds., The Hague: Kluwer, 2004).

131 *Nation und Staat im Internationalen Privatrecht* (supra n. 110); Roman Trips-Hebert, *Internationales Privatrecht und Globalisierung. Der Einfluss der Globalisierung auf die Anknüpfung des Personalstatus im Internationalen Privatrecht* (Wissenschaftlicher Verlag Berlin, 2003).

IV. The Statute of Corporations and the Überseering Decision

All of these points cannot be proven here. What can be done is to show how they influence the *Übersee* decision presented in the introduction, and how these changes may explain the mentioned “obsolescence of traditional private international law”.

1) *The role of the state*

The role of the state necessarily changes within the European Union. We can see this in *Überseering* in various ways. The most obvious is that the decision is based not on national (private international) law, but on European Union law, a supranational law. The relation between EU law and national law is in itself a conflict of laws,¹³² albeit a special variant – vertical instead of horizontal – with special conflicts rules – primacy of EU law on the one hand, the subsidiarity principle¹³³ on the other. It tends to be overlooked that Savigny is aware of the possibility of such vertical conflicts; he is just not very interested in them. His solution is simple:

“While several laws are subordinate, one to another, the simple rule holds that the law has always the preference which has the narrowest sphere of application. The only exception to this rule is the case in which the wider law above it contains special provisions of an absolute and imperative character”.¹³⁴

A footnote invokes the adage “*Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht*”.¹³⁵ We could translate this into the principle of subsidiarity¹³⁶ – and realize that the conflicts rule neither captures the primacy of EU law, nor the complexity of the relation. It is understandable, therefore, that the relation between EU and national law is not usually conceptualized as a conflict of laws.

2) *Sovereignty and State Interests*

This first aspect has an evident impact on state sovereignty: by transferring parts of their sovereignty to the European Union, the member states evidently have lost some of the monopoly on regulating their affairs. Yet we can also see a more specific impact on sovereignty in the decision. The German company seat principle is not a politically neutral conflicts rule, as Savigny might have conceived it; it sets out to ensure that certain standards would be upheld by corporations with their effective seat in Germany.¹³⁷ The

132 Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Discipline*, 14 *Duke J. of Comp. & Int'l L.* 149 (2003).

133 Art. 5 EC.

134 Savigny, *VIII System* § 347, p. 22.

135 *Id.*, note (g). For the adage, see Ruth Schmidt-Wiegand, *Deutsche Rechtsregeln und Rechtssprichwörter*, 220, 310 (Munich: Beck, 1996). In practice (and in court), the principle was not as straightforward as it may look on its face; see Peter Oestmann, *Rechtssvielfalt vor Gericht*, 6 ff. and *passim* (Frankfurt: Klostermann, 2002), with further references.

136 Art. 5 (2) EC.

137 For its history see Bernhard Grossfeld, *Zur Geschichte der Anerkennungsproblematik bei Aktiengesellschaften*, 38 *RebelsZ* 344–371 (1974).

incorporation principle (a fruit of the first wave of globalization¹³⁸), on the other hand, gives the founders of a corporation the effective freedom to choose the applicable law. It represents, therefore, a (deliberate) restraint of the state. By effectively declaring the German company seat principle irreconcilable with EU law,¹³⁹ the Court of Justice strips the member states of an effective way of regulating corporations with an effective seat in their territories. The judgment enables corporations to choose the law applicable to them and thereby, so it is hoped, enables a regulatory competition between the member states.¹⁴⁰

Regardless of whether one favors or abhors such regulatory competition, it is an undeniable challenge to the classical concept of absolute sovereignty. Not only is the state no longer free to decide on the best policies and must instead bow to the pressure of the market. Moreover, such a regulatory competition suddenly moves corporations (and even individuals) from a subordinate to an equal position. Suddenly, they no longer have to obey state laws, but can instead play out one state's laws against the other's. The Europea Union disempowers the member state not only vis-à-vis itself, but also vis-à-vis its citizens. It thereby enhances a general trend of globalization, the growing power of individuals and corporations, especially multinational enterprises, relative to the state.

Yet *Überseering* reveals an odder impact on questions of sovereignty. Effectively, Germany is obliged to recognize companies which have, under the law of incorporation, fulfilled all requirements. This could be explained by some kind of enforced comity owed to other member states, but it is even more reminiscent of the vested rights theory. Reminiscence of this theory – which Savigny rejects,¹⁴¹ is not accidental. In fact, a collaborator of the rapporteur in the Court of Justice expressly compares the solution in *Überseering*, as well as an earlier decision¹⁴² to the “Anglo-American theory of vested

138 See, for the development of general incorporation in the United Kingdom, Henry N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes*, 6 *International Review of Law and Economics* 169–188 (1986); for the application of the incorporation principle to foreign companies, see *Dutch West-India Co. v. Henriques van Moses*, 1 *Strange* 612 = 93 *E.R.* 733 (1724 K.B.); Albert Farnsworth, *The Residence and Domicil of Corporations* (London, 1939).

139 See supra n. 15.

140 Thus the opinion of Advocate General La Pergola in *Centros* (supra n. 6) no. 20; See Eva-Maria Kieninger, *Wettbewerb der Rechtsordnungen im Europäischen Binnenmarkt*, esp. §§ 5–7, pp. 105–273 (regulatory competition in corporate law) (Tübingen: Mohr, 2002); Stefano Lombardo, *Regulatory Competition in Company Law in the European Community – Prerequisites and Limits* (Frankfurt et al.: Peter Lang, 2002); after *Überseering*, see Horst Eidenmüller, *Wettbewerb der Gesellschaftsrechte in Europa*, 2002 *ZIP* 2233; Klaus Heine, *Regulierungswettbewerb im Gesellschaftsrecht* (Berlin, 2003). The argument has now been taken up by Advocate General Alber: *Opinion of Jan 30, 2003, C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*; see Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art*, 23 *IPRax* 193 (2003); Matthias Weller, *Schein-auslandsgesellschaften nach Centros, Überseering und Inspire Art: Ein neues Anwendungsfeld für die Existenzvernichtungshaftung*, id. 207.

141 Supra text accompanying n. 72.

142 Judgment of Jan 28, 1992, C-204/90 Hanns-Martin Bachmann v. Belgian State, [1992] *E.C.R.* I-249, no. 16.

rights”.¹⁴³ This invocation of a mostly discarded theory is somewhat odd. Not only is the territorial basis of the vested rights theory missing in *Überseering* – there need not be any territorial connection to the incorporation state, making the “vesting” a somewhat fleeting concept.¹⁴⁴ Moreover, the criticisms Wächter pronounced¹⁴⁵ are not answered. The second of these can be overcome: while one *state* cannot vest rights and then force another state to enforce these rights, a *superior organization* – the European Union – can.¹⁴⁶ This is not really different from forcing states to enforce each other’s judgments.¹⁴⁷ Yet the first criticism – the circularity of the vested rights approach – remains. *Centros* is a prime example: Denmark is asked to enforce the rights vested in *Centros Ltd.* under the law of England and Wales and therefore apply English law to it; yet these rights are only vested provided English law is applicable – a circular argument. Those authors criticizing the Court of Justice of circular reasoning are thus reaffirming a criticism that is almost 200 years old.

3) *De-Territorialization*

The result in *Überseering* – the demise of the effective seat principle – is also a step in de-territorialization. From the beginning it has been difficult to establish the territorial presence of a company, for the simple reason that companies are creatures of the law with no (necessary) physical existence, they exist by the law of its creation.¹⁴⁸ The seat principle takes the company’s headquarters for the company itself and thereby re-territorializes the company. The principle ignores, for the purpose of private international law, the legal separation between the company and its founders and/or leaders. The incorporation principle, on the other hand, does not seek for any territorial connection – unless one considers the place of registration (if necessary) or the place of a post box (for so-called letterbox companies) a relevant territorial connection. Companies are therefore accepted to exist, at least before the law, independent from any territorial connection.

This is not only irreconcilable with classical private international law, but possibly with any private international law based on a state paradigm. As long as the state is by necessity territorial, such non-territorial aspects pose problems. If a company need not have any territorial connection with a state but can effectively choose the law applicable to it, why is it confined to state laws in its choice at all? Small states, especially tax havens, are likely to cater their company laws to such companies.¹⁴⁹ Why should this be a privilege for states at

143 Philippe-Emmanuel Partsch, cited after Markus Rehberg, *Internationales Gesellschaftsrecht im Wandel: Das Überseering-Urteil des EuGH und seine Folgen* (Tagungsbericht), 23 IPRax 175–181, 176 f. (2002). For a more elaborate analysis, see Michaels (*supra* n. 19).

144 The incorporation principle was, however, accepted by the vested rights theory.

145 *Supra* n. 72.

146 Savigny recognized this difference between conflicts within one state, and between laws of different states: VIII System § 348, p. 29.

147 EC Regulation 44/2001, Art. 33 (1); U.S. Constitution, Art. IV Sec. 1 (“Full Faith and Credit”).

148 Scoles, Hay et al. (*supra* n. 86), § 23.2, p. 1106 (2000); Daily Mail (*supra* n. 4), no. 19.

149 A privilege that may be changing; see Small States, Big Money, *The Economist*, Sep 23, 2000. For negative impacts of globalization, and multi-national corporations, on small (“real”) states see Dermott McCann, Small States in Globalizing Markets: The End of Economic Sovereignty?, 34 *International Law and Politics* 281–297 (2001).

all?¹⁵⁰ Ultimately, companies may be able to exist, by and large, outside the law of states. This may be desirable to those who do not trust states, but it is precisely for this reason that it presents a challenge to a private international law based on a state paradigm. These principles may not exist within the European Union, but certainly on a global level.

4) *The Citizenship of Corporations*

This problem may also be phrased in the terminology of citizenship. *Centros* involves Danish citizens who want to found a company that should be active entirely in Denmark. The company they found, however, is considered by the Court of Justice to be English. In what sense can it be said that such a company – after all a legal *person* - is a “citizen” of the United Kingdom?¹⁵¹ In which sense is Überseering a Dutch “citizen”?

The problem is of course that, on the one hand, corporations are not really “citizens” of any country, and that on the other, Art. 48 EC requires that companies “be treated in the same way as natural persons who are nationals of Member States”. The result is a kind of “citizenship” that is up for grabs for companies, freely selectable.¹⁵² Selectable citizenship is irreconcilable with concepts of 19th century continental law. It certainly does not reflect ideas about nationality, which traditionally require a certain allegiance (although some small states are now freely giving away nationality rights for a small fee). This makes it difficult to speak of the “nationality” of corporations.¹⁵³ Yet it is even problematic for the less political concept of domicile, although this has been used for corporations frequently.¹⁵⁴ Of course, Savigny was aware of the manipulability of his concept of domicile.¹⁵⁵ But for individuals, changing domicile requires at least a considerable effort of moving. Such effort is unnecessary for companies that need only register in a state to become “citizens” of that state. If corporations are legal creatures, then they have no “domicile” either. In United States Law, citizenship,¹⁵⁶ domicile,¹⁵⁷ and nationality¹⁵⁸ are defined through incorporation, but there is the awareness that this is a mere fiction. If European Union law accepts, on the one hand, that corporations are “creatures of the law”,

150 For a radical example, see Ralf Michaels, *My Own Private Switzerland*, 7 ZEuP 197–199 (1999).

151 See Peter Behrens, *Das internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH*, 19 IPRax 323–33, 326 (1999); Schurig (supra n. 10), 206.

152 See Ernst Steindorff, *Centros und das Recht auf die günstigste Rechtsordnung*, 54 Juristenzeitung (JZ) 1140–1143 (1999); Eva-Maria Kieninger, *Niederlassungsfreiheit als Rechtswahlfreiheit*, 28 Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 724–749 (1999).

153 For this reason, the U.S. Supreme Court used to deny the possibility of a corporation’s nationality; see Herman Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int’l L. 373, 377 f. (1956) with references; but see E. Hilton Young, *The Nationality of a Juristic Person*, 22 Harv. L. Rev. 1 (1909); Heinrich Kronstein, *The Nationality of International Enterprises*, 52 Colum. L. Rev. 983 (1952); Comment, *The “Nationality” of International Corporations Under Civil Law and Treaty*, 74 Harv. L. Rev. 1429–1451 (1961). See also Kegel & Schurig (supra n. 37), 501: “Die juristische Person hat kein Heimatrecht”.

154 *Ohio & Mississippi R.R. v. Wheeler*, 66 U.S. (1 Black) 286 (1862).

155 Savigny, VIII System § 346, p. 17.

156 U.S. C.A. § 1332(c); see James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426 (1964).

157 *Johnson & Johnson v. Picard*, 282 F.2d 386 (6th Cir. 1960).

158 *Scoles, Hay et al.* (supra n. 86) § 23.2, p. 1105 n. 8.

but on the other hand requires them to be treated like nationals of the member states – individuals – this mix creates problems.

V. Conclusion

Of course, determining the law applicable to corporations is not a problem brought about by globalization; it has existed as long as corporations have. Nothing new under the sun, therefore? It seems by contrast that the particular constellation of the private international law of corporations within the European Union reveals several problems for classical private international law, when faced with challenges that are, even if not always new, characteristic of globalization.

It appears from the foregoing that traditional private international law, if not necessarily “obsolete”, is at least ill-equipped for globalization. It also appears probable that the problems stem from the field’s intimate connection with the state, a connection that becomes problematic once the state’s role in the world changes. Does that mean that traditional private international law is a dying species? Or can the discipline be adapted to the new challenges? Is it possible to supplant sovereignty, territory, and citizenship with factors that are adequate for globalization? It is not within the scope of this paper to explore these possibilities. Yet it is likely that such changes will be necessary if the discipline is to remain relevant in the future.